CHAPTER - 2

2.1 HISTORICAL EVOLUTION

As the Indian legal system follows common law tradition, it is necessary to have a glance at the birth and growth of this remedy in England to understand properly the province and functions of declaratory action. Compared to the prerogative writs, the declaratory judgement entered into the exclusive society of supervisory remedies in public law only recently. But Borchard said: "All that is new about the declaratory judgement is its name and its broad scope the phenomenon itself is as old as judicial history". But the books on Chancery Practice are silent on the matter. Borchard did not cite any decision to substantiate the point. The earlier history gives only contrary evidence to his assertion. In Clough Vs. Ratcliffe, Bruce, 1

1. Dyson V Attorney General, (1911) 1 K.B.410 is considered to be the first decision which accepted the effectiveness of declaration to challenge administrative action.

2. B.M.Borchard, Declaratory Judgements (2nd Edn.) p.137.


V.C. observed: "Nakedly to declare a right without being or directing anything else relating to the right, does not, belong to the functions of this Court". The observation shows the reluctance of the Courts to give purely declaratory judgements without any traditional coercive effect because it was widely believed that a mere declaration of rights unaccompanied by ancillary reliefs without coercive force would be insufficient to meet the ends of justice. Court of Chancery, on the view that equity acts in personam, thought it indecent to command the Crown and resisted the impulse to issue declaratory judgements. The restraint was a self imposed one which necessitated legislative intervention to prompt the Courts to issue declaration of rights. The Courts of Chancery Procedure Act was passed in 1852 and S.50 of the Act provided for the issue of declaration without any consequential relief, which has positively negatived all misgivings regarding the grant of declarations. Even then the Court of Chancery was not ready to accept the legislative intervention and still refused to issue declaratory judgements without consequential reliefs. The Court of Chancery construed Sec.50 very narrowly. The section was interpreted as empowering the grant of purely declaratory relief only where

5. S.50 provides, "No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.

consequential relief could have been granted if asked for. Order 25, Rule 5 of Rules of Supreme Court was made in 1883 to remedy the situation, which provided:

No action or proceeding shall be open to objection, on the ground that a merely declaratory judgement or order is sought thereby and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not. The provision also proved to be abortive and fell short of producing the expected result. The significance of order 25, Rule 5 was that a bare declaratory relief could be claimed even if consequential relief could not be granted. The Court still kept its reluctance under the cover of consequential relief\(^7\) till 1911. The decision in Dyson v. Attorney General\(^8\) marked the turning point in the arena of declaratory judgements. Dyson was a taxpayer who, along with eight million other tax-payers, as told by the Government that if he did not complete a certain taxation return, he would be committing an offence punishable by a fine of up to pound 50. Dyson brought an action against the Attorney General simply claiming declarations that he could not lawfully be compelled to complete the return. The Court of Appeal, relying on Order 25, Rule 5 said that Dyson could maintain his action notwithstanding the inability to grant

8. (1911) 1 K.B. 410.
consequential relief and the absence of a cause of action. As Dyson said that Order 25, Rule 5 could be used even where no consequential relief could be granted, it impliedly ruled that it is permissible to sue for a declaration in the absence of a cause of action. The facts of the decision show that the Land Revenue Commissioners required Mr. Dyson to submit certain particulars. Dyson alleged that the requisition was illegal and that he was not bound to comply with it since it was ultra vires and claimed a declaration under Order 25 Rule 5 of the Rules of the Supreme Court. The Court of Appeal held that such a declaration was proper under the said provision and granted the declaration sought. The Court rejected the contention of the crown that the right course was to take no action and then dispute the demand when he was sued for the penalty.

Fletcher Moulton, L.J. observed:

"So far from thinking that this action is open to objection on that score, I think that as action thus framed is the most convenient method of enabling the subject to test the justifiability and proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings". 9

9. Ibid at 168.
Prof. de Smith says that the judgement in the *Dyson* case was founded on a misreading of legal history.\(^{10}\) and that the Court did not take pains to see whether the crown was bound by Order 25 Rule 5 of Supreme Court Rules. Whatever that might be, the importance of the decision lies in the fact that the Court gave a warm welcome to this form of proceedings. Here, the Plaintiff had no 'cause of action' in the traditional sense of the term which would have entitled him to any other form of relief. There was only a threat to invade his interests. Later decisions\(^{11}\) which followed Dysons's case disclosed the dynamics of declaration and has explicitly exposed that declaration was available even where no question of breach of specific duty was involved but in cases where the citizen wanted to know the limits of the power of public authority.\(^{12}\) This would help the citizen to know beforehand the powers of the authority and he need not wait till he was proceeded for penalties for non compliance and then set up a collateral attack by way of defence. The Court of Appeal's power to make declarations was once more proclaimed on another occasion when it granted a declaratory relief to the effect that the Plaintiffs were not bound to repay the money to the

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11. For example, *Burghes Vs Attorney General* (1911) 2 Ch.139  
Defendants. It was urged by the Defendants that the Rules Committee had no power to extend the jurisdiction of the Court and hence order 25 Rule 5 was ultra vires. But the Court ruled out that contention and observed that the Court of Chancery had jurisdiction to make purely declaratory judgements even though it was reluctant to render such judgements. Order 25 Rule 5 is still the law and now the Courts are accustomed to using it freely without any aspersions or hesitation.

