

(2002) 10 AHC CK 0056

In the Allahabad High Court

Case No : C.M.W.P. No. 37910 of 1999 & Civil Miscellaneous Writ Petition No. 37910 of 1999

Virendra Ojha and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-10-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21

Citation : AIR 2003 All 102 : (2003) 2 AWC 1514

Hon'ble Judges : Binod Kumar Roy, J;A.K. Yog, J

Bench : Division Bench

Advocate : R.K. Jain and A.K. Pandey, for the Appellant; R.P. Goyal, A.G., P.M.N. Singh, A.A.G., A.K. Singh, S. Chaturvedi, R.B. Singhal, Sharad Verma and Yashwant Verma and S.C., for the Respondent

Judgement

Binod Kumar Roy and A. K. Yog, JJ.—By filing this writ petition on 2nd September, 1999, the petitioners, who claim to have small agricultural holdings in which they grow sugarcane and supply sugarcane to Sugar Factories/Mills in Kushi Nagar reserved area, have come up with following prayers :

(i) to quash the Government Order No. 788 (C.D.)/46-1996 dated 26.2.1996 issued by the Chief Secretary of the U. P. Government, as contained in Annexure-2, taking a decision to make payment of the price of the sugarcane supplied by the farmers through Banks directing them to open their Accounts in the Banks from the next crushing season and the consequential letters/ orders dated 26.9.1996, 16.10.1996, 18.1.1997 and 17.10.1997 issued by the Cane Commissioner, U. P. (Respondent No. 3) as contained in Annexures-3, 4, 5 and 8 respectively directing payment of cane price to the cane growers and suppliers through Bank only ;

(ii) to direct the respondents to pay to the petitioners and other cane growers of the District Kushi Nagar price of the cane forthwith upon receipt of the cane price from the Sugar Factory and in any case within a period of seven days ;

(iii) to direct the respondents to make orders for payment of cane price for such farmers who supply sugarcane to the extent of 1 to 5 bullock cart ;

(iv) to direct respondent Nos. 7 to 9--The Punjab National Bank, Deoria Kasia Zila Sahkari Bank Limited and the Central Bank to operate Extension Counters at the office of the Cane Unions to make payment throughout the week during the season and to provide additional steps and arrangement to make payment forthwith and in any case within a period not more than 7 days ; and

(v) to award cost. The Pleadings :

2. In short the petitioners assert to this effect :

(i) They and other cane growers of the District Kushi Nagar are receiving payments through Banks under the scheme initiated by the impugned Government order after considerable delay ranging between 25 to 72 days from the receipt of the payment advice by the Banks which are causing great hardship and inconvenience which resulting in reduction of growing of cane ;

(ii) In the District of Kushi Nagar there are nine Sugar Mills and about 2,05,000 sugarcane growers out of which 1,55,000 are small cane growers who are having agricultural holdings comprising less than one acre who supply about 1 to 5 bullock cart of sugarcane in a crushing season and thereby constitute 74 per cent of the total cane growers ;

(iii) Section 17 of the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 (hereinafter referred to as the Act) provides for payment of cane price ;

(iv) u/s 38 of the Act, Sugarcane (Regulation of Supply and Purchase) Rules, 1954 (hereinafter referred to as the Rules) have been made ; Rules 44 to 48A provide a scheme for payment to be made to the cane growers, namely, that the payment of price of the sugarcane shall be made on the basis of recorded weight of sugarcane at the purchasing centres only to the cane growers or their representatives duly authorised by him in writing or to a cane grower or to a Cane Growers Co-operative Society ; payment will be made by the factory with mutual agreement with the factory and the Society and the remuneration to the factory for the payment to the members of the Society shall be determined by the Cane Commissioner ; arrears of cane price shall be remitted to the Society concerned within 15 days of the close of the factory ; it also provides for settlement of a dispute ; it also restricts any deduction from the price and regulates any loan with the previous permission of the Cane Commissioner ;

