

(2000) 11 AHC CK 0027
In the Allahabad High Court
Case No : C.M.W.P. No. 606 of 2000

Kesar Enterprises Ltd. and another

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 08-11-2000

Acts Referred:

Administration of Justice Act, 1980 — Section 4
Constitution of India, 1950 — Article 226
Uttar Pradesh Excise Act, 1910 — Section 11(2), 24B, 41
Uttar Pradesh Excise Rules — Rule 417

Citation : AIR 2001 All 209 : (2001) 1 AWC 426

Hon'ble Judges : Yatindra Singh, J

Bench : Single Bench

Advocate : Arun Tandon, for the Appellant;

Judgement

Introduction

Yatindra Singh, J.—Country spirit is sold by retailers, who are selected by an auction sale. The contractors, who are selected after inviting sealed tenders, supply it in every district at fixed rates. They (contractors) before their selection also file an undertaking before the Excise Commissioner that they will abide by the rate fixed by him and in fact supply country spirit throughout the State at the same rate fixed by the Excise Commissioner. In light of these facts.

What is the relevance of tendered rates by the contractors? Have they become irrelevant? Is there any point in calling sealed tenders? Can a contract still be awarded to a contractor on the basis of tendered rates?

This is the main question involved in this writ petition. It arises on the following facts.

The facts

2. The Excise Commissioner, Allahabad, published a tender notice on 13.1.2000 inviting tenders for allotment of various districts to the contractors for supply of

country spirit for the excise year 2000-2001. The tenders were to be submitted by 3 p.m. of 4.2.2000 and were to be opened on the same day at 4 p.m. Sri R. K. Goswami, Secretary General of U. P. Distillers Association (the U.P.D.A.) submitted tenders on behalf of 15 distillers of the State for different districts. The petitioner was one of the 15 distilleries represented by the U.P.D.A. and had given tender apart from other districts for district Sultanpur. He had supplied country spirit for district Sultanpur in the previous excise year. The Bajpur Distillery and Chemical Works, Bajpur, district Udham Singh Nagar (the contesting respondent) also submitted a tender, apart from other districts for district Sultanpur. Tenders were opened on 4.2.2000 and the participants noted down the rates. They were requested to appear before a committee for further negotiation on February 16 and 17, 2000.

3. In recent years, a practice has also developed : the participants are required to submit an undertaking in form of an affidavit that they will abide by the rates fixed by the Excise Commissioner and he fixes same rate for the entire State. The contractors for many years have been supplying country spirit at the fixed rate throughout the State. In this case, some participants had given their undertaking earlier in the form of an affidavit ; some filed their affidavits afterwards : some did not file any affidavit but during negotiations, a representative of the U.P.D.A. on behalf of 15 distilleries (including the petitioner) orally agreed to supply country spirit at the rates fixed by the Excise Commissioner and affidavits were filed later on. The petitioner also filed his affidavit, sworn on 21.2.2000. In short, everyone agreed to supply country spirit at the rates to be fixed by the Excise Commissioner.

4. The tender of the contesting respondent was the lowest. The committee further negotiated with it and made recommendations regarding price of the country spirit, and district-wise selection of the contractors. The committee recommended that the contesting respondent may be awarded contract for district Sultanpur. The State Government approved the recommendation of the committee for district Sultanpur on 3.4.2000 and on the same day, the Excise Commissioner awarded contract for Sultanpur to the contesting respondent.

5. The petitioner filed a Writ Petition No. 323 (T) of 2000 challenging the orders granting contract for Sultanpur district to the contesting respondent. A Division Bench of this Court declined to decide the case on merits on 29.5.2000 holding that :

* the petitioner can approach the State Government u/s 11 (2) of the U. P. Excise Act (the Act) ;

* the State Government cannot only revise the order of the Commissioner under that Section, but could also review its order ;

The petitioner thereafter filed a representation before the State Government that was rejected on 21.6.2000. Hence, the present writ petition.

Points for determination

6. I have heard Sri S. P. Gupta, senior advocate and Sri Arun Tandon, counsel for the petitioner ; Sri Ajai Kumar Mishra, Sri Ashwani Kumar Mishra and Sri Neeraj Kumar Sharma for the contesting respondent : and Sri H. R. Mishra for the State. Following points arise for consideration in this case :

(i) Whether the High Court at Allahabad has territorial jurisdiction to entertain this writ petition?

