Administrative Law and the Judicial Review of Administrative actions

Power and duties [Power coupled with duty]

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5.4 Power and duties:
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> Every public servant is a trustee of the society and in all facets of public administration; every public servant has to exhibit honesty, integrity, sincerity and faithfulness in implementation of the political, social, economic and constitutional policies to integrate nation, to achieve excellence and efficiency in the public administration. A public servant entrusted with duty and power to implement constitutional policy and all inter-related directive principles, should exhibit transparency in implementation and should be accountable for due effectuation of constitutional goals. The Constitution has trusted the public servant as honest administrator to effectuate public policy and constitutional goals.
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> Supreme Court
> Superintending Engineer vs. Kuldeep singh

Apart from statutory or administrative discretionary powers, the Law also imposes a "statutory duty" to be discharged toward the Citizens for achieving the object of the Act. The duty is so imposed by the Legislature or the Parliament to seek "better welfare" of the Citizen, or to achieve what is called the "public good".

Dividing line between the "powers and duties" exercisable by the authorities is now blurred across the pages. The "power can be transformed in a duty". When the law empowers the authority, and when the law imposes a "clear duty to be discharged", there is no option with the authority, but to "discharge the duty according to law". The discharge of duty that exists under the provision of law cannot be avoided by assuming, presuming or pretexting that such power to discharge the duty is permissive[1].

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[1] Hirday Narayan vs. Income Tax Officer, AIR 1971 SC 33

The discretionary statutory power conferred upon an authority for a public good is generally “coupled with a duty” to perform it under relevant circumstances. The fact that the exercise of the power is left to the discretion of the authorised person “does not exonerate the public authority from discharging his duty”, or else why the Parliament, or the Legislature would cloth the authorities with such a power.

If the discretionary power so conferred is exercised arbitrarily, capriciously or unreasonably or by taking into consideration extraneous and irrelevant consideration, in the eye of law, the authority concerned must be deemed not to have exercised the discretion at all, that is, he has not discharged his duty. If the Court on the facts placed before it comes to definite conclusion that a particular authority has not exercised his duty for one or other of the aforesaid reasons, it will compel the authority to discharge his duty, or to put it differently, to exercise discretion honestly and objectively.

There is an essential distinction between the “refusal to exercise the discretion” and the “manner of its exercise”. If the authority fails to discharge his duty by refusing to exercise his discretion, when facts calling for its exercise exist, or if the authority exercises the discretion under the circumstances mentioned above, which is not an exercise of discretion in law, the Court will compel that authority to do so[2].

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[2] If the authority concerned exercises discretion honestly and in the spirit of the statute, no mandamus will be issued directing him to exercise his discretion in a particular way. But, if the authority fails to discharge his duties as contemplated under the Law, the Court would compel the performance.(Lord Krishna Sugar Mills Ltd. vs. Income-tax Officer, Julius v. Bishop of Oxford, All croit vs. Lord Bishop of London.)

"Often quoted observation of Lord Cairns" in case of Julius vs. Bishop of Oxford[3] fits well as far as the power coupled with duty is concerned:

"But there 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 conditions under 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 on whom the power is reposed, to exercise that power when called upon to do so"

And the case decided:

"where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised"

Padfield vs. Minister of Agriculture, Fisheries and Food[4], (1968) AC 997 is a considered landmark in administrative law. There were powers with the Minister to refer the Complaint to the Committee for its investigation and redressal in relation to "milk price deferential" to producers and he should have referred the complaint to the committee.

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[3] Julius v. Lord Bishop of Oxford, (1880) 5 AC 214

[4] Padfield vs. Minister of Agriculture, Fisheries and Food, (1968) AC 997[On 3rd February 1966 a Divisional Court (Lord Parker L.CJ. and Sachs and Nield JJ.) made an order against the Minister but on 27th July 1966 this order was set aside by the Court of Appeal by a majority (Diplock and Russell LJJ., Lord Denning M.R. dissenting].