(v) As compared to the small farmers of the Eastern U. P. the farmers of the Western U. P. have large agricultural holdings and their payment is also big ;

(vi) At the beginning of the crushing year reserved area of sugar factories is determined by the Cane Commissioner ; the Central Government fixes statutory price of the sugarcane ; in a reserved area there are Unions of cane growers registered as a Cooperative Society ; on the recommendation of the Society and

the cane growers, the Cane Commissioner fixes the number of places of purchasing centres ; the Society estimates production of the sugarcane in the area, gives offer to the sugar factories after acceptance of which an agreement is entered between the Society and the sugar factory for purchase of the offered quantity of the sugarcane ; the farmers bring their sugarcane to the purchasing centres where it is weighed and they are issued parchas by the Factories on which the Sugar Factory has to pay the price within a statutory period of 15 days to the Society through Bank which distributes the sum to its members ; the Society never caused any delay and that immediately on receipt of the payment advice in the Bank the amount is disbursed to the farmers ;

(vii) In the year 1992, the State Government received some complaints about the sale and purchase of Supply Tickets and purchas ; after consideration the State Government issued a policy decision under which payment was to be made by the sugar factories to the farmers through Banks ; this scheme, however, could not succeed and was thus withdrawn by the Cane Commissioner vide h i s Circular Letter No. 143/C/ Sale-Cane Price dated 1.12.1992 as contained in Annexure-1 ;

(viii) In the year 1995-96 again there were some complaints, but only from the Western U. P., the Government once again after considering representations issued the impugned Government order (Annexure-2) the object of which appears to check malpractices ; the Cane Commissioner vide his letter dated 26.9.1996 (Annexure-3) circulated the aforementioned policy decision ; vide Circular dated 16.10.1996, as contained in Annexure-4, however, the aforesaid policy was modified by the Cane Commissioner, as the system started causing considerable delay in payment of the cane price it was brought to the notice of the then Governor of the State Sri Moti Lal Bora, who intervened in the matter on which by a Circular dated 18.1.1997 (Annexure-5) of the Cane Commissioner the policy of payment of sugarcane price through Bank was made optional at the option of the cane growers ; the policy of payment through Bank being made optional was again altered with the change of the Government in power in the State by the new Cane Commissioner through his Circular letter dated 11.7.1997 (Annexure-6) without taking into account the direction made by the then Governor ; in the beginning of the year 1997-98 season the Chief Secretary of the Government through his letter dated 27.5.1995 (Annexure-7) gave instructions to all the District Magistrates to take steps for opening bank accounts of the cane growers ; pursuant to the aforementioned decision the Cane Commissioner also wrote a letter dated 17.10.1997 (Annexure-8) to all the occupiers of the sugar factories for implementation of the scheme aforementioned ;

(ix) Great hardships were faced by the small farmers of Eastern U. P. who had to open 2.05,000 Bank Accounts in Rural Branches of the Banks who were having staff comprising three or four persons only for only a few hundred accounts ; there were agitations, demonstrations and dharnas by them but no step was

taken in improving the payment which continued to be made between 40 to 90 days after receipt of the payment advice ; various representations were made to the Cane Commissioner but he could not take any remedial measure who also wrote letter dated 9.1.1998 (Annexure-9) to all the District Magistrates ; the Co-operative Societies having foreseen the difficulties also resolved vide resolution dated 9.7.1997 (Annexure-10) against the scheme aforementioned and made representations to the State Government ; the Secretaries of the Societies also faced difficulties in the implementation of scheme of payment through Banks who also represented to the District Cane Officers vide Annexures-11A to 11E ; (xxx) Even representations made through M.L.As. having failed.

(x) Some of the difficulties which are being faced by the small cane growers are as follows :

(1) The banks take long time in opening the accounts of cane growers and insist upon formalities which causes great hardship to the farmers.

