

(L) Presidential Reference under Article 143(1)

Mohit Kumar Gupta, Advocate-on-Record, Supreme Court of India

Re: special Reference No. 1 of 2012

[Under Article 143(1) of the constitution of India]

2019

Q. 5.

1. What is the impact of spl. Reference decision on the allocation of natural resources and contracts by government?
2. Scope of judicial review of economic policy and financial matters post the judgement.

2014

Q. 3

1. What was the challenge to the maintainability of the Reference?
2. Why was the reference entertained despite the fact that the revision petition against the judgement in CPIL was withdrawn?
3. Outline the separate opinion of Justice Khehar.
4. To what extent can the courts undertake judicial review of policy decisions of economic nature?

Facts: After the decision in CPIL ~~the~~ & Ors. vs Union of India (2G scam/2G case), review was filed but later withdrawn. President of India sought an opinion from the SC by making a reference to the SC under A.143(1) of the constitution of India.

- Issues:
1. Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by conduct of auction?
 2. Whether a broad proposition of law that only auction can be resorted to run contrary to judgements?
 3. Whether enunciation of a broad principle as expressed as constitutional law has the effect of formulation of policy and unsettling policies formulated by government?
 4. Permissible scope for interference with policy making?
 5. If the court holds within the purview of judicial review that a policy is flawed, is the court not obliged to take into account the investments made?

Important Discussion:

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1. Article 143(1): Power of President to consult SC

- Not necessary the questions must have arisen, and may also for future if likely to arise. (even at interlocutory stage)
- Whether question meets pre-requisite of Article 143(1) is a matter for the President to decide.
- Upon receipt of reference, SC to consider reference, the questions, facts stated (narrative) & report its opinion.
- The word 'may' implies that SC is not bound & may respectfully refuse to answer for strong, compelling and good reason.

If at any time it appears to the President that a question of law or fact has arisen or likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the SC upon it, he may refer the question to that ^{court} for consideration and the court, may after hearing as it thinks fit, report to the President its opinion thereon.

2. Article 137 and 143(1): Review and Reference

Review is less specific

Merely because a review was withdrawn + incidental of reference, the narrative refers to the said case, the same would not be an embargo or impediment.

3. Maintainability of Reference

- ✓ Above 2 points
- ✓ Allegations of malafide of Authority or truthfulness of facts cannot be looked into.
- ✓ Principles
 - ↳ Not vague, general, undefined
 - ↳ court can go through written brief to narrow down the legal controversies
 - ↳ question become unspecific / incomprehensible, risk of returning unanswered
- ✓ No mention of word 'doubt' + No specific format = Therefore, not a necessary condition
- ✓ Indirect endeavour to unsettle 2G judgement = stand of govt.
 - circumventing of a principle of law is not an outcome of appellate jurisdiction but a consequence of inherent power. Power can be exercised so long as previous decree *vis-a-vis* the inter parties is not affected.
 - Smelling upon previous judgement is permissible.
- ✓ Questions of great public importance pertaining to allocation / disbursement / distribution / allocation of natural resources.

4. Why auctum cannot be stated to be only method as a constitutional mandate.

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1. Article 141 'Law declared' is binding on all courts. It is the *ratio decidendi*, the principle of law on which the questions are decided. In 2G case, the validity of auctum was decided, and the word 'perhaps' was used qua allocation of spectrum, and not in general. Public Trust doctrine
2. Article 14 secures to all citizen & non-citizen, equality before law and equal protection of laws within the territory of India.
 - Positive ~~for~~ & negative = citizens
 - Negative ~~for~~ state = state
 - Constitutional mandate is absolute & cannot be applied selectively.
 - Auctum for revenue maximization, but not for other
 - Revenue may be secondary to development considerations.
 - Auctum is price discovery mechanism, is a science and not law.
3. Article 39(b) which mandates ownership and control of natural resources should be so distributed so as to best sub-serve the common good.
 - not justiciable
 - Fundamental in governance
 - Restriction is on object not on means
 - word 'distribution' encompasses all methods
4. Legitimate deviation from auctum, subject to fairness and non-arbitrariness, non-discrimination etc.
5. Plea of Potential Abuse is no ground. It is the actual bias.

5. Judicial Review of Policy Decisions

- wisdom and advisability of policies are ordinarily not amenable to judicial review, unless contrary to statutory or constitutional mandate.
- court cannot conduct a comparative study and suggest best method.
- when questioned, then only legal validity be decided.

Remaining questions have a direct bearing on the allocation of spectrum, therefore, refused to be answered.

Concurring opinion of Justice Khehar (Dr. Khehar)

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1. Auction be termed as tender, tender-cum-auction or auction.
2. Rights of ~~part~~ plurality against individual interests, especially when for one reason or the other, is not in a position to seek redressal of its grievances.
3. Test of reasonableness and non-discrimination.
4. Promotion of public interest and public good.

[Faint, mostly illegible handwritten notes in blue and red ink, appearing to be bleed-through or very light writing.]