The question at issue in that appeal before the House of Lords was the nature and extent of the Minister's duty under section 19(3)(b) of the 1958 Act in deciding whether to refer to the Committee of Investigation, a complaint as to the operation of any scheme made by persons adversely affected by the scheme.

The approval of Parliament shows that this scheme was thought to be in the public interest, and in so far as it necessarily involved detriment to some persons, it must have been thought to be in the public interest that they should suffer it. But in sections 19 and 20 Parliament drew a line. They provide machinery for investigating and determining whether the scheme is operating or the Board is acting in a manner contrary to the public interest. The effect of these sections is that if, but only if, the Minister and the Committee of Investigation concur in the view that something is being done contrary to the public interest the Minister can step in. Section 20 enables the Minister to take the initiative. Section 19 deals with complaints by individuals who are aggrieved.

If the Minister directs that a complaint by any of them shall be referred to the Committee of Investigation, that committee will make a report which must be published. If they report that any provision of this scheme or any act or omission of the Board is contrary to the interests of the complainers and is not in the public interest then the Minister is empowered to take action, but not otherwise. He may disagree with the view of the Committee as to public interest, and, if he thinks that there are other public interests which outweigh the public interest that justice should be done to the complainers, he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable in Parliament but the Court cannot interfere.

The Respondent (minister) contended that his only duty is to consider a complaint fairly and that he is given an "unfettered discretion" with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The Appellants contended that it is his duty to refer every genuine and substantial complaint, or alternatively that his discretion is not unfettered and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law or by his having taken into account extraneous or irrelevant considerations.

Lord Reid observed:

"It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects 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 reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court".

Lord Pearce observed:

"I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the Court's surveillance."

Lord Upjohn observed:

“The Minister in exercising his powers and duties conferred upon him by statute can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purpose of the present appeal (and here I adopt the classification of Lord Parker CJ, in the Divisional Court): “by an outright refusal to consider the relevant matter, or by misdirecting himself in point of law or by taking into account some Wholly irrelevant or extraneous consideration, or by wholly omitting to take into account a relevant consideration..”

Minority view of Lord Denning in the court of appeal was approved in the House of Lords.

[Minority view: “In my opinion every genuine complaint which is worthy of investigation by the committee of investigation should be referred to that committee. The Minister is not at liberty to refuse it on grounds which are arbitrary or capricious. Nor because he has a personal antipathy to the compliant or does not like his political views. Nor on any other irrelevant ground. It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the Courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievance should be remedied. When parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason. But it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned.

So why does it matter if he gives bad reason? I do not agree. This is the only remedy available to a person aggrieved... Else why did it set up a committee of investigation? Minister... would at least have good reasons for refusal; and if asked, he should give them. If he does not do so, the court may infer that he has no good reasons. If it appears to the Court that the Minister has been, or must have been, influenced by extraneous considerations which ought not to have influenced him or, conversely, has failed, or must have failed, to take into account considerations which ought to have influenced him...the court has power to interfere, it can issue a mandamus to compel him to consider the complaint properly..]

Thus, the House of Lords interpreted the term "if the minister in any case so directs". Apparently, the Minister did not refer the complaint and provided no reasons at all in support probably thinking that the provision is worded in the permissive language, but the Court held that the Minister was “bound to exercise his lawful discretion, so as to achieve the object of the Act”.

The “Minister had no unfettered discretion in law”. And the minister was not justified in refusing to refer the Complaint at his sweet will that would frustrate the policy of the Act. Contention of the producers could not be dismissed as wholly unreasonable or inconsistent with the general Scheme. And the matter was remitted to the Queen’s Bench for requiring the Minister to consider the complaint of the producers in relation to the price differential in accordance with the scheme of the Act. (Julius vs. Bishop Principle: “something in the title of the person or persons for whose benefit the power is to be exercised”.)

