

Writ of mandamus an overview essay sample

Law



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ACKNOWLEDGMENT

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* JAYA KOSLEY

(Semester ' VI')

OBJECTIVES

* To study meaning of writ of mandamus, * What is the traditional writ of mandamus? Can it be modified in the Indian context? * To study mandamus under Indian law prior to Constitution, * To study the interpretation of public right and mandamus.

LIST OF CASES

* Praga Tools Corporation v. C. V. Imanual (A. I. R. 1969 S. C. 1306) *

Sohanlal v. Union of India (A. I. R. 1957 S. C. 529: (1957) S. C. R. 738) *

Raman & Raman v. State of Madras (A. I. R. 1959 S. C. 694) * State of Assam v. Ajit Kumar (A. I. R. 1965 S. C. 1196)

* S. I. Syndicate v. Union of India

* Bandhua Mukti Morcha case

* Indian Council for Enviro-Legal Action ((1996) 5 SCC 281) * Vellore Citizen's Welfare Forum v. Union of India ((1996) 5 SCC 647) * D. K. Joshi v. Chief Secretary, State of U. P ((1999) 9 SCC 578) * M. C. Mehta v. Union of India (AIR 1987 SC 1086.)

* T. N. Godavarman v. Union of India

RESEARCH METHODOLOGY

The objective of this project is to understand the examine the doctrine of mandamus and to see its evolution, how it has been applied by the courts, its efficacy and finally, its constitutional validity. The scope of the project is limited in that very little case law relating to mandamus has been dealt with pre-1995. The project also extends to analysing its constitutional validity in light of the basic structure doctrine

This Doctrinal research is descriptive and analytical in nature. Secondary and Electronic resources have been largely used to gather information and data about the topic. Books and other reference as guided by Faculty of sociology have been primarily helpful in giving this project a firm structure. Websites, dictionaries and articles have also been referred. Footnotes have been provided wherever needed, to acknowledge the source.

INTRODUCTION

In India Article 32 and 226 of the Constitution gives power to the Supreme Court and High Court to issue writs in case of breach of Fundamental rights of any citizen by the state. By such writs the Judiciary can control the

administrative actions and prevent any kind of arbitrary use of power and discretion. There are five kinds of writs:

- * Mandamus
- * Certiorari
- * Prohibition
- * Quo-warranto
- * Habeas-corpus

A writ of mandamus or mandamus (which means “ we command” in Latin), or sometimes mandate, is the name of one of the prerogative writs in the common law, and is “ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly”. The word “ mandamus” appeared in a number of orders issued by the sovereigns who ruled England in the live centuries following the Norman Conquest. These orders however were not concerned with the grievances of the citizens.

The first instance of mandamus being used for enforcing the right of a private citizen was in 1615 when it was issued to a mayor and corporation to restore a burgess to his office unless they could show cause to the contrary. As no cause was shown, a peremptory order to restore him to the office was issued. By the early eighteenth century, it was used to compel performance of a variety of public duties which had been wrongly refused.

Mandamus lies to enforce a public duty in the performance of which the petitioner has a sufficient legal interest, but he must show that he has demanded performance which has been refused. It is discretionary and will

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not be granted if there is an alternative remedy equally beneficial, convenient and effective. The project covers the judicial control of the administrative actions by way of mandamus in India and the landmark judgments given by the apex Court in relation to it. It also elaborates the position of the Doctrine in U. K. DEFINITION OF MANDAMUS

Mandamus according to Black's law dictionary, Ninth Edition

“ A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act.”

Mandamus according to Wharton's Law Lexicon, 15th Edition, 2009 “ A high prerogative writ of a most extensive remedial nature. In form it is a command issuing in the King's name from the King's Bench Division of the High Court only, and addressed to any person, corporation, or inferior court of judicature requiring them to do something therein specified, which appertains to their office, and which the court holds to be consonant to right and justice. It is used principally for public purposes, and to enforce performance of public duties. It enforces, however, some private rights when they are withheld by public officers.”

The order of mandamus is of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in nature of a public duty. Mandamus is not a writ of right, it is not consequently granted of course, but only at the discretion of the court to

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whom the application for it is made; and this discretion is not exercised in favour of the applicant, unless some just and useful purpose may be answered by the writ.

A writ of mandamus or remedy is pre-eminently a public law remedy and is not generally available against private wrongs. It is used for enforcement of various rights of the public or to compel the public statutory authorities to discharge their duties and to act within the bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties.

