

## Critically analysis of writ of mandamus

Dr. Gyanendra Kumar Sahu

Asst. Professor of P.G. Dept. of Law, Utkal University, Vani Vihar, Bhubaneswar, Odisha, India

### Abstract

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.

**Keywords:** mandamus, Certiorari, quo warranto

### 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. There are five kinds of writs they are (i) Mandamus (ii) Certiorari (iii) Prohibition (iv) Quo warranto (v) 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<sup>[1]</sup>. By the early eighteenth century, it was used to compel performance of a variety of public duties which had been wrongly refused<sup>[2]</sup> 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<sup>[3]</sup>. It is discretionary and will not be granted if there is an alternative remedy equally beneficial, convenient and effective<sup>[4]</sup>. 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:  
"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 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<sup>[5]</sup>.

### Status of Mandamus 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<sup>[6]</sup>. 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<sup>[7]</sup>. The Supreme Court can also issue mandamus for the enforcement of fundamental rights<sup>[8]</sup>.

### Framework of law in relation to mandamus

The Supreme Court has the power to issue writs under the Constitution of India, art. 32<sup>[9]</sup>. 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'<sup>13</sup>. 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<sup>[10]</sup>. 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. 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:

1. The applicant must have a legal right to the performance of a legal duty<sup>[11]</sup>. It will not issue where to do or not to do an act is left to the discretion of the authority<sup>[12]</sup>. It was refused where the legal duty arose from an agreement which was in dispute<sup>[13]</sup>. The duty to be enforced by a writ mandamus could arise by a provision of the Constitution<sup>[14]</sup> or of a statute<sup>[15]</sup> or of the common law<sup>[16]</sup>.
2. The legal duty must be of a public nature. In *The Praga Tools Corporation v. C.V. Imanuel*, A.I.R. 1969 S.C. 1306 and *Sohanlal v. Union of India*, A.I.R. 1957 S.C. 529; (1957) S.C.R. 738 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<sup>[17]</sup>. 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 State<sup>[18]</sup>. 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*, A.I.R. 1959 S.C. 694; *State of Assam v. Ajit Kumar*, A.I.R. 1965 S.C. 1196.

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<sup>[19]</sup>. Again it can be issued to a municipality to discharge its statutory duty<sup>[20]</sup>.

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<sup>[21]</sup>. Mandamus is not available where the order upon which the alleged right of the petitioner is founded is itself ultra vires<sup>[22]</sup>. 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<sup>[23]</sup>. 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<sup>[24]</sup>. Where provisions are merely directory, non-compliance with them does not render an act invalid and hence no mandamus issues.

3. 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<sup>[25]</sup>.
4. 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<sup>[26]</sup>. 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<sup>[27]</sup>. 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 <sup>[28]</sup>.

### **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 <sup>[29]</sup>. However, the Constitution expressly provides that appropriate proceedings may be brought against the Government of India and the Government of a State <sup>[30]</sup>. Further the Constitution empowers the courts "to issue to any person or authority, including in appropriate cases any Government" any of the writs mentioned there in <sup>[31]</sup>. Mandamus is therefore issued against the government <sup>[32]</sup>.

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 <sup>[33]</sup>. Mandamus will not issue to a legislature to forbid it from passing legislation repugnant to the fundamental rights <sup>[34]</sup>. Mandamus was issued to a municipality to forbid collection of a tax ultra vires the Municipalities Act <sup>[35]</sup> to a University directing it to forbear from giving effect to an order made in violation of its own rules <sup>[36]</sup>. 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. Election includes everything from the issue of the notification to the announcement of the result. It is not therefore possible to obtain mandamus against officials conducting the various stages of an election, it was refused against a returning officer who rejected a nomination paper <sup>[37]</sup>. 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 <sup>[38]</sup>.

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 results <sup>[39]</sup>. However, it will not lie to secure performance by a company of a duty towards its employees which is not of a public nature <sup>[40]</sup>.

### **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 infringed <sup>[41]</sup>. 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 <sup>[42]</sup>. 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 <sup>[43]</sup>.

### **Demand and Refusal**

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* <sup>[44]</sup>, 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 <sup>[45]</sup>. 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" <sup>[46]</sup>. 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."

### **UK Perspective**

The writ of mandamus is commonly used as weapon by the ordinary civilian when public authority fails to do its duty. Mandamus is used to enforce performance of many duties which directly affect the individual. Mandamus can be issued where there is duty to exercise discretion, such a duty of the tribunal to hear and determine a case within its jurisdiction.

Section 10 of the Tribunals & enquiries Act, 1992, imposes a duty on tribunal to give reasons for its decisions. Such a duty may be enforced by issuance of writ of mandamus.

A writ of mandamus is not being granted where law provides some other adequate remedy. However

mandamus has lost the character of residual remedy. Section 40 (5) of the Crown Proceedings Act, 1947, already provides that introduction of a new remedy of the Act shall not limit the discretion of court to grant the mandamus.

### Conclusion

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.