(2) The rural branches of the banks have an operating staff of only 2 or 3 employees namely Branch Manager, Cashier, Clerk and Peon. This staff was hardly sufficient to manage to 2 to 3 hundred accounts. With the implementation of the scheme each of the rural branch had to open about 3,000 accounts which was not possible to be managed by the staff of one cashier and one clerk and therefore, each business transaction with the bank is delayed by weeks.

(3) The Rural Branches have forfeited for making payment for only 4 days in the week namely from Monday to Thursday. Most of these banks can make payments to only 50 account holders and thus one rural branch can make payment to only 200 account holders in a week. During season period between October to April when the payment advises after credited all the accounts holders want to take payment without any delay which cause a great rush to the banks and long queues. Some times the farmers have to wait for several days all together to take his payment.

(4) The banks deduct bank commission from the payment advise received from the cane union which receives the payment from the factory. Firstly the delay is caused by two banking transactions--one between factory and union and thereafter from Union to the bank. The bank deducts bank commission on both the banking transactions which is to be ultimately borne by the cane growers.

(xi) Due to the aforementioned difficulties hardships, inconveniences and delays to the cane growers the growth of the sugarcane in the District Kushi Nagar in the year 1999-2000 came down to 13833 hectares which in the year 1998-99 was 14801.593 hectares as it would appear from the certificate granted by Senior Cane Development Inspector dated 17.8.1999 (Annexure-15), besides large quantities of sugarcane were exported to the sugar factories situated in the neighbouring districts of State of Bihar which do not have the payment system through banks which fact stands acknowledged by the Cane Commissioner in his letter dated 27.10.1998 (Annexure-16) sent to its counterpart of the State of

Bihar.

3. In the counter-affidavit filed on behalf of respondent Nos. 1 to 3 which has been sworn by the Deputy Cane Commissioner, Deoria by bringing the salient features of the policy dated 6th July, 1996 along with other relevant circulars and letters as contained in Annexure-C.A.-1, it has been stated, inter alia, as follows :

(i) The policy decision for payments to the cane growers through Bank Accounts is being implemented with utmost success for the last two years inasmuch as it is now ensured that instead of exploitation by the big cane growers and/or by the mafias by misutilizing parchis of the small cane growers, the small cane growers in fact are getting their payments ;

(ii) As a matter of fact the money instead of going to the real cane growers went to the unauthorised persons who somehow managed to utilise the parchis/slips and faced with this situation and for ensuring that payment is made to the real cane growers the policy of payment through Bank Account of each of the supplier of sugarcane was adopted and the misuse of the parchis/slips stand eradicated which is apparent from the fact that out of 205363 cane growers 1,93,000 have already opened their Bank Accounts in the respective banks without who are getting their payments through banks facing any sort of exploitation/ problem ;

(iii) It is also visualised that a huge sum of about Rs. 10.7 crores have been misutilised by the different Societies of Deoria Region by diverting the cane price funds in different Heads which by introduction of the scheme of payment through Bank Account has been prevented ;

(iv) It has also been visualised that big cane growers of the neighbouring State of Bihar used to purchase sugarcane at much less price from the small cane growers of the district and thereby badly exploiting them which with the introduction of the new scheme has been eradicated ;

(v) The small cane growers are getting their supply ticket within the stipulated period of time through the banks ;

(vi) From a bare perusal of letter dated 1.12.1992 it would be clear that the scheme for payment of cane price through banks was never withdrawn ;

(vii) Those cane growers who had not opened their Bank Accounts in the Bank had felt hardships in the year 1996-97 when the District of Kushi Nagar was under severe flood and to facilitate the cane growers of that area only some relaxation was given and it is not a fact that the policy itself was withdrawn ;

(viii) In regard to the request made by the Chairman of the Cane Society, Seorahi to exempt the small cane growers is not possible to be accepted as the scheme has been implemented in interest of such small farmers ;

(ix) In the beginning some problems were raised by the bankers but presently the cane price is being paid through banks within 10-15 days time and in making payments no local collection charges are being made by the banks ; the writ

petition is devoid of merit and is liable to be dismissed with cost.