MANDAMUS IN INDIAN LAW PRIOR TO THE CONSTITUTION

Mandamus was introduced in India by the Letters Patent creating the Supreme Court in Calcutta in 1773. The Supreme Courts in the Presidency towns were empowered to issue the writ. In 1877, the Specific Relief Act substituted an order in the nature of mandamus in the place of the writ of mandamus for the purpose of " requiring any specific act to be done or forborne within the local limits of its ordinary civil jurisdiction by any person holding a public office. Under the Specific Relief Act, 1963, which replaced the earlier Act, this provision has been omitted.

This omission must have been because such a provision under the Specific Relief Act became redundant since the Constitution of India contains a similar and more efficacious provision for the enforcement of public duties. The Constitution empowered all High Courts to issue directions, orders or writs including writs in the nature of mandamus for the enforcement of any

of the rights conferred by Part III and for any other purpose. The Supreme Court can also issue mandamus for the enforcement of fundamental rights.

FRAMEWORK OF LAW IN RELATION TO MANDAMUS

The Supreme Court has the power to issue writs under the Constitution of India, art. 32. The Supreme Court has the power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, certiorari, prohibition and quo warranto, whichever may be appropriate for the enforcement of any right conferred by this part. It is an important part of the constitution. Art. 32 guarantee to every person the right to move the Supreme Court directly for enforcement of fundamental rights. It provides an inexpensive and expeditious remedy.

In Ambedkar's memorable words: ' If I was asked to name any particular Article in the Constitution as the most important - an Article without which this Constitution would be a nullity- I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it'. This provision states that there must be a clear breach of fundamental right not involving disputed questions of fact. It also states that government policy may not be enforced by writ under the article.

With regard to mandamus, art. 32 states that it may be issued where a fundamental right is infringed by a statute. It may be a statutory order or an executive order. However, according to some decisions it is discretionary. The aforesaid provision also mentions continuing mandamus where a mere issue of mandamus would be futile against a public agency guilty of continuous inertia and thus continuing mandamus' may be issued.

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This continuous mandamus has become the most commonly issued mandamus. Although the framework of law clearly states where a mandamus may be issued, the courts have not found it easy in many cases whether to issue a mandamus and it has become an important question of law.

INTERPRETATION OF PUBLIC RIGHT AND MANDAMUS

Mandamus lies against authorities whose duty is to perform certain acts and they have failed to do so. Under following circumstances mandamus can be issued : (i) The applicant must have a legal right to the performance of a legal duty. It will not issue where to do or not to do an act is left to the discretion of the authority. It was refused where the legal duty arose from an agreement which was in dispute. The duty to be enforced by a writ mandamus could arise by a provision of the Constitution or of a statute or of the common law.

(ii) The legal duty must be of a public nature. In *The Praga Tools Corporation v. C. V. Imanual*, and *Sohanlal v. Union of India*, the Supreme Court stated that mandamus might under certain circumstances lie against a private individual if it is established that he has colluded with a public authority. It will not issue against a private individual to enforce a private right such as a contract. Even though mandamus does not lie to enforce a contract inter partes, it will lie where the petitioner's contractual right with a third party is interfered with by the State¹⁸. Mandamus will not issue to enforce departmental manuals or instructions not having any statutory force which

do not give rise to any legal right in favour of the petitioner as in the cases of Raman & Raman v. State of Madras , State of Assam v. Ajit Kumar,.

However if the authority were under law obliged to exercise discretion, mandamus would lie to exercise it in one way or the other. Mandamus can be issued to compel an income-tax officer to carry out the instructions issued by income-tax appellate tribunal exercising its appellate power. Again it can be issued to a municipality to discharge its statutory duty. There are however exceptions to this rule. Where there is no statutory provision, executive instructions fill in the gap and are capable of conferring rights on the citizen imposing obligations on the authorities. In appropriate cases the courts may even compel the performance of such a duty. Mandamus is not available where the order upon which the alleged right of the petitioner is founded is itself ultra vires.

Similarly it was held that the grant of dearness allowance at a particular rate is a matter of grace and not a matter of right and hence mandamus cannot issue to compel the Government to pay dearness allowance at a particular rate. Article 320 (3) of the Constitution which provides that before a government servant is dismissed, the Union Public Service Commission should be consulted, does not confer any right on a public servant and hence failure to consult the Public Service Commission does not entitle the public servant to get mandamus for compelling the government to consult the Commission.

Where provisions are merely directory, non-compliance with them does not render an act invalid and hence no mandamus issues. (iii) The right sought

to be enforced must be subsisting on the date of the petition. If the interest of the petitioner has been lawfully terminated before that date, he is not entitled to the writ. (iv) As a general rule, mandamus is not issued in anticipation of injury. There are exceptions to this rule. Anybody who is likely to be affected by the order of a public officer is entitled to bring an application for mandamus if the officer acts in contravention of his statutory duty.