It is made clear in Padfield's case that the duty has to be discharged by specified authority to achieve the object of the Statute and irrespective of whether the specified or public authority likes it or not. Similarly, Section 65 of the Housing Act[5], 1985 (UK) imposed a duty on the Local authorities to provide "housing" to the "Homeless persons". This duty is simply required to be discharged towards those, who are homeless. If the Local authority fails to discharge the demarcated duty, the person aggrieved can seek the writ in the form of certiorari to quash the inaction not allocating "housing facility" and simultaneously seek the performance of statutory duty by way of writ in the form of mandamus.

India: Alike the powers and public duties dischargeable under the Housing Act of 1985, the Indian Parliament enacted the National Food Security Bill, 2013 to provide the food and nutritional security in human life cycle approach by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and matters connected therewith or incidental thereto. The National Food Security Bill, 2013 appears to have imposed "sheer statutory obligations" upon the Central and the State Government to take adequate measure in relation to supply of the food at minimum support price to the identified priority household under Section 15 of the Act. The Act also provides for the proper regulations of the affairs so as to achieve the object of the Statute. If the authority now fails to discharge the public duty as laid down, the specified authorities would be directly accountable and performance of duty can be compelled.

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[5] (This Act of 1985 is replaced by new Housing Act, 1996 and that Section 65 is replaced by Section193 of the Housing Act, 1996)

One has to ascertain as to how the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue. Several statutes confer power on the authorities and officers to be exercised by them at their discretion[6].

[6] It is well-settled that the use of word "may" in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word "may" as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word "may", the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like.

It is equally well-settled that where the word "may" involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word "may" should be interpreted to convey a mandatory force. As a general rule, the word `may' is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word 'shall', which ordinarily is imperative as it imposes a duty.

Cases however, are not wanting where the words "may" "shall", and "must" are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect.

The distinction reflected in the use of the word "shall" or "may" depends on conferment of power. Depending upon the context, "may" does not always mean may. "May" is a must for enabling compliance of provision but there are cases in which, for various reasons, as soon as a person who is within the statute is entrusted with the power, it becomes his duty to exercise that power. Where the language of statute creates a duty, the special remedy is prescribed for non-performance of the duty.

As we see it to be, the power is in permissive language, such as, it may be lawful, it may be permissible, it may be open to do etc. In certain circumstances, however, such power is coupled with duty and must be exercised. Before more than a century in Baker, Re (1890) 44 Chancery Division 262, Cotton L.J. stated: I think that great misconception is caused by saying that in some cases may means must. It never can mean must, so long as the English language retains its meaning; but it gives a power, and then it may be question in what cases, where a Judge has a power given by him by the word may, it becomes his duty to exercise it.

If it appears to be the settled intention of the legislature to convey the sense of compulsion, as where an obligation is created, the use of the word “may” will not prevent the court from giving it the effect of Compulsion or obligation. Where the statute was passed purely in public interest and that rights of private citizens have been considerably modified and curtailed in the interests of the general development of an area or in the interests or removal of slums and unsanitary areas. Though the power is conferred upon the statutory body by the use of the word “may” that power must be construed as a statutory duty.

Conversely, the use of the term “shall” may indicate the use in optional or permissive sense. Although in general sense “may” is enabling or discretional and “shall” is obligatory, the connotation is not inelastic and inviolate. Where to interpret the word “may” as directory would render the very object of the Act as nugatory, the word “may” must mean “shall”. The ultimate rule in construing auxiliary verbs like “may” and “shall” is to discover the legislative intent; and the use of words “may” and “shall” is not decisive of its discretion or mandates.

Use of the words “may” and “shall” may help courts in ascertaining the legislative intent without giving to either a controlling or a determining effect. The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed. Obviously where the legislature uses two words may and shall in two different parts of the same provision prima facie it would appear that the legislature manifested its intent on to make one part directory and another mandatory. But that by itself is not decisive. The power of court to find out whether the provision is directory or mandatory remains unimpaired.

In leading case of Julius vs. Lord Bishop,

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.

Explaining the a doctrine about the power coupled with duty, Learned Author de Smith Judicial Review of Administrative Action, 1995 pp.300-01) states: Sometimes the question before a court is whether words which apparently confer discretion are instead to be interpreted as imposing duty. Such words as “may” and “it shall be lawful” are prima facie to be construed as permissive, not imperative. Exceptionally, however, they may be construed as imposing a duty to act, and even a duty to act in one particular manner.