4. In their rejoinder to the counter-affidavit of respondent Nos. 1 to 3 the petitioners have taken the following stand :

"It is admitted that the policy decision of the State Government was taken for the welfare of the benefit of small cane growers. The stand of the Government in the counter-affidavit that out of about 2,05,363 cane growers, 1,93,000 have already opened their account is true and thus admitted. However, on account of the laches and inefficiency on the part of the concerned banks the small cane growers are not in a position to take full benefit of the policy aforesaid. The banks are situated at long distance. When they contact the bank for opening a new account in their name, several formalities are required to be fulfilled which are time taking and causes great hardship to them most of whom are illiterate, There is scarcity of the staff in the rural branches of the bank as a result of which there is difficulty in implementation of the scheme. The cane growers of the State of Bihar are selling their sugarcane to the sugar mill owners of Bihar as they are getting price of their sugarcane In cash and thus, it is wrong to say that by promulgating the new policy the abuse has been eradicated.

5. Counter-affidavit was also filed by respondent No. 6 through District Magistrate, Gorakhpur Kshetriya Gramin Bank, Deoria, pointing out that the Bank has been complying with the various Government orders and circulars issued from time to time ; that despite limited staff the bank is managing the existing accounts opened by the cane growers and performing their task to the best of their ability which is deducting collection charges but only in regard to out station cheques.

6. In its. counter-affidavit, the Central Bank, Regional Office, Gorakhpur-respondent No. 9, sworn by the Regional Manager, Deoria, it has been stated, inter alia, that the Bank has been complying with various Government orders and circulars issued from time to time ; the Bank while opening the accounts has to go through various formalities as required in law and the charge that it is taking long time and causing hardship to the farmers are incorrect ; it is true that most of Rural Branches of the bank have couple of employees but they are sufficient enough to manage the accounts which have been performing their task to the best of their abilities who are not charging any commission in relations to the transaction and the writ petition is misconceived and is liable to be dismissed with special cost.

7. Petitioners also filed rejoinder to the counter-affidavit of respondent No. 9 high-lighting that the Bank has utterly failed to solve the problems of sugarcane owners.

The Submissions :

8. Mr. Ravi Kiran Jain, learned senior counsel appearing on behalf of the petitioner, after taking us to the various rules and the pleadings made in the writ

petition contended that most of the small farmers of district Kushi Nagar are illiterate and there are difficulties in opening accounts by them in the Rural Branches of the Bank in which there are hardly 2-3 staff and thus the impugned policy decision adopted by the Government is "disproportionate" arbitrary, discriminatory and attracts the vice which are excluded by the constitutional safeguards provided under Articles 14, 19(1)(g) and 21 of the Constitution of India. As a part of his submission in this regard he adopted the observations made by the Hon"ble Supreme Court in *Om Kumar and Ors. v. Union of India*. JT 2000 3 92.

9. On the other hand the learned Advocate General appearing on behalf of the State, after referring to the pleadings set-forth in the counter-affidavits vis-a-vis the writ petition and placing reliance on the decision of the Hon"ble Supreme Court in *Krishnan Kakkanth Vs. Government of Kerala and others*, contended that true it is that there were some teething troubles when the policy was adopted but now with the opening of the bank accounts by most of the small cane growers it cannot be said that hardships are being caused and/or there is any discrimination vis-a-vis such cane growers of the Western District of the State or even there is vice of any discrimination requiring Interference with the scheme and the various Government orders issued in relation to implementation of that scheme. In fact due to the situation created on account of floods some special Instructions were issued but the fact is that the scheme in question was never withdrawn and there is no force in the submissions of Mr. Jain. The decision in the case of *Om Kumar* is of no help to the petitioners and thus the writ petition be dismissed.