Thus an intending bidder at an auction is entitled to apply if the authority holding the auction acts contrary to the statute under which the auction is held or fails to perform his statutory duties in connection with the auction. A person against whom an illegal or unconstitutional order is made is entitled to apply to the court for redress even before such order is actually enforced against him or even before something to his detriment is done in pursuance of the order. For, the issue of such order constitutes an immediate encroachment on his rights and he can refuse to comply with it only at his peril.

CASES IN WHICH THE COURT HAS USED MANDAMUS:

The first case, where such a principle evolved was in the Bandhua Mukti Morcha case, where a writ petition was filed to improve the conditions of several workers who were working in inhumane conditions in certain mines in Faridabad. The Judge held that this was against the worker's right to life and directed the state to ensure the welfare of the workers. The Court then continued to monitor the actions taken by the state. This was the first instance where the Court exercised its powers to issue a continuing

mandamus against the state although it wasn't called so. In the case of Indian Council for Enviro-Legal Action, a writ was filed in the Court to prevent the flouting of the acts passed by the government to prevent water bodies from getting polluted.

This was because the authorities were not taking any action against the offenders. The Court held that the agencies should enforce the law and report to it for further clarifications. It passed several directions especially to the states asking them to submit management plans to control the pollution to both, the Central Government as well as the courts. The Court would go through the plans and the enforcement of the plans in another hearing which was set up. This was a clear case of mandamus and the remedy seemed effective as it delegated any further cases to the respective High Courts and agreed to reconvene to ensure that all its other directions were complied with.

The judges also discussed the merits of the judiciary performing an executive function, but finally held that this was not the case here and that the court was not usurping the function of the executive, but only discharging its judicial functions in ensuring that it rectified errors of the judiciary. In the case of Vellore Citizen's Welfare Forum v. Union of India, a writ petition was filed against the tanneries in the State of Tamil Nadu since their untreated effluents were polluting all the ground water.

The Supreme Court held that the Central Government should create an authority to deal with the above matter and that instead of the Supreme Court further monitoring the situation, the Chief Justice of the Madras High

Court was directed to set up a Green Bench to deal with the case and to monitor the functioning of the committee and the tanneries in Tamil Nadu. Thus the Apex Court asked for a special bench to be set up to continuously hear all matters pertaining to this case and other environmental cases within the state in another show of mandamus although it wasn't called so then.

Besides this, in the case of *D. K. Joshi v. Chief Secretary, State of U. P.*, a writ was filed before the court stating that in spite of several orders filed before these courts, the concerned authorities in Agra had been extremely lackadaisical and had been extremely slow in enforcing the various directions given by the court to ensure better living of the citizens in Agra. The Court thus held that since the case had been going on since 1992, there should be a special monitoring body set up which the authorities would be responsible to. This is a case where the remedy of mandamus has not been very successful since even after 7 years of directions, the Court has been able to achieve a very limited level of cooperation from the authorities.

In the case of *M. C. Mehta v. Union of India*, a writ was filed due to the vehicular pollution in Delhi. The Supreme Court had passed directions for the phasing out of diesel buses and for the conversion to CNG. The directions were not complied with and the state pleaded that this was because there was shortage in supply of CNG. The Apex Court held that orders and directions of the Court could not be nullified or modified by State or Central governments. The problem that the court faced was that although they wanted to punish the offenders, they did not want to harm the public who relied on these buses. They therefore had to modify their order and charge all the buses that ran without CNG, a fixed amount with the government

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phasing out the unconverted buses. However, the Court did not give any means for collecting this fine, which was a problem.

This is a case where, in spite of several directions by the Supreme Court, the government had been extremely slow in responding to the order. This was hence an extremely difficult case to implement although the pollution levels have gone down to an extent. In the case of T. N. Godavarman v. Union of India,[1vi] a writ was filed in the court to protect certain national forests since the government was still allowing mining and felling of trees to take place there.

The court gave several directions and monitored the actions of the various state governments to ensure that they complied with the orders and made them report back to the court as to the action taken by them and the reasons for which they allowed certain actions to be taken. The court thus monitored the executive to ensure that they took care of the national forests. This could technically be called the executive's role as it is up to them to implement legislation, but the court took over its function due to its inefficiency and made the governments periodically report back to the court periodically.

AGAINST WHOM MANDAMUS WILL NOT ISSUE

In England, mandamus does not lie upon the Crown. In India, it will not lie upon the President and the Governor of a State in their personal capacities. However, the Constitution expressly provides that appropriate proceedings may be brought against the Government of India and the Government of a State. Further the Constitution empowers the courts " to issue to any person
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or authority, including in appropriate cases any Government” any of the writs mentioned there in. Mandamus is therefore issued against the government. No mandamus will lie against an officer or member of parliament or an officer or member of the legislature of a State In whom powers are vested by or under the Constitution for regulating procedure or the conduct of business or for maintaining order in Parliament or the State legislature.

