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ENFORCEABILITY OF GOVERNMENT DIRECTIONS, POLICIES, GUIDELINES AND CONTRACTS

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When dealing with government policies, guidelines and contracts, one is often faced with the question of the nature of these policies, directions and contracts. For instance, do the codes and guidelines issued by different departments of the Government of India or the contracts entered into by public bodies fall in the realm of public law and therefore enforceable by judicial intervention or are they simply executive instructions subject to deviations? Are they statutory in nature or simply advisory?

The Indian Courts have addressed these questions in various cases, often while dealing with petitions filed against the Government, seeking strict enforcement and compliance of these Government policies/contracts as a matter of right and held that guidelines or executive instructions which are not statutory in character or under some provision of the Constitution, are not 'laws', and not judicially enforceable. Compliance thereof cannot be enforced through courts, and the competent authority might depart from these guidelines where the proper exercise of discretion so warrants. This is because such guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.¹

For instance, the Supreme Court of India in *GJ Fernandez vs. State of Mysore & Ors.* [AIR 1967 SC 1753], considered the question of whether the instructions contained in the Mysore Public Work Department Code, has statutory force or not. The Court held that in order for executive instructions to have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore. Since, in the present case, the code

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had not been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution, the Court held it to be in the nature of administrative instructions and not statutory rules. Such administrative instructions, which have no statutory force, can therefore confer no right on any member of the public to ask for a writ against Government by a petition under Article 226 of the Constitution.

We may also refer here to a related concept of statutory contracts, as discussed by the Supreme Court in the case of *India Thermal Power Ltd v. State of Madhya Pradesh & Ors.*, [(2000) 3 SCC 379], in the context of Power Purchase Agreements (PPAs) entered into by Independent Power Producers (IPPs) with Madhya Pradesh Electricity Board (MPEB). On the contention that appellant/IPPs had entered into PPAs under the Electricity (Supply) Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions, the Supreme Court held that merely because a contract is entered into in exercise of an enacting power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute than that contract becomes a statutory contract. Similarly, if a contract incorporate certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of a mutual agreement between the parties. The PPAs in the instance case were therefore regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2) and not otherwise.

The Supreme Court also discussed in the concept of statutory contacts in *Kerala SEB v. Kurien E. Kalathil & Ors.*, [(2000) 6 SCC 293], while examining an agreement executed between a contractor and the Kerala State Electricity Board, and held, that a contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. However, dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body does not by itself affect the principles to be applied. The Court therefore, held this contract to be in the realm of private law, and not a statutory contract. Accordingly, the disputes under such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract.

To conclude, one can therefore, refer to the following key principles to determine the status of government policies and contracts as under:

- Government policies, guidelines, instructions which have not been framed under any statute or provision of the Constitution of India, are not considered as statutory in nature, and are instead in the nature of executive instructions/administrative guidelines and compliance thereof cannot be enforced through courts. Non-

adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same.

- Similarly, a contract does not become a statutory contract merely because it's been issued by a public body or entered into in exercise of an enacting power conferred by a statute. However, if a contract contains certain terms and conditions in it which are prescribed under a statute, then that contract becomes a statutory contract to that extent. Otherwise, a non-statutory contract with a government body is enforceable between the parties as a matter of contractual law (and not public law).

Endnotes

¹ *Narendra Kumar Maheshwari vs. UOI & Ors.* [AIR 1989 SC 2138]; *Syndicate Bank vs. Ramachandran Pillai and Ors.*, [(2011) 15 SCC 398]

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