Sir William Wade[7] stated:

The hallmark of discretionary power is permissive language using words such as may or it shall be lawful, as opposed to obligatory language such as shall. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory.

In Alcock vs. Chief Revenue Authority[8], the relevant statute provided that if in the course of any assessment a question arises as to the interpretation of the Act, Chief Revenue Authority may draw up a statement of the case and refer it to the High Court. Holding the provision to be mandatory and following Julius, Lord Phillimore observed:

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[7] Wade & Forsyth, Administrative Law : 9th Edition p.233

[8] 50 Indian Appeals 227: AIR 1923 PC 138,

"When a capacity or power is given to a public authority, there may be circumstance which couple with the power or duty to exercise it.

In case of Commissioner of Police vs. Gordhandas Bhanji[9], the Court observed that the "discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the convenience, safety, morality and the welfare of the public at large. An enabling power of this kind conferred for "public reasons" and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded"

Indian cases: In the case of Hirday Narayan vs. Income Tax Officer, AIR 1971 SC 33, appellant before the Supreme Court of India, applied to the Income Tax Officer under Section 35 of the Indian Income Tax Act to rectify the mistake committed while assessing the Income. The Income Tax Officer was convinced about the said mistake committed by him, while assessing the tax.

High Court had recorded a finding that under Section 35 of the Act, the Income Tax Officer has "discretionary jurisdiction" to rectify the error so committed and did not interfere with the patent error. Supreme Court on appeal said that it is erroneous to say that Income Tax Officer may or may not exercise his discretion granted under the Statute.

That was a mistake apparent on the face of record. This is what the Supreme Court held:

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[9] AIR 1952 SC 16, 1952 SCR 135

"If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority shown to exist. Even if the words in the Statute are prima facie enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right-Public or private of a Citizen."

(Julius vs. Bishop: Title and benefits category: "something in the title of the person or persons for whose benefit the power is to be exercised". Lord Blackburn observed in the same case at Page 244-245 that the enabling words give, a power which prima facie might be exercised or not, but if the object for which the power is conferred is for the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Lord Penzance and Lord Selbone made similar observations at Page 229 and 235.)

Manifestly, therefore, when statutory conditions for exercise of power are fulfilled or that specified set of circumstances are shown to have existed in a case, the public authorities are expected to discharge their lawful duty. They cannot refuse to carry on the duty merely on the pretext of such power being permissive in its nature. Nor the authority can say that it is enabling power.

In case of the Chief Controlling Revenue authority and Superintendent of Stamps vs. Maharashtra Sugar Mills Ltd, AIR 1950 SC 218 the Borrower Company sought the financial assistance from the Bank. In order to secure the financial assistance, a deed of hypothecation "without possession of goods" was executed with a particular amount of stamp affixed. When the deed was sent to the Sub Registrar for registration, the Sub Registrar impounded the deed of hypothecation and sent the deed to the Stamp Office. The

Assistant Superintendent of Stamps wrote to the respondent that the deed of hypothecation was actually a “mortgage with possession”, chargeable with duty under article 40 (a) of the Schedule and inquired why it was not duly stamped before execution.

The respondent contended that the document was not, and was never intended by the parties to be, a mortgage with possession. It was pointed out that “no possession of the property” had been given or was “intended to be given”, except in certain contingencies, and therefore, the document was properly stamped.

However, the Assistant Superintendent intimated that the document was chargeable with the duty and a penalty had been imposed. The respondents were asked to pay the amount forthwith. The respondent filed a suit against the Bank contending that the document was not a mortgage with possession.

It was alleged that since a doubt had arisen as to whether the document gave effect to common intention of the parties the Court's directions were sought for and if the Court found that the document as framed did not give effect to the said common intention of the parties the instrument may be rectified.