Mandamus will not issue to a legislature to forbid it from passing legislation repugnant to the fundamental rights. Mandamus was issued to a municipality to forbid collection of a tax ultra vires the Municipalities Act, to a University directing it to forbear from giving effect to an order made in violation of its own rules. Article 329 of the Constitution precludes any law courts from entertaining electoral matters such as the validity any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328 and provides that no election to either House of Parliament or to the House or either House of the legislature of a State shall be questioned except by an election petition presented as provided by Parliament.

This ban however applies only in respect of elections to Parliament and State legislatures. Mandamus was issued upon the Deputy Commissioner compelling him to hold municipal elections within a month and a half.

Mandamus lies to secure the performance of a public duty. If the petitioner has sufficient legal interest in the performance it will issue even if the body against which it is claimed is not a statutory body. Thus it was issued against the Sanskrit Council; which was constituted by a resolution of the state

government to. compel it to hold the examination and publish the results³⁹. However, it will not lie to secure performance by a company of a duty towards its employees which is not of a public nature.

ALTERNATIVE REMEDY: A BAR TO MANDAMUS

Mandamus is not refused on the ground that there is an adequate alternate remedy where the petitioner complains that his fundamental right is infringed⁴¹. The courts are duty bound to protect the fundamental rights and therefore mandamus is issued. It is only when mandamus is issued “ for any other purpose” that the existence of an alternate remedy bars its issuance. Mandamus will not, however, be refused when ordinary civil proceedings or administrative appeals or revision do not provide an equally effective and convenient remedy. Thus if the alternative remedy imposes a heavy financial burden on the petitioner, it will not be regarded as a ground for refusing mandamus.

For the issue of mandamus against an administrative authority the affected individual must demand justice and only on refusal he has right to approach the Court. In *S. I. Syndicate v. Union of India*, the Supreme Court has adopted the following statement of law in this regard. :” As a general rule the orders would not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that the demand was met by a refusal.”

Thus, a party seeking mandamus must show that the demand justice from the authority concerned by performing his duty and that the demand was refused. In *S. I. Syndicate* the court refused to grant mandamus as there was no such demand or refusal. Where a civil servant approached the court for mandamus against wrongful denial of promotion, he was denied the relief because of his failure to make representation to the government against injustice. The demand for justice is not a matter of form but a matter of substance and it is necessary that a " proper and sufficient matter has to be made".

The demand must be made to the proper authority and not to an authority which is not in a position to perform its duty in manner demanded. It is suggested that the court should not fossilize this rule into something rigid and inflexible but keep it as flexible. As Wade suggests, " these formalities are usually fulfilled by the conduct of the parties prior to the application, and refusal to perform the duty is readily from conduct". Demand may also not be necessary " where it is obvious that the respondent would not comply with it and therefore it would be but an ideal formality."

CONCLUSION

The prerogative writ of mandamus, which was enforceable in England is not strictly applicable to India since the Constitution itself provides for the innovation of several other remedies to suit the purpose and ensure that justice is served. The Courts have defined the remedy of mandamus for the first time in the case of *Vineet Narain v. Union of India*. It has stated that within that remedy, the court would issue a remedy in the interests of the

public and would monitor the executive authority itself to ensure that there would be compliance with the orders. The court also stated that this would not be usurping the powers of the executive, but merely following the judicial functions of the court and that the court had full right to do so in the interests of public good and justice.

However, the remedy has been criticised on several grounds, especially as being violative of the basic structure of the Constitution; that being the doctrine of separation of powers as has been held in the case of Kesavananda Bharati and Indira Gandhi. However, this may not be possible since firstly the basic structure doctrine is invented by the Supreme Court and enforced by the same Court. Thus they would not hold themselves guilty of a basic structure, although their decision could be reviewed on the grounds of a blatant wrong.

At the same time, in order for an action to be struck down as violating the basic structure, it needs to so 'damage and destroy' the doctrine such that they cannot exist together, which is not the case here. Hence the writ of mandamus is to protect the interest of the public from the powers given to them to affect the rights and liabilities of the people. This writ makes sure that the power or the duties are not misused by the executive or administration and are duly fulfilled. It safeguards the public from the misuse of authority by the administrative bodies.

Although there are certain conditions also which were discussed in the project like all the alternative remedies should be exhausted and it should be a statutory duty and not discretionary in nature. Hence it forms one of basic

tool in the hands of the common people against the administrative bodies if they do not fulfil the duties which by statutes they are bound to perform.

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