Our Findings :

10. Let us have a look first at the decision in *Om Kitmar and Ors. v. Union of India*. JT 2000 3 92 strongly relied upon by Sri Jain earlier and reiterated on 20.9.2002. The relevant passages are as follows :

"27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court had applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

28. By "proportionality", we mean the question whether, while regulating exercise of Fundamental Rights, the appropriate or least restrictive choice of measures has been made by the Legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the Legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties

or interests of persons keeping in mind the purpose which they were intended to serve". The Legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court to decide. That is what is meant by proportionality.

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30. On account of a Chapter of Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, such as freedom of speech and expression, freedom to assemble peacefully, freedom to form associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India, this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable, lay on the State. "Reasonable restrictions" under Article 19 (2) to (6) could be imposed on these freedoms only by legislation and Courts had occasion throughout to consider the proportionality of the restrictions. In numerous Judgments of this Court, the extent to which "reasonable restrictions" could be imposed was considered. In *Chintaman Rao Vs. The State of Madhya Pradesh*, Mahajan, J. (as he then was) observed that "reasonable restrictions" which the State could impose on the Fundamental Rights "should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation." "Reasonable" implied intelligent care and deliberations, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right, could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Article 19. (2)to(6) Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in *State of Madras Vs. V.G. Row*, . observed that the Court must keep in mind the "nature of the right alleged to have been Infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions of the time. This principle of proportionality vis-a-vis legislation was referred to by Jeevan Reddy, J., in *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*, recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. Article 21 guarantees liberty and has also been subjected to principles of

"proportionality". Provisions of Criminal Procedure Code, 1973 and the Indian Penal Code came up for consideration in *Bachan Singh Vs. State of Punjab*, the majority upholding the legislation. The dissenting judgment of *Bachan Singh Vs. State of Punjab*, dealt elaborately with "proportionality" and held that the punishment provided by the statute was disproportionate.

32. So far as Article 14 is concerned, the Courts in India examined whether the classification was based on intelligible differentia and whether the deferentia had a reasonable nexus with the object of the legislation. Obviously, when the Court considered the question whether the classification was based on intelligible differentia, the Courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable *AIR India Vs. Nergesh Meerza and Others*, . But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*,

33. In Australia and Canada, the principle of proportionality has been applied to test the validity of statutes (See *Cunliffe v. Commonwealth* (1994) 68 ALJ 791 (at 827, 839), (799, 810, 821). In *R. v. Oakes*. 1986 (26) DLR 200 Dickson. C.J. of the Canadian Supreme Court has observed that there are three important components of the proportionality test. First, the measures adopted, must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be "proportionality" between the effects of the measures and the objective. See also *Ross v. Brunswick School Dishut No. 15*, (1996) (1) SCR 825 , referring to proportionality. English Courts had no occasion to apply this principle to legislation. Aggrieved parties had to go to the European Court at Strasbourg for a declaration.

34. In U.S.A., in *City of Boerne v. Flores*, (1997) (521) UJ 507 the principle of proportionality has been applied to legislation by stating that "there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

35. Thus, the principle that legislation relating to restrictions on fundamental freedoms could be tested on the anvil of "proportionality", has never been doubted in India. This is called "primary" review by the Courts of the validity of legislation which offended fundamental freedoms.

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III (b) Proportionality and Administrative Action in India :

(i) Fundamental freedoms under Article 19(1) and Article 21 :

53. In the Indian scene, the existence of a Charter of fundamental freedoms from 1950 distinguishes our law and has placed our Courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action is concerned. We have already dealt with proportionality and legislation. Now, we shall deal with administrative decisions and proportionality.

54. Now under Article 19(2)to(6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing restriction or whether the administrator has not properly balanced the Fundamental Right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of "proportionality", just as it is done in the case of the main legislation. This, in fact, is being done by our Courts.