The respondent informed the Assistant Superintendent that such a suit had been filed and requested that the demand for payment of stamp duty and penalty may not be pressed under the circumstances. In the further correspondence, on behalf of the appellant, the demand was reiterated and resort to the coercive procedure of section 48 of the Stamp Act was threatened.

The Collector sent a letter to the respondents demanding payment. The suit filed by the respondent was disposed of by the Court and the rectification as prayed was ordered. The Respondent immediately intimated the result of the suit to the Assistant Superintendent and sent a copy of the deed showing the rectifications made in the original document.

The Respondent enquired of the Assistant Superintendent of Stamps whether he was agreeable to make a reference under section 56 (2) to the appellant, as the question of liability to pay the stamp duty and penalty involved important questions of law. A petition on behalf of the respondent to the appellant was also filed in which it was prayed that either the order of the Assistant Superintendent of Stamps be rescinded or in the alternative a case may be referred under section 57 of the Stamp Act for the opinion of the High Court.

This petition was rejected. The respondent there upon filed a petition in the High Court praying that a writ of certiorari may be issued against the appellant, or an order may be made against him under section 45 of the Specific Relief Act to cancel the levy of the stamp duty and penalty as claimed or in the alternative the appellant may be ordered under section 57 of the Stamp Act to refer the matter to the High Court for its opinion. High court did not grant the relief, but directed the appellant to state a case under section 57 of the Stamp Act to the Court for its opinion.

Points raised before Supreme Court: The first is whether under section 57 of the Stamp Act there is an obligation on the appellant to state a case and if not whether the High Court had jurisdiction to give a direction to that effect. The second point is whether having regard to the terms of section 226 (1) of the Government of India Act, 1935, the High Court had jurisdiction to order the appellant to state the case, it being a matter relating to the revenue.

Under this head it was argued that the matter had proceeded beyond the stage of assessment and had reached the stage of recovery. Therefore, the High Court had no jurisdiction to pass the order it did. The material part of section 57 of the Stamp Act runs as follows:

Section 57 (1):

(a) The Chief Controlling Revenue authority may state any case referred to it under section 56, sub-section (2), or otherwise coming to its notice, and refer such case, with its own opinion thereon.

(b) If it arises in the province of Bombay, to the High Court at Bombay;

Section 226 (1) of the Government of India Act 1935, runs as follows.

"226. (1) until otherwise provided by Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It was contended by the appellant that the very words of section 57 of the Stamp Act show that it is a power given to the appellant to state a case and it is not an obligation. The section is framed and worded only to give the benefit thereof to the appellant and it is not for the benefit of any other party. The word “may” used in the section was deliberately used for that purpose. It was pointed out that under section 56 (2) of the Stamp Act if the Collector felt doubt as to the amount of duty with which the instrument was chargeable “he may draw up a statement of the case and refer it with his opinion for the decision of the Chief Controlling Revenue Authority.”

Similarly, under section 60 if any Court felt doubt as to the amount of duty to be paid, it was given power to draw up a statement of case for the opinion of the High Court. It was argued that both these sections gave only power to the Collector and the Court to make a reference for their own benefit. Section 57, it was argued, was on the same lines for the benefit of the appellant. In none of these, any other party had any right to insist on a reference. It was pointed out that under the Stamp Act, a Collector could certify that the document was properly stamped, although it was not sufficiently stamped on a true construction, and when such a certificate was given the Controlling Authority could do nothing. He had not even the power to refer that case to the Court to levy a higher stamp duty. For these reasons, it was contended that the scheme of the Stamp Act was materially different from the scheme of the Income Tax Act.

The Supreme Court observed:

“In our opinion the appellant's contentions are unsound.”

The contention that section 57 of the Stamp Act gives only a discretion and does not cast a duty on the appellant to make a reference overlooks the fact that the appellant has not to make a reference only when he is in doubt about his decision or conclusion. In his conclusion the party liable to pay the assessed stamp duty is materially interested. The appellant's decision is not necessarily based only on the reading of the entries in the Schedule to the Stamp Act. As in the present case, the question under what item stamp duty is leviable may depend on the true construction of a document. It may also involve the decision of the question, as in the present case, as to what is the effect of the Court's order directing a rectification of the instrument.

