

IN RE DELHI LAWS ACT CASE: LANDMARK IN CONCEPT OF DELEGATED LEGISLATION IN INDIA

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Abstract:

If we see around we can realize that due to shift to welfare state, there has been increase in the administrative functions of the country. After independence there was a lot of confusion regarding delegation of legislative power to the executive. To clarify this: the president under article 143 of the constitution referred the matter to the apex court and it laid down certain guidelines clarifying the position. The paper analysis this landmark judgment of 7 judges bench wherein every judge had a difference of opinion.

INTRODUCTION

Delegated legislation is one of the most inevitable parts of administration. Along with being most significant, it was one of the most debatable issues in India. According to the traditional theory, the function of the executive is administering the law enacted by legislature and in ideal state the legislative power must be exclusively dealt by the legislature.¹ But due to increase in administrative function and shifting of the concept to welfare state, they have to perform certain legislative functions.²

STATUS BEFORE CONSTITUTION:

A lot of decisions from privy councils to Supreme Court deal with the same. This discipline can be read into three times – pre independence, Post independence and post constitution. *In pre constitution* era when Privy Council was the highest court of appeal from India till 1949 question of constitutionality of delegation of legislative power came before it in case of ***Queen v Burah***³. The act in dispute gave certain powers to Lt Governor namely – the power to bring the act in effect, determine what laws were to be applicable and power to extend the application of the act (Sec. 9). The act was enacted to remove garo hills from the jurisdiction

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¹ SP Sathe, *Administrative Law*, p 39 (3rd Edn., Lexis Nexis Butterworths)

² Takwani, *Lectures of Administrative Law* p 23 (3rd Edn., Eastern Book Company).

³ 1878 3 AC 889

of civil and criminal courts and extend all or any provisions of the Act in Khasi, Jaintia and Naga Hills in Garo Hills. . The question was whether giving Lt Governor power to extend the application of the law is delegation of power? Privy Council observed that Indian legislature is not an agent or delegate as against Calcutta High Court⁴ but was intended to have plenary powers of legislation, and of the same nature of the parliament itself. It was observed that Indian legislature had exercised its judgment as to the place, person, law, powers and what the governor was required to do was to make it effective upon fulfilment of certain conditions. This is called conditional legislation which was upheld by the court. The question of permissible limits of legislative power became important in Independent India. Just on the eve of independence, the federal court had held in *Jatindra Nath v Province of Bihar*⁵ that there could be no delegated legislation in India beyond conditional legislation. Provincial Govt. could by notification was allowed to extend the time for which the Bihar Maintenance of Public Order Act 1948 was to remain. The court held this power non-delegable.

There was a lot of confusion regarding delegated legislation after these cases.⁶ The question of moot was whether the legislature of Independent India should be restricted to such rules or should it be given greater freedom? The next step of confusion was whether India should follow American model where unlimited power cannot be delegated or like that of England where as much power can be delegated? It was left open to the courts to follow either of the models because of similarities between the US and UK with India. Further, Indian constitution is silent on the issue whether legislature can delegate or not and hence, such issues could not possible be decided with keeping constitution as the basis.

AFTER CONSTITUTION: IN RE DELHI LAWS ACT CASE: ANALYSIS OF FACTS AND JUDGEMENT:

In order to remove doubts regarding the validity of a number of laws which contained such delegation, the president of India under article [143](#) of the Constitution asked the Court's opinion on the three questions submitted for its consideration and report.⁷ The three questions are as follows :-

⁴ *Empress v Burah and Book Singh* ILR 3 Cal 64

⁵ (1949) 2 FCR 595

⁶ *Supra* Note 1, at 42.

⁷ *Id.*

(1) Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act ?

Section 7 of the Delhi Laws Act, mentioned in the question, runs as follows :-

"The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification."

This act delegated to the provincial Govt. the power to extend to Delhi area with such restrictions and modification any law in force in any part of British India. *This was held valid by the majority.*

(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act ?

Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, runs as follows :-

"Extension of Enactments to Ajmer-Merwara. - The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification."

This act delegated the power to the Govt to extend to the province with such modification and restriction as it may deem fit. This was also held valid by the court.

(3) Is section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Parliament ?

Section 2 of the Part C States (Laws) Act, 1950, runs as follows :-

"Power to extend enactments to certain Part C States. - The Central Government may, by notification in the Official Gazette, extend to any Part C State (other than Coorg and the

Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State.

Part C were states directly under the control of the Central Govt without having a legislature of their own and hence, Parliament had to legislate for them. This act delegated the power to the Central Govt to extend to Part C States with such modification and restriction as it may deem fit any enactment which was in force in any Part A states. It also empowered the Govt to repeal or amend any corresponding law which was applicable to Part C States. Sec 2 of the Act was held valid but the power to repeal or amendment of any corresponding law which was for the time being applicable to part C was void and was held to be excessive delegation.