55. Administrative action in India affecting fundamental freedoms has always been tested on the anvil of "proportionality" in the last fifty years even though it has not been expressly stated that the principle that is applied is the "proportionality" principle. For example, a condition in a licence issued to a cinema house to exhibit, at every show, a certain minimum length of "approved films" was questioned. The restriction was held reasonable *R.M. Seshadri Vs. The District Magistrate, Tanjore* and Another, *Union of India and Others Vs. The Motion Picture Association and Others* etc. etc., also related, inter alia, to validity of licensing conditions. In another case, an order refusing permission to exhibit a film relating to the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a) *S. Rangarajan Vs. P. Jagjivan Ram and Others*, Cases of surveillance by police came up for consideration in *Malak Singh and Others Vs. State of P and H and Others*, Cases of orders relating to movement of goods came up in *Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others*, . There are hundreds of such cases dealt with by our Courts, in all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the Courts as a primary reviewing authority and not on the basis of *Wednesbury* principles. It may be that the Courts did not call this proportionality, but it really was.

56. In *Ganayutham*, the above aspect was left for further discussion. However, we are now pointing out that in administrative action affecting fundamental freedoms, proportionality has always been applied in our country though the word "proportionality" has not been specifically used.

57. We may point out that in Israel, the Supreme Court of Israel has now recognised "proportionality" as a separate ground in administrative law--different from unreasonableness. It is stated that it consists of three elements. First, the means adopted by the authority in exercising its power should rationally fit the legislative purpose. Secondly, the authority should adopt such means that do not injure the individual more than necessary. And third, the injury caused to the individual by the exercise of the power should not be disproportional to the benefit which accrues to the general public. Under this test, the Court recently invalidated several administrative actions (See De Smith, Woolf, Jowell, first Cumulative Supplement to Judicial Review of Administrative Action, 1998, p. 114).

(ii) Article 14 and Administrative Action.--Discriminative classification and arbitrariness :

58. We next come to the most important aspect of the case. Discussion here can be divided into two parts :

(a) (1) Classification test under Article 14 :

Initially, our Courts, while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification. It is not necessary to give citation of cases decided by this Court where administrative action was struck down as being discriminative. These are numerous.

(ii) Arbitrariness test under Article 14 :

But, in *E.P. Royappa v. State of Tamil Nadu*, 1974 (4) SCC 31, Bhagwati, J., laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary", it could be struck down under Article 14. This principle is now uniformly followed in all Courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

(b) If under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, *Wednesbury* applies and it is secondary review.

59. We have now reached the crucial aspect directly arising in the case. This aspect was left open for discussion in future In *Ganayutham* but as the question of "arbitrariness" (and not of discriminatory classification) arises here, we wish to make the legal position clear.

60. When does the Court apply, under Article 14, the proportionality test as a

primary reviewing authority and when does the Court apply the Wednesbury rule as a secondary reviewing authority? From the earlier review of basic principles, the answer becomes simple. In fact, we have further guidance in this behalf.

61. In the European Court, it appears that administrative action can be challenged under Article 14 of the Convention (corresponding to Article 14 of our Constitution) as being discriminatory and be tested by applying the principle of "proportionality". Prof. Craig refers to the judgment of the European Court under Article 14 in *Lithgow v. U.K.*, 1996 ECHR 329, as follows :

"The differential treatment must not only pursue a legitimate aim. It had to be proportionate. There had to be relationship of proportionality between the means employed and the aim sought to be realised."

62. Similarly, in the European law, in relation to discrimination on ground of sex, the principle of proportionality has been applied and it has been held that the State has to justify its action. In *E.U. Law and Human Rights* (by Lammy Betten and Nicholas Grief (1998 at p 98), it is stated :

"If indirect discrimination were established, the Government would have to show Very weighty reasons" by way of objective justification, bearing in mind that derogations from fundamental rights must be construed strictly and in accordance with the principle of proportionality", [*Johnstone v. Chief Constable of the R.V.C.* 1986 ECR 1651 (para 38.51)]

63. In the context of Article 14 of the English Act, 1998, (which is similar to our Article 14) Prof. Craig refers to the above principle. (See *Administrative Law*, Craig 4th Ed., 1999 page 652). Thus, it would appear that under Article 14 of the European Convention, principle of proportionality is invoked where questions of discrimination are involved and the Court is a primary reviewing authority. According to Prof. Craig, this is likely to be the position under Article 14 of the English Act. 1998.