(ii) The writ petition is against the decision-awarding contract for supplying country spirit. Is writ petition against grant of a contract maintainable?

(iii) All participants had given their undertaking that they will abide by the price fixed by the Excise Commissioner. Is this undertaking beyond the Act and the Rules? Is it liable to be ignored?

(iv) The State Government has given following two reasons for awarding contract in favour of the contesting respondent :

(a) The rates tendered by the contesting respondent were less than the rates tendered by the petitioner.

(b) Utilisation of the potable liquor of the contesting respondent is less than the petitioner.

Are tendered rates still relevant when participants have given undertaking to abide by the rate fixed by the Excise Commissioner? Is second reason factually correct?

1st point : The High Court at Allahabad has territorial jurisdiction

7. The respondents submit that the High Court at Allahabad has no territorial jurisdiction to entertain the writ petition as :

* the tender was for the supply of country spirit for district Sultanpur, which lies in the area governed by Lucknow Bench ; and

* the order was passed by the State Government at Lucknow.

They submit that writ petition could be entertained by the High Court at Lucknow only.

Jurisdiction depends on the Cause of Action

8. Jurisdiction of the High Court at Allahabad or Lucknow, depends upon the cause of action. In case it arose exclusively in the areas situated within Allahabad or Lucknow Bench, then the High Court at Allahabad or Lucknow, will have exclusive jurisdiction. But in case part of cause of action arose in the areas situate within jurisdiction of Allahabad or Lucknow Bench then writ petition can be entertained at either places. Let's see if any part of cause of action arose in an area situate within Allahabad jurisdiction.

Part of cause of action arose at Allahabad

9. A part of cause of action arose at Allahabad. This is clear from following facts :

- * Tenders were invited by the Excise Commissioner at Allahabad.
- * They were opened at Allahabad.
- * The negotiations took place at Allahabad.
- * Undertakings in form of the affidavits were filed at Allahabad.
- * The final order awarding contract to the contesting respondent (challenged in the writ petition) was passed by the Excise Commissioner at Allahabad.

In view of above, the High Court at Allahabad has territorial jurisdiction to entertain this writ petition.

2nd point ; The writ petition against grant of contract-maintainable

10. The respondents submit that the writ petition is against grant of a contract and should be dismissed at the threshold. They submit that writ petition is not maintainable for the following reasons :

- * There is no fundamental right to manufacture or sell liquor. Indeed, it has been so held. It is also so declared by Section 24B of the U. P. Excise Act (the Act).
- * By grant of contract, neither petitioners' legal nor fundamental right are infringed.
- * A contract for supply of country liquor is awarded under Rule 417 of the Excise Rules" and Clause No. 17 of the auction notice. Rule 417 states, "full power is reserved to accept such tender as may be deemed best in public interest and, to reject any of those received without reasons being assigned". Clause 17 of the auction notice states, "no district is reserved for any tendering party". In view of these specific stipulations in the rule and the auction notice the petitioner cannot raise any grievance against the award of the contract.

Relevant factors for selecting a contractor

11. Every excise year, the State selects contractors to supply and fixes the rates at which they have to supply country spirit. This exercise is completed before right to sell country spirit is auctioned to the retailers. The reason is simple : Retailers should know the rates before the auction and there should be certainty about getting country spirit. The State Government has discretion in selecting a contractor to supply country spirit, but it is to be exercised on relevant factors. They are enumerated in Rule 417 and clause 17 of the auction notice. Rule 417 states, "the contract will ordinarily be awarded to the firm tendering at the lowest rate". Clause 17 of the auction notice also lists certain preferences to be given "if there is no material difference in the tendered rates". This shows that apart from others, at least the relevant factors are the tendered rates and the

preferences maintained in clause 17 of the auction notice ; there could no more. The other factor would be clear by looking into purpose of selecting a contractor (paragraph 13 of the judgment). They have to be considered while selecting contractors. But Rule 417 also states that "full power is reserved to accept such tender as may be deemed best in public interest". It also uses the word "ordinarily" contract will be awarded to the person offering lowest tenders. Clause 17 of the auction notice also states that, "no district is reserved for any tendering party". If relevant factors are there, then what is the reason for using of these words. Do these words shield the decision where no writ can enter. Is the decision impregnable? In order to find it out, let's understand how State earns public revenue and the purpose of selecting a contractor.