ANALYSIS OF OPINION:

Seven judges presided over the case providing us with 7 different opinions. The importance of the case cannot be under estimated in as much as, on one hand it permitted delegated legislation while on the other it demarcated the extent of such permissible delegation of power.⁸ The question was on the limits to which legislature in India can delegate its legislative power.

There were two extremist views put forth by the counsels: M C Setalvad took the view that power of delegation comes along with the power of legislation and the same does not result in abdication of the powers. The other counsel took the view that there exist separation of powers in the country and India follows *delegates non potest delegare*. Therefore, there is an implied prohibition on delegation of power. As both the views were extremely extremist, the court took the middle view.

The Supreme Court took the following view and the 7 opinions were based on the same:

- Separation of power is not a part of Indian Constitution
- Indian parliament was never considered as an agent of anybody. Therefore doctrine of *delegates non potest delegare* is not applicable

⁸ *Supra* Note 2, at 70.

- Parliament completely cannot abdicate itself by creating a parallel authority
- Only ancillary functions can be delegated
- There is a limitation on delegation of power. Legislature cannot delegate its essential functions. Essential function involving laying down the policy of the law and enacting that policy into binding rule of conduct.

Based on these views, the Supreme court gave 7 different views. There was unity of outlook on two points: *firstly*, keeping the exigencies of modern govt in view, Parliament and state legislatures have to delegate the power in order to deal with multiple problems prevailing in India, as it is impossible to expect them to come with complete and comprehensive legislation on all subjects sought to be legislated on. *Secondly*, since the legislature derives its power from the Constitution, excessive freedom like in the case of British constitution cannot be granted and limitations are required.

Judges differed on the question as to what were the permissible limits within which the Indian legislature could delegate its legislative powers. One view propounded that the legislature can delegate to the extent to the limit it does not abdicate its own power and have control over the delegate: that is it must retain in its hands the ultimate control over the authority so as to be able to withdraw the delegation whenever delegate did something wrong. Second view propounded that the legislature cannot delegate its essential functions which comprised the formulation of policy etc. That meant the legislature should lay down the standards or policy in the delegating Act and delegate may be left with power to execute the policy.

Fazl Ali, J conclusions regarding the case was:

- (1) The legislature must normally discharge its primary legislative function itself and not through others.
- (2) is ancillary to and necessary for the full and effective exercise of its power of legislation.
- (3) It cannot abdicate its legislative functions, and does not become a parallel legislature.

I. Power to Legislative Includes Power to Delegate

It was concurred upon that the intention that legislation should essentially be enacted by the Legislature is manifested; the Legislature cannot retire and leave the task of law making to any other body or class of bodies. Therefore, delegation in respect of delegating law making

authority by one legislature to another is, by necessary implication, forbidden by the Constitution.

It was claimed by the Attorney General, M C Setalvad that Parliament could delegate because of the legislative power carried with it is power to delegate which was rejected rightly by **C.J Kania, Mahajan and Mukherjea J.J** opining that constitution has never *per se* warranted delegation powers at any stage and agreed on the view that legislature can however, conditionally legislate. . In doing so it may, in addition, lay down conditions, or state facts which on being fulfilled or ascertained according to the decision of another body or the execution authority, the legislation may become applicable to a particular area. This was described as conditional legislation

Bose J who was in favour of delegated legislation, also concurred with the opinion above. However, **Sastri and Das JJ**, agreed to the contention and differed from the other judges. Their decision was based on the theory of Parliamentary sovereignty and observed that power to make law comes along with the power to delegate.

This case was decided in 1951 and since then things have changed drastically. It is now judicially conceded that power of delegation is constituent element of legislative power; and the power resides in the legislature.⁹ This is near to what the attorney general had contended that time.

II. Ultima Thule: limits of Delegation

The position is that the legislative function in its true and intrinsic sense cannot be delegated. Therefore what can be delegated are only the non essential functions. Only functions ancillary to the essential functions of the legislature. According to the opinion of **J Mukherjea** – if the policy laid down in an Act is in broad terms, the formulation of the details of the policy can generally be passed to the executive. **Mahajan J** commented that essential matters cannot be delegated by the legislature. **Kania CJ** opined that legislature cannot delegate to lay down policy underlying a rule of conduct.

Discretion to make modifications and alterations in an Act while extending it to a given area, and to effect consequential amendments or changes in an existing law is again conditioned

⁹ DS Garewal v State of Punjab, AIR 1959 SC 512 (517).

with the proposition that essential functions can't be delegated. The question on amount of discretion exercisable by delegated authority cannot be defined and is a moot question.