64. In the U.S., in the matter of discrimination, tests of "intermediate scrutiny" and "strict scrutiny" have been laid down. In cases of affirmative action, the U.S. Courts have hitherto been applying the "intermediate scrutiny test". See the discussion in *Indira Sawhney v. Union of India*, 1992 (3) SCC 215 at pp 684-685 by Jeevan Reddy, J. But, recently, however, in 1995, the U.S. Supreme Court has shifted, in matters of affirmative action, from the "intermediate scrutiny" test to the "strict scrutiny" test. See *Adarand Constructors Inc v. Pena* (1995) 75 UJ 200 referred to by the Constitution Bench recently in *Ajit Singh and Others Vs. The State of Punjab and Others*, .

65. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the constitutional courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus

with the objective intended to be achieved by the administrator. Here the Court deals with the merits of the balancing action of the administrator and is, in essence, applying "proportionality" and is a primary reviewing authority.

66. But where, an administrative action is challenged as "arbitrary" under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted Illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, Venkatachaliah, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In Tata's Cellular v. Union of India, JT 1994 (4) SC 532 ; 1994 (6) SCC 651 , Indian Express Newspapers v. Union of India 1985 (1) SCC 641 at 691, Supreme Court Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, and U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others, , while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a Wednesbury review always.

67. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as "arbitrary" under Article 14, the principle of secondary review based on Wednesbury principles applies."

11. In Krishnan Kakkanth Vs. Government of Kerala and others, relied upon by the learned Advocate General the Apex Court had observed thus :

"34. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial if a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionally, Court should avoid "embarking on uncharted ocean of public policy."

35. The contention that the impugned circular suffers from hostile discrimination

meted out to the farmers in northern region of the State covered by the financial assistance under the Government schemes, by fastening such assistance with an obligation to purchase pumpsets only from the two approved dealers, cannot be accepted in the facts of the case. The reasons for fastening the farmers of northern region with the obligation to purchase pumpsets from the said two dealers have been indicated by Mr. Bhat and Mr. Gupta and, in our view, it cannot be held that such reasoning suffers from lack of objectivity. The law is well-settled that even in the matter of grant of largess, award of job contracts etc. the Government is permitted to depart from the general norms set down by it in favour of particular group of persons by subjecting such persons with different standard or norm, if such departure is not arbitrary but based on some valid principle which in itself is not irrational, unreasonable or discriminatory *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ."

12. Every cause has got a martyr. True it is that there were teething problems when the scheme in question was introduced but having regard to the apparent fact pleaded by the State that a vast majority of the small cane growers of the district of Kushi Nagar have opened their Bank Accounts for the purposes of payment of the price of their sugarcane which also stand admitted by the petitioners, we are of the view that there is really no scope for interference. In fact we find that this scheme is having manifold advantage in favour of the small cane farmers as demonstrated in the counter-affidavit filed on behalf of respondent Nos. 1 to 3. There is nothing wrong on the part of the banks to deduct collection charges of the out-station cheques.

13. Having perused the relevant pleadings and the decisions cited at the Bar, we do not find any unreasonableness or such discrimination in the policy decision etc. so as to attract vice of breaching Articles 14 19(1)(g) and 21 of the Constitution of India. In fact we find that the policy decision and the various Government orders were made to stop exploitation of the small cane growers as rightly submitted by the learned Advocate General.

14. If some of the small cane farmers have any real difficulty in relation to non-payment of the price of sugarcane supplied by them, we are sure that if they will move the Cane Commissioner (respondent No. 3) he will pass suitable orders in accordance with law by taking expeditious remedial action besides penal action against the exploiters concerned.

15. With these observations this writ petition is dismissed but without cost.

16. Let a copy of this order be handed over to the learned standing counsel by 12th October, 2002, for its intimation to the Cane Commissioner.