### Reference

1. James Bagg's case, 11 Co. Rep, 93b 77 E.R. 1271. See Institute, Judicial review, 122.
2. Baker Rv. 3 Burr. 1265, 1267. See Institute, Judicial Review, ibid. S.I. 1762.
3. Syndicate v. Union of India. A.I.R. S.C. 1975, 460
4. I.L.J. Judicial Review Through Writ Petitions, p. 163. v. Bank of England 2 B.S.A. 1819, 620.
5. Binny Limited vs. Sadasivan V. AIR (SC) 3202. 2005
6. Section 45 of the Specific Relief Act, 1877.
7. Article 226
8. Article 32
9. Bakshi Pm. Constitution of India New Delhi: Universal Law Publication, 2000, 74.
10. Vineet Narain vs. Union of India AIR (SC) 1998, 889.
11. Dr. Rai Shivendra Bahadur v, Governing Body of the Nalunda College, A.I.R. S.C. 1210, 1962.
12. Controller of Monghyr v. Keshav Prasad, A.I.R. 1962 S.C. 1694; State of U.P. v. Manbodhanlal, A.I.R. 1957 S.C. 912; (1958) S.C.R. 533. T.G. Gaokar v. R.N. Shukla, A.I.R. 1968 S.C. 1050; Rajalakshmia v. State of Mysore, A.I.R. 1967 S.C. 993.
13. Carlsbad Mineral Water Mfg. Co. v. H.M. Jagtiani, A.I.R. Cal. 1952, 315.
14. Chintaman Rao v. State of M.P., A.I.R. 1951 S.C. 118;(1950) S.C.R. 759; Rashid Ahmed v. Municipal Board, A.I.R. 1950 S.C. 163; S.C.R. 1950, 566
15. State of Bombay v. Hospital Mazdoor Subba, A.I.R. S.C. 1960, 610.
16. Juggilal Kamalapat v. The Collector of Bombay, A. I. R. Bom. 1946, 280.
17. Lekhraj v. Deputy Custodian. Bombay, A.I.R. 1966 S.C. 334; Shantabai v. Bombay, A.I.R. 1958 S.C. 532; Jaidev Jain & Co. v. Union of India A.I.R. Cal. 1972, 253.
18. Calcutta Gas Co. v. State of W.B., A.I.R. S.C. 1962, 1044, 1047.
19. Bhopal Sugar Industries v. I.T.O. AIR 1961 SC 182
20. Rampal v. State AIR 1981 Raj. 121
21. Jiwat Bai, Sons v, Batra GC. A.I.R. Delhi 1976, 310.
22. Prakaslt v. Principal, A.I.R. M.P. 1965, 217, 218.
23. State of M P. v. G.C. Mandamir, A.I.R. S.C- 1954, 493.
24. State of U.P. v. Manbodhantal, A.I.R. 1957 S.C. 912; S.C.R. 1958, 533.
25. Kalyan Singh v. State of U.P., A.I.R. S.C. IIS3, 1962.
26. Guruswami v. State of Mysore, A.I.R. S.C. 1954, 592
27. Ibid
28. Commr. of Police, Bombayv. Gordhandas Bhanji, A.I.R. 1952 S.C. 16: S.C.R. 135, 148; Bengal Immunity Co. Ltd. vd. State of Bihar, A.I.R. 1955 S.C. 661: (1955) 2 S.C.R. 1952, 603.
29. Article 361.
30. Articles 300 und 361.
31. Article 226.
32. See Ram Prasad v. Bihar, A.I.R. 1953 S.C. 215 ;(1953) S.C.R. 1129; Jagannath v. State of Orissa, (1954) S.C.R. 1046; State of Rajasthan v. Nathmal, A.I.R. 19 54 S.C, 307: S.C.R. 1954, 982.
33. Article 122 (2) and 212 (2).
34. Choteylal v. State of U.P., A.I.R. All 1951, 228.
35. Samij v KK. JVagpur Corporation, A.I.R. Nag, 1956, 152.
36. Tapendra Nath Roy v. University of Calcutta, A.I.R. Cal. 1954, 141
37. Shankar v. Returning Officer, A.I.R. 1952 Bom 277
38. Kartar Singh v. Store of Patiala, A.I.R. 1951 Pepsu 141.
39. State of Bombay v. United Motors. A.I.R 1953 S.C. 252: S.C.R. 1069, 1953.
40. The Praga Toots Corporation v. C.V. immanuel, A.I.R. S.C- 1306, 1969.
41. State of Bombay v. United Motors, A.I.R. 1951 S.C. 252: (1953) S.C.R. 1069.
42. Veerappa Pillaiv. Raman Rtimin Ltd. A.I.R. 1952 S.C. 192: SCR 1952, 583.
43. Himmatlal v. State of M.P., AIR. 1954 S.C. 403: (1954) S.C.R. 112.
44. AIR SC 1975, 460
45. Amrit Lal v. Collector, C.E.C. Revenue, A.I.R. S.C. 1975, 538
46. The Stateman v. Fact finding Committee, A.I.R. 1975 Cal. 14.