How State earns public revenue

12. The State Government does not receive any revenue from the contractors who supply country spirit. It earns its revenue from the retailers to whom the right to sell country spirit is auctioned. The State selects contractors for different districts, fixes the rate of the country spirit and minimum quota of country spirit of a district. Then auctions the right to sell country spirit to the retailers. They offer the price fixed by the State Government to the contractors directly and give excise duty, as well as licence fee (determined by public auction) for selling the country spirit, to the State. The retailers are selected by auction to sell country spirit. Lower the price fixed by the State Government for supply of country spirit, higher the auction money that can be expected from the retailers.

Purpose of selecting a contractor--Other factors

13. The purpose of selecting a contractor is to ensure supply of good spirit at cheap rates so that higher licence fee (public revenue) may be earned from the retailers. It is for this reason that the Rule 417 States that "the object (is) to secure to the retail vendors a supply of good spirit at a cheap and fixed rate". It shows there are three objects :

- (i) Country spirit should be cheap.
- (ii) It should be at fixed rate.
- (iii) There should be security of supply of good country spirit.

It is for the third object that Rule 417 states that "ordinarily" the contract will be awarded to the firm tendering the lowest rates and further states that it reserves full power to accept, such tenders as may deem best in public interest. It is for the third object that clause 17 of the auction notice uses the word, "No district is reserved for any tendering party". Ensuring supply of good spirit in a district is important and is also a relevant factor otherwise State cannot earn public revenue from the retailers. It is for this reason that some room has been given to the State in exercise of its discretion. This does not mean that exercise of discretion is immune even if it is improperly or unfairly exercised.

Discretion is to be exercised on relevant factors

14. The State has enumerated relevant factors as well as purpose for grant of the contract. The discretion to grant the contract is to be exercised on those relevant factors. The State cannot say that exercise of that discretion is absolute, immune from any scrutiny. Half a century ago. Justice Frankfurter said.

"An executive agency must be rigorously held to the standards by which it professes its action to be judged....Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

It is entrenched in our Administrative Jurisprudence too. The State cannot profess one standard and ask to be judged by another. The State has discretion in the matter to be exercised on relevant factors ; it does not have absolute discretion. The discretion cannot be exercised on relevant factors. It is often said :

"Absolute discretion is a ruthless master. It is more destructive of our freedoms than any of man's other inventions."

It is the "Rule of law", and not the discretion, that is the master.

15. The Courts have carved out an area and have laid down grounds on which an administrative decision can be struck down. Few countries have even enacted laws specifying these grounds concisely and succinctly. Australian Administrative Decisions (Judicial Review) Act, 1977 (The ADJP Act) as well as the Barbados Administrative Justice Act, 1980, are two such Acts. I have quoted relevant Section 5 of the A.D.J.R. Act and Section 4 of the Barbados Act as Appendices 1 and 2 to the judgment. Similarly, French and Israel Parliaments have enacted similar laws. Not only our Indian Courts but also the Courts world over are reviewing administrative decisions on the grounds similar to Australian and Barbados Acts. High Court of Australia in Minister for Aboriginal Affairs v. Peko-Wallsend Ltd. had scanned the law in this regard world over and has held that Section 5 (2) (b) of the A.D.J.R. Act (Australian Act) is substantially declaratory of the common law. The relevant part of the judgment is reproduced as Appendix 3 to this judgment. We have also traversed a similar path ; our law is the same ; our Courts have been striking down administrative decisions on similar grounds. A decision taken on irrelevant factor is illegal and liable to be struck down. No shield can protect it.

Fairness--Theory of Everything (TOE)

16. The aim of Administrative Jurisprudence is to achieve fairness. The Courts have evolved different principles striking down administrative decisions to ensure fairness. The different principles namely, the promissory estoppel, or the

legitimate expectation, or the principles of the natural justice, or the Wednesbury principle, or any other ground (bad faith, irrelevant consideration, acting under dictinction etc.) on which judicial review is permissible are merely tools to ensure that the proceeding and the end result are fair. These tools or principles will (if not already) merge into one--fairness : The theory of Every Thing (TOE). The world of Physics has not found its TOE in this century ; it still eludes physicists. But Administrative jurisprudence has already found its TOE in fairness ; World over it is moving in this direction. Our Courts are repeatedly using this concept to judge the validity of the administrative actions. Some decisions have even used this concept to strike down a legislative Act. Though striking down an Act on this ground lies in the grey area. It is on the yardstick of fairness that administrative decision is to be judged. The relevant question is, "But, is it fair". It is only if the procedure is fair, and the end result is fair, then it can be said that it is an end of the matter.