III. Delegation of power to make modifications and alterations

The questions stated in this case is already stated above. Most of the judges answered these questions in affirmative. **Only Kania C.J and Mahajan J** gave answers in negative way. They observed that only legislature has the authority to modify and alter the law in any substantive sense. **Fazel Ali J**, power to change necessary things is incidental to apply the law. If modifications are done within the framework and does not change the identity or structure no objection could be taken. **Mukhreja J** observed that modification does not mean change of policy but it is confined to alterations which keeps the policy intact and introduces changes appropriate to suit the local conditions. **Bose J** also was of the same opinion. In this way majority felt that the executive authority could be authorised to modify but not in essential and intrinsic sense.

IV. Repeal of Law

Power to repeal a law is essentially a legislative power and hence, delegating that to the Govt. is at once ultra vires the power to delegate.

Fazl Ali, Das J and Sastri JJ held all the sections to be perfectly valid. The majority based its opinion on the maxim expression *unis est exclusion alterious*, and ruled that an express provision permitting delegation contained in article 357 would mean uncontrolled legislation was not permitted under the constitution. Essential functions could not be delegated under any condition. The minority based its view of the theory of legislative omnipotence of the British Parliament, and its reflection in the Australian, the Canadian and the Indian Constitutional systems, which include power to delegate legislative function, subject to the condition of non-abdication. According to me, the variance between the views of the minority and majority was not materially different. To say that legislature should not abdicate its power is similar as to say that the legislature should not delegate its essential powers.

V. Impact of the in re Delhi Laws Act Case:

After In Re Delhi Laws Act, the question which arose was related to the limits of delegation and the grounds for the same.

The first case was *Gwalior Rayon Silk Manufacturing Co. v Assistant Commissioner of Sales Tax*¹⁰ wherein S 8(2)(b) of Central Sales Tax Act, 1956 authorised levying of sales tax on interstate sales @ 10% or at the rate applicable to sale or purchase of goods in that state whichever is higher. This was challenged as excessive delegation on the grounds that no policy was laid down in the parent act. The Act was upheld to be valid. J Khanna gave the “*Standard Test*” – when legislature confers powers on an authority to make delegated legislation it must lay down policy, principle or standard for the guideline for the authority concerned. J Mathew gave the “*Abdication Test*” – As long as the legislature can repeal the parent act conferring power on the delegate, the legislature does not abdicate its powers. The majority refused to accept this test.

J Mathew, in the case of *N K Pappiah v Excise Commissioner*¹¹ held the legislation valid based on his test. The question was whether the Act which conferred power on the Govt. to fix the rate of excise duty¹² and lay them before the legislature was valid or not. Further in the case of *Brij Sunder v First Additional District Judge*¹³ the court even allowed the extension of future laws of another state to which the adopting state legislature never had an opportunity to exercise its mind. In addition to this, in *Registrar of Co-operative Societies v K Kanjambu*¹⁴ upheld the “*Policy and Guideline*” test. All these cases upheld the constitutional validity of the delegated legislation.

Analysis and Conclusion:

The case has materially contributed in the development of the concept of delegated legislation by clarifying certain areas of confusion. One of it was laying down that British model of Delegated Legislation cannot be implemented in India because of the difference of Constitution. Moreover, it laid down that delegation is possible and necessary due to increase in burden on the legislature and increase in administrative activities. This cleared the confusion of conditional delegation and delegation. This case increased the scope of the delegated legislation to the extent of ancillary powers i.e. non abdication of own power and non-transferring of main and essential functions. Majority judges were in favour of delegated legislation except *Mahajan J and Kania CJ* who was emphasizing more on the conditional

¹⁰ (1974) 4 SCC 98

¹¹ (1975) 1 SCC 492

¹² S 122 of Karnataka Excise Act

¹³ (1989) 1 SCC 561

¹⁴ (1980) 1 SCC 492

delegation. As the opposite Counsel built on the argument of Separation of power and the concept of non potest delegare, the court observed that separation of power is not a part of Indian constitution. Courts are clear on the status of delegated legislation being allowed.¹⁵ The only question in courts regarding such cases is that whether the power delegated is excessive or within the ambit of the parent act.¹⁶

This case achieved 2 ends: **(1)** legitimized legislation of legislative power by the legislature to administrative organs; **(2)** it imposed an outer limit on delegation by the legislature. The case shows lack of judicial consensus. The ghost of *jatinder nath case* was hovering over the judges who presided on both these cases and they could not be expected to change their opinion. In present India it is a well accepted concept and delegation of power is allowed. The necessity for it was realised as the functions and powers of administrative and legislative bodies increased and delegation was felt as a need!

¹⁵ *Agricultural market Committee v Shalimar Chemical Works* (1997) 5 SCC 516.

¹⁶ I P Massey, *Administrative law*, p 103 (7th Edn., Eastern Book Company)