Very truly, the Supreme Court held:

"It does not appear, on principle, sound to hold that these difficult questions should be left under the Stamp Act to the final decision of the appellant, and if the party affected by the assessment has a grievance there is no relief at all in law for him. The construction of a document is not always an easy matter and on the ground that it is a substantial question of law, parties have been permitted to take the matter up to the highest Court. If so, it appears difficult to start with the assumption that because this is a Revenue Act the decision of the appellant should be considered final and conclusive".

The Supreme Court further observed:

The provisions of section 56 (2) and section 60 giving power to the Collector and the Court to send a statement of case to the appellant and the High Court respectively, in our opinion, instead of helping the appellant, go against his contention. In those two sections this power is given when the referring authority has a doubt to solve for himself. The absence of the words "feels doubt as to the amount of duty to be paid in respect of an instrument" in section 57 supports the view that the reference contemplated under that section if not for the benefit of the appellant only but ensures also for the benefit of the party affected by the assessment. In our opinion, the power contained in section 57 is in the nature of an obligation or is coupled with an obligation and under the circumstances can be demanded to be used also by the parties affected by the assessment of the stamp duty[10].

[10] Chief Controlling Revenue authority and Superintendent of Stamps vs. Maharashtra Sugar Mills Ltd, AIR 1950 SC 218

In case of Aryakumar Mahasabha vs. Town Planning Officer[11], 1979 (2) GLR 54, the Trust existed with an object to impart the education and knowledge to enlighten the women. The trust had a big portion of land to carry on such activities. It was also the object of the trust to carry on the religious and charitable purpose. Section 32 (1) (vii) of the Bombay Town Planning Act drew a duty upon the Town Planning Officer to decide as to whether the plot was exclusively occupied for such religious and charitable purpose so as to exempt the trust from any payment of contribution.

The question that arose for determination was whether the respondent performed the duty cast upon him under the Bombay Town Planning Act, 1954 read with Bombay Town Planning Rules, 1955 and, if so, whether the duty was performed in accordance with law and within the framework of the statute which conferred the duty.

Section 32(1), which prescribes duties of the Town Planning Officer, opens with the words "In accordance with the prescribed procedure, the Town Planning Officer shall...".

It was manifest therefore, that the several duties under Section 32(1) were to be performed by the Town Planning Officer in accordance with the prescribed procedure. One of the duties conferred upon the Town Planning Officer was to calculate the contribution to be levied on each plot included in the final scheme. At the same time, however, it was also the duty of the Town Planning Officer to determine amount of exemption, if any, from the payment of the contribution that may be granted in respect of plots exclusively occupied for the religious or charitable purposes.

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[11] Aryakumar Mahasabha vs. Town Planning Officer, 1979 (2) GLR 54

Under Section 33, except in matters arising out of Clauses of Section 32(1), every decision of the Town Planning Officer shall be final and conclusive and binding on all persons. Therefore, the decision of the Town Planning Officer with regard to the determination of the amount of exemption, if any, under Clause (vii) of Section 32(1) is attached with finality and has a binding effect on all persons including those affected by such decisions. As regards the Town Planning Officer's decision under Clause (x) of Section 32(1), however, Section 34 provided an appeal to the District Judge for decision by a Board of Appeal constituted under Section 35. In performing the duties cast upon him under Section 32(1), the Town Planning Officer was required to follow the prescribed procedure and that makes it necessary to refer to the Bombay Town Planning Rules, 1955.

Rule 21 deals with the procedure to be followed by the Town Planning Officer. Under Sub-rule (4), the Town Planning Officer is under a duty to give all persons affected by any particular of the scheme sufficient opportunity of stating their views and not to give any decision till the town planning officer duly considered their representations, if any. Rule 21(6) casts duty on the Town Planning Officer to record and enter in the scheme every decision given by him under various specified clauses of Section 32(1) and, accordingly, the decision given by him, inter alia, under Clause (vii) is required to be recorded and entered in the scheme.