17. To sum up, whenever an administrative decision of the executive is challenged, the Court will scrutinise to see if the decision is fair, applying well-established principles. It is too late a day to contend that writ petition is not maintainable ; barred, at the threshold, at the entry point. To say that the Courts are not even entitled to see if an administrative decision is arrived fairly is to misunderstand the law, a dis-service to Themis. But if discretion is properly and fairly exercised then the Courts will not substitute the decision with their own merely because they think that different conclusions ought to have been arrived at. These two propositions are different, they may not be confused with each other.

3rd Point : Undertaking is not beyond the Rules

18. The petitioner's argument floats on the balloon that the practice of obtaining undertaking (regarding supplying spirit at the price fixed by the Excise Commissioner) has rendered the tendered quotes irrelevant. The contesting respondent wishes to puncture it on the basis of two Division Benches decisions. He submits that :

- * the undertaking is beyond the Act and the Rules;
- * it cannot be taken into account;
- * it should be rejected.

19. In the aforesaid two cases, contract of a district was awarded to a contractor who had not applied for that district and the petitioner in those cases had applied for that district. This auction was challenged. The respondents in those cases tried to rely upon the undertaking given by the parties that they can be given any district to supply country spirit. This undertaking was contrary to the Act and the Rules as they stipulate that a participant has to apply before he can be awarded a contract for a district. The Government has to ensure supply of good spirit. If a contractor has not applied for a district, how can he supply spirit to

that district. It is in this light that the Division Benches have said that the Act and Rules do not contemplate giving an undertaking with regard to allotment of district to the contractor even if he had not applied for that district. These observations were not in regard to the undertaking to fix rates.

20. The undertaking regarding fixation of price serves the purpose contemplated under Rule 417 in two ways :

(i) The object to select contractor under Rule 417 is to secure to the retail vendors supply of good spirit at a fixed rate. The undertaking is taken so that the contractor may not refuse to supply at negotiated price, which is generally less than the tendered rate.

(ii) The undertaking helps the Government to fix one price throughout the State, avoiding any imbalance between the districts.

The undertaking regarding allotment of a district did not. The undertaking to fix rates can neither be rejected nor the reasoning of aforesaid two Division Benches is applicable to it. But the question is "does this undertaking render tendered rates irrelevant".

4th Point : Tendered rates are still relevant

21. I have already indicated relevant factors for selecting a contractor (Paragraph 11 and 13) of the judgment. The State has to ensure country spirit at cheap rates. This shows that tendered rates are relevant. But there is a practice of obtaining undertaking in form of an affidavit from the participant that they will abide by the price fixed by the Excise Commissioner. Initially the petitioner had not given his affidavit but an oral undertaking was given on its behalf before the committee negotiating the price and later on an affidavit was also submitted. All participants submitted similar affidavit. What is its effect?

22. Sri Arun Tandon, counsel for the petitioner, stated that the practice of taking an undertaking in form of affidavit has not rendered the system of sealed tenders irrelevant, as it has to be decided who will supply country spirit in a district. But the petitioner submits that:

* Everyone has agreed to supply at the price fixed by the Excise Commissioner and there is one rate for the entire State for last many years and also for this year. The petitioner is willing to supply at the rates fixed by the Excise Commissioner. In view of this there is no justification in awarding the contract on tendered rates. The tendered rates have become irrelevant. The decision has been taken on an irrelevant factor.

* If all participants are undertaking to supply country spirit at the rate fixed by the Excise Commissioner then the contract should be awarded on other preference mentioned in conditions (1) to (9) of sub-clause (a) of clause 17 of the auction notice. These conditions make an existing contractor relevant if they have fulfilled conditions mentioned in that clause.

* The petitioner was an existing supplier for Sultanpur district in the previous year. He fulfils conditions (1) to (9) of sub-clause (a) of clause 17 of the auction notice. The decision has been taken without considering this relevant factor.