The pronouncement of the Court in Dyson's case was followed in the outstanding modern authority, Bernard V. National Dock Labour Board. Here the London Dock Labour Board delegated its power to take disciplinary action to the port Manager. He suspended the Plaintiffs without a hearing. The Defendants argued that the Court had no power to interfere with the decisions of a statutory tribunal except by certiorari, rejecting the contention. Mc.Nair, L.J., held that the Court could interfere with illegal proceedings of administrative tribunals by using declaration and injunction.

Lord Denning observed that quo warranto would have

13. Guaranty Trust Co. of New York V. Hanney Co. (1915) 2 K.B. 536
15. (1953) 2 Q.B. 18.
been the proper remedy in such situations. It is submitted with due respect that the observation of Denning L.J. may not hold good. Quowarranto in such circumstances may not serve the purpose, because the plaintiffs were not interested in the fact whether the Port Manager was holding his post validly or legally on the other hand they were only interested in questioning his purported exercise of discretionary power over them.

Now the law in England is that this equitable remedy is available in almost all the fields16 where the rights and liberties of the citizen are threatened by administrative action. It may be awarded whenever it is just and convenient to do so.

The power of the Court to make a declaration where it is a question of defining the rights of two parties, is almost unlimited, if at all limited is only by its own discretion.17 To borrow the words of Prof. A.T. Markose: "The shackles of the past had been almost completely broken and remedial justice

16. British Oxygen Co., Ltd. V. Board of Trade (1969) 2 All. ER 18 where a number of declarations were sought regarding the Defendant's exercise of their powers. Mollison V. Garner (1970) 2 All E.R. 9 It was observed, "...it is not the practice to grant a declaration) it is embarrassing or useless for any good purpose" p.12 Cox V. Green, (1966)1 All E.R. 268, a question concerned with professional ethics was declared to be not justifiable.

17. Hanson V. Radcliffe Urban District Council (1922) 2 Ch. 490.
had been freed from the fetters of unjustifiably rigid procedure." The declaratory action had been much acclaimed by very learned Judges. In short, the discretion of the Court is limited only by the metes and bounds of its own sense of propriety and it has power to make a declaration when it is just and convenient.

In India the law of declaration is governed by S.34 of the Specific Relief Act, 1963 (Formerly S.42 of Specific Relief Act, 1877). The section provided for a mere declaratory judgement where the party could not have asked for any further relief. However, if a party was entitled to a consequential relief and if he omitted to pray for it, under the provisions of the section, the Court was bound to refuse it. The section gave no discretion to the Court in that respect. However, it might be said that the purpose underlying the section was only to discourage unavoidable multiplicity of sections and not to put fetters on the jurisdiction of the court to grant declaratory relief.

In England, there was no general provision, for a mere declaration before S. 50 of the Chancery Procedure Act, 1852


was made applicable to the Supreme Court in India by S.19 of Act VI of 1854. A codification of the procedural law other than those established by Charters, was taken place in 1859 by the Civil Procedure Code. The remedy under section 19 was incorporated in S.15 of the Code of Civil Procedure. But that did not include the Courts in India to assume jurisdiction to issue declaration.

The provisions regarding declaratory relief was transferred to S.42 of the Specific Relief Act, 1877. As Lord M'C Naughtan observed in Fischer v. Secretary of State that "there can be no doubt as to the origin and purpose of that section" and that "it was intended to introduce the provisions of S.50 of the Chancery Procedure Act, 1852, as interpreted by judicial decisions".

Even though it is stated before that S.15 of the Civil Procedure Code was transferred to S.42 of the Specific Relief Act, one should not take that these two sections were similarly worded. S.42 provided for declarations as to title to any legal character or any right as to any property of the Plaintiff. But the language of S.15 of Civil Procedure Code had not restricted to any way the type of declarations that could be given. Secondly, the proviso to S.42 prohibited the Court from

20. Act, VIII of 1859
22. (1899) I.L.R.22 Mad. 270, 281.
granting the declaratory relief as the Plaintiff had neglected any consequential relief which he was able to ask. Whereas under S.15, it was not necessary that the consequential relief which was available