Under the same Sub-rule, it is further the duty of the Town Planning Officer to set out and record in the scheme the calculations and estimates required, inter alia, by Clause (x). Under Sub-rule (9), the Town Planning Officer is under a duty to publish the final scheme drawn up by him: (1) by a notification in the Official Gazette and (2) by means of an advertisement in the local newspapers announcing that the final scheme shall be open for the inspection of the public during office hours at his office. The Town Planning Officer is also under a duty to communicate forthwith the 'decisions' taken by him in respect of each plot to the owner or person interested by the issue of the requisite extract from the final scheme.

Provision indubitably cast a duty upon the respondent to decide whether the Trust was entitled to exemption, if any, from the payment of contribution and, if so, to determine the amount of exemption and to record and enter into the scheme such decision and to communicate forthwith the said decision to the Trust. That this is the mandatory duty of the respondent is obvious not only from the language employed in the relevant statutory provisions but also having regard to the salutary object underlying the enactment. When such duty is cast upon the respondent, the respondent has to perform the same duty irrespective of whether the party interested calls upon him to do so. A specific application seeking exemption may be advisable but it is not an essential prerequisite of the performances of duty under Section 32(1)(vii). An application would only be reminder, for the performance of duty, but even in absence of such reminder, the respondent was lawfully obliged to perform his duty.

Looked at from either point of view, there was no escape from the conclusion that in the instant case, there was really no effective exercise of power or duty conferred upon the respondent under Section 32(1)(vii) of the Act. The statutory power which was vested in the respondent for salutary object of granting exemption from payment of the contribution in respect of plots exclusively occupied for religious or charitable purposes was not exercised at all, bearing in mind the relevant facts and circumstances of the case and the objects of the statute which conferred such discretion.

His Lordship Justice P.D.Desai replying upon Julius v. Lord Bishop of Oxford, (1880) 5 AC 214 said: “It is settled law that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the condition upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it to be exercised. In other words, if the conditions laid down for the exercise of discretion are satisfied, the authority has no discretion to refuse to exercise the discretion. The authority is under a statutory duty to exercise the discretion. It is equally well settled that where a statute conferring a discretion on a public authority to exercise or not to exercise a power did not expressly limit or define the extent of his discretion and did not require it to give reasons for declining to exercise the power, his discretion might nevertheless be limited to the extent that it must not be used, whether by reason of misconstruction of the statute or for other reason, as to frustrate the object of the stature which conferred it. Under such circumstance, though the public authority might have full and unfettered discretion, it is bound to exercise it lawfully." (Download the judgment here)

In case of Dr. (Shri) P. Navinkumar vs. Bombay Municipal Corporation[12] Sujata Manohar said[1] that:

“Their duty is clear and needs no judicial interpretation. However, unpleasant the duty may be, they are bound to discharge it in public interest.”

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[12] Dr. P. Navinkumar and other V/s Municipal Corporation for greater Bombay and others (1988 Municipalities and Corporation Cases 280)

Honourable the Bombay High Court said so in the facts and circumstances that that Allan Road is a small road in Colaba at Bombay. There was a garage in the locality. The Muslim community used this garage as a place to offer prayer. By the efflux of time, the garage was converted into mosque, where number of people gathered for offering prayer. And Friday is considered a very heavy day for Muslims to offer the mass prayer. Invariably, all the Muslim people would gather in a substantial number. This was resulting in blockage of public road and they used to install wooden blocks for certain period.

However, public in general were facing great inconvenience due to blockage. Time to offer prayer was from 11:00 a.m. to 2:00 p.m. Persons would go to their offices or at their work place. Children would either go to school and some would come back according to their time schedule. Some would be back at home for taking their daily meal. Housewives would return from shopping. This activity of the community caused great inconvenience to the general public.

Despite the hardship or inconvenience to the general public, Municipal Corporation and Police Department did not carry out their duty for public good.

Section 63 of Bombay Municipal Corporation Act[13] provided:

Section 63: "It shall be incumbent on the Corporation to make adequate provision, by any means or measures which it is lawfully competent to them to use or to take, for each of the following matters, namely:

[13] Bombay Provincial Municipal Corporations Act, 1949
[Act, No. LIX of 1949][29th December, 1949]

Sub Section (19) of Section 63:

“the removal of obstructions and projections in or upon streets, bridges and other public places;”

Section 312 (1) also provides that:

“No, person shall, except with the permission… erect or set-up in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion of such street…”

These are all statutory powers and duties imposed on the Municipal Corporation for the exercise of their discretion in a best manner for removal of obstructions in the interest of general public. The Court not only scanned “obligation” of the Municipal Corporation, but it also took into consideration the “obligation” of the Police authority. Section 67 of the Bombay Police Act provided that:

Section 67: “It shall be the duty of a Police Officer:

(a) to regulate and control the traffic.”

All persons are bound to carry out the directions reasonably issued by the police authorities under this provision. Similarly, the Police authorities are bound to discharge their public duty. The provisions in the Act provided for the prevention of traffic. Though the Court did not exhaustively deal with the question of interpretation, the words mentioned in Section 67 of the Bombay Police Act like “regulate and Control” entrusts wide powers to the police authorities in the matter of exercise of their duties to prevent the traffic on a public road.

Putting general principle, the Court concluded that:

"In other words to discharge their statutory duties the Bombay Municipal Corporation and the State of Maharashtra seek shelter behind judicial robes. Their duty is clear and needs no judicial interpretation. However, unpleasant the duty may be, they are bound to discharge it in public interest."

It was observed that it is unfortunate that for discharge of statutory obligations by a public authority, ordinary citizens are compelled to resort to litigation. From the reading of judgment, it plainly appears that the authorities failed to exercise their public duties. But the real reason may be the "assumed fear" of displeasure in the Muslim community.

In case of Maharudrappa Danappa vs. The State of Mysore [1961 AIR 785= 962 SCR (1) 129] Rule 68 framed under the Bombay District Municipal Act, 1901 (Bombay Act III of 1901) and admittedly applicable to the appellant reads:

"The Chairman of an Executive Committee shall sign payment orders on behalf of the Committee after the Committee have passed the bills and may also order payment of bills for fixed recurring charges such as pay bills in anticipation of the Committee passing them".

The only criticism was urged against the view was that the High Court did not keep the distinction between the words "duty" and "power" in mind and that rule 68 empowers the Chairman to order payment and does not impose a duty on him to order payment.

Supreme Court said that the power to make payment of fixed recurring charges such as pay bills imposes a duty on the Chairman to do so when necessary as the power is vested in the Chairman for the benefit of the persons entitled to receive those recurring charges.

The power is conferred on the Chairman for the benefit of the persons, who have served the Municipality, and have got the right to receive their pay or money for articles provided. There may arise circumstances when any delay in payment may affect those persons adversely. The pay is due on the first day of the month and it may not be convenient to fix a meeting of the Committee at a date for early payment of the pay due. A meeting already fixed may have to be adjourned for want of quorum.

The passing of the pay bills, in the circumstances, is more or less a formal matter, and therefore, the rules empower the Chairman of the Managing Committee to order payment of the pay bills in anticipation of sanction by the Committee.

The Chairman can exercise this power for the benefit of the employees voluntarily or when requested by those persons to exercise it. The mere fact that this power of the Chairman was to be exercised only with respect to fixed recurring charges and in anticipation of the Committee passing the bills for those charges, therefore, does not affect the question in any way. Clause 10 of Section 21 of the Indian Penal Code merely requires that the person should have the duty to expend property for certain purposes. It is not restricted to such cases only where there is no limitation on the exercise of that power of expending property.

The Chairman has the duty to order payment and to spend money of the Municipality in certain circumstances[14].

[14] Maharudrappa Danappa vs. The State of Mysore [1961 AIR 785= 962 SCR (1) 129][Rendered by Raghubir Dayal J: Bench Raghubir Dayal and K. Subba Rao : Decided on 16 February, 1961]