* The decision to award contract to the contesting respondent is illegal. Contract should be awarded to the petitioner.

The submission is attractive but does not convince me.

23. It is not disputed that the price of the country spirit and the contractors who supply country spirit in a district are settled before the auction to sell country spirit (for the retailers) is held. This is done so that:

(a) The retailers may know price at which a retailer would get the country spirit.

(b) They should know the contractor who will supply country spirit in that district.

(c) They may bid accordingly.

According to Rule 417, the object and purpose of selecting a contractor to supply country spirit is to secure to the retail vendors a supply of good spirit at "cheap are fixed rates". This is done to ensure higher auction money from the retailers. Cheaper (and of course good) the country spirit : Higher the price the retailers will bid. The tendered rates help the State Government while negotiating and lowering the price. This is clear from the facts of this case.

24. The U.P.D.A. is an association of distilleries. They had formed a cartel- Fifteen distillers had together tendered rates that were higher. The contesting respondent had tendered the lowest rates. The rates tendered by the contesting respondent and negotiation with it helped the committee in forwarding the overall price of the country spirit. This led to higher bids by the retailers and more public revenue. Tendered rates help the State in achieving its purpose. It does not become irrelevant merely because all participants had given undertaking that they will abide by the rates fixed by the Excise Commissioner. If this were so, then no one may tender their rates scuttling the price fixation process.

25. The State should encourage those who have helped in getting more public revenue. It is good economics. It is not only sound decision but is fair and proper. Tendered rates afford basis for negotiation. It cannot be said that tendered rates have lost their meaning. It is helpful in obtaining country spirit at cheaper rates. It is a relevant consideration for grant and for allotment of particular district to a contractor. The other factors in clause 17 of the auction notice are not only subject to the Rule 417 but come into play only when there is no material difference in the tendered rate. The tendered rates of the contesting respondent were lower than the petitioner. In these circumstances, there is no illegality in allotting district Sultanpur to the contesting respondent.

For necessary to decide validity of the second reason : Point 4 (b)

26. The second reason for decision by the State Government is that utilisation percentage of potable spirit of the contesting respondent is less than that of the petitioner. This has been calculated taking the total capacity of the contesting respondent and the petitioner to be 15,000 and 10,228 K.L. per annum. Potable capacity was taken to be 800 of the same. According to the petitioner these figures are wrong :

- * The total capacity of the contesting respondent is 93,600 K.L. per annum and not 15,000 K.L. per annum.

- * The total capacity of the petitioner is 13,100 K.L. per annum and not 10,228 K.L. per annum.

- * Potable capacity of the contesting respondent and the petitioner should be 808 of the aforesaid figures.

27. The petitioner has neither stated the total capacity of the contesting respondent nor asserted that figures stated by the State Government in its order are wrong. The State Government has produced the records. The Excise Commissioner has also sent details of total capacity and potable capacity of all participants as Annexure-3 to the report. This also states that the total capacity of the contesting respondent to be same as mentioned by the State Government in the order. There is no necessity to further pursue in regard to the potable capacity of the contesting respondent. Let's consider the potable capacity of the petitioner.

28. Annexure-3 of the Commissioner's report (mentioned in the preceding paragraph) says that the total capacity of the petitioner is 13,092 K.L. per annum. It is about the same as asserted by the petitioner in paragraphs 3 and 4 of the writ petition. The State Government has replied these paragraphs in paragraph 34 of its counter-affidavit. It has been stated that:

- * The total capacity of the petitioner was enhanced to 13,092 K.L. by the order dated 17.5.1991;

- * This enhancement was only in respect of industrial alcohol ;

- * There was no enhancement of the potable capacity ; and

- * 80 of the enhanced capacity that is meant only for industrial Alcohol cannot be taken to be potable capacity.

The State in paragraph 34 of its counter-affidavit has denied the allegations of paragraphs 3 and 4 of the writ petition. It has mentioned the same figure as in its order. Which one is correct? The one in the order of the State Government, or in the report of the Commissioner. I leave this question open for following reasons :

(i) According to the petitioner this ground cannot be taken into account, as it was not a ground for allotting Sultanpur district to the contesting respondent.

(ii) Even if the aforesaid point is decided in favour of the petitioner, it will not make any difference to the result as I have already held that tendered rates are relevant.

(iii) The contesting respondent had tendered lower rates and was rightly allotted Sultanpur district.

Conclusion

29. My conclusions are as follows :

(i) Part of cause of action arose at Allahabad. The High Court at Allahabad has jurisdiction to entertain the writ petition.

(ii) Writ petition against award of contract cannot be dismissed at the threshold. The Courts are entitled to see whether the discretion in awarding contract has been exercised properly and fairly.

(iii) The undertaking filed by participants that they will abide by the rates fixed by the Excise Commissioner serves the purpose in the Rules. It cannot be rejected.

(iv) Tendered rates are relevant even after participants file their undertaking that they will abide by the price fixed by the Excise Commissioner.

(v) The rates tendered by the contesting respondent were less than that of the petitioner and was rightly allotted Sultanpur district.

(vi) No purpose will be served in deciding whether the second factor (mentioned in point 4 (b)) by the State Government is correct or not.

In view of my conclusion, the writ petition has no merits. It is dismissed with costs.

Dated 8.11.2000

Appendix-I

Section 5 of the (Australian) Administrative Decisions (Judicial Review) Act, 1977, is as follows :

Applications for review of decisions :

5. (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds :

(a) that a breach of the Rules of natural justice occurred in connection with the making of the decisions ;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed ;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision ;

(d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made ;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made ;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision ;

(g) that the decision was induced or affected by fraud ;

(h) that there was no evidence or other material to justify the making of the decision ;

(i) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1) (e) to an improper exercise of a power shall be constructed as including a reference to--

(a) Taking an irrelevant consideration into account in the exercise of a power ;

(b) failing to take a relevant consideration into account in the exercise of a power ;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred ;

(d) an exercise of a discretionary power in bad faith ;

(e) an exercise of a personal discretionary power at the direction or behest of another person ;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case ;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power ;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain ; and

(i) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1) (h) shall not be taken to be made out unless :

(a) The person who made the decision was required by law to reason that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established ; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

Appendix-II

Section 4 of the Barbados Administrative Justice Act, 1980, is as follows :

4. The grounds upon which the Court may grant relief by way of the remedies mentioned in this Act are :

- (a) that an administrative act or omission was in any way unauthorised or contrary to law;
- (b) excess of jurisdiction ;
- (c) failure to satisfy or observe conditions or procedures required by law;
- (d) breach of the principles of natural justice ;
- (e) unreasonable or irregular or improper exercise of discretion ;
- (f) abuse of power ;
- (g) fraud, bad faith, improper purposes or irrelevant considerations ;
- (h) acting on instructions from an unauthorised person;
- (i) conflict with the policy of an Act of Parliament ;
- (j) error of law, whether or not apparent on the fact of the record ;
- (k) Absence of evidence on which a finding or assumption of fact could reasonably be based ; and
- (l) breach of or omission to perform a duty.

Appendix-III

The High Court of Australia in Minister for Aboriginal Affairs v. Peko- Wallsend Ltd. 1987 LRC (Const) 822 at 835, has summarised the law "when an administrative decision can be struck down". The relevant part of the decision is as follows :

"The failure of a decision maker to take into account relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action. That ground now appears in Section 5 (2) (b) of the A.D.J.R. Act, which, in this regard, is substantially declaratory of the common law, together with the related ground of taking into account irrelevant considerations, it has been discussed in a number of decided cases, which have established the following proposition :

- (a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which

he is bound to take into account in making that decision *Sean Investment Pvt. Ltd. v. Mackellar* (1981) 38 ALR 363 ; *Greednz Inc. v. Governor General* (1981) 1 NZLR 172 *Ashby v. Minister of Immigration* (1981) 1 NZLR 222 . The statement of Lord Greena, M. R., in *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* (1948) 1 KB 223 that a decision maker must take into account these matters which he "ought to have regard to" should not be understood in any different sense in view of his Lordships statement on the following page that a person entrusted with a discretion "must call his own attention to the matters which he is bound to consider.

(b) What factors a decision maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the Court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors and in this context I use this expression to refer to the factors which the decision maker is bound to consider are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In this context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which is in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the maker may legitimately have regard (see *R. v. Australian Broadcasting Tribunal ex parte 2 H. D. Put. Ltd.* (1979) 144 CLR 45 adopting the earlier formulation of Dixon, J., in *Swan Hill Corporation v. Bradbury*, (1937) 56 CLR 746 and *Water Conservation and Irrigation Commission (NSW) v. Browning* (1947) 74 CLR 492. By analogy, where the ground of review is that the relevant consideration has not been taken into account and discretion is unconfined by the terms of the statute, the Court will not find that the decision maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.

(c) Not every consideration that a decision maker is bound to take into account but fails to take into account will justify the Court setting aside impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take into account could not have materially affected the decision (see. for example, the various expressions *Baldwin and Francis Ltd. v. Patents Appeal Tribunal* (1959) AC 663 ; *Hanks v. Minister of Housing and Local Government* (1963) 1 QB 999 *R. v. Chief Registrar of friendly Societies, ex parte New Cross Building Society* (1984) QB 227A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decisions *R. v. Bishop of London*, (1899) 24 QBD 213 *R. v. Rochdale Metropolitan Borough Council, ex parte Cromer Ring Mills Ltd.* (1982) 3 All ER 761 The limited role of a Court reviewing the exercise of an administrative discretion must constantly be borne

in mind, is not the function of the Court to substitute its own decision for that of the administrator by exercising a discretion, which the Legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned (*Wednesbury Corporation*, at 228).

(d) It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power *Sean Investments Pvt. Ltd. v. Mackellar* at 375 ; *R. v. Anderson, ex parte Ipec-Air Pvt. Ltd.* (1965) 113 CLR 117 ; *Elliot v. Southward London Borough Council* (1976) 53 WLR 499 : (1976) 2 All ER 721 at 788 : *Pickwell v. Camden London Borough Council* (1986) QB 962 I say "generally" because both principle and authority indicate that in some circumstances a Court may set aside an administrative decision, which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground, on which this is done, however is not the failure to take into account relevant considerations or the taking into account of irrelevant consideration, but that the decision is "manifestly unreasonable". This grounds of review was considered by Lord Greene, M. R., in *Wednesbury Corporation*, at 230, 233-234, in which His Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. This ground is now expressed in Sections 5 (2) (g) and 6 (2) (g) of the A.D.J.R. Act in these terms. The test has been embraced in both Australia and England (*Parramatta City Council v. Pestell* (1972) 128 CLR 305 ; *Bread Manufacturer of NSW v. Evans* (1981) 56 ALJR 89 : *Re Moore, Ex parte Cooperative Bulk Handling Ltd.* (1982) 41 ALR 221 : *Hall and Co. Ltd. v. Shoreham-By-Sea Urban District Council* (1964) JWLR 240 ; *R. v. Hillindon London Borough Council, ex parte Royco Homes Ltd.* (1974) QB 720 at 731-32 ; *Newbury District Council v. Secretary of State for the Environment* (1981) AC 578 . However, in its application there has been considerable diversity in the readiness with which Courts have found the test to be satisfied (compare, for example, *Wednesbury Corporation*, at 230, and *Parramatta City Council*, at 328, with the conclusion reached in the *South Oxfordshire District Council v. Secretary of State for the Environment* (1981) 1 WLR 1092 ; *Shoreham-By-Sea Urban District Council and Ministry of Housing and Local Government v. Hartnell* (1965) AC 1134 But guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion. In the context of the latter, it has been held that an appellate court may review a discretionary judgment that has failed to give proper weight to a particular matter, but it will be slow to do so because a near preference for a different result will not suffice (*Lovell v. Lovell* (1959) 81 CLR 513 at 519 ; *Gronow v. Gronow* (1979) 144 CLR 513 ; *Mallet v. Mallet*, (1984) 58 ALJR 248 at 252. So, too, in the context of administrative law a Court should proceed with caution

when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.

(e) The principles stated above apply to an administrative decision made by a Minister of the Crown (*Murphyores Incorporated Pvt. Ltd. v. Commonwealth* (1976) 136 CLR 1 ; *Re Hunt, ex parte Scan Investments Pvt. Ltd* (1979) 53 ALJR 552 ; *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) AC 997 ; *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977) AC 1014). However, in conformity with the principle expressed in (b) above, namely that relevant considerations may be gleaned from the subject-matter, scope and purpose of the Act, where the decision is made by the Minister of the Crown, due allowance may have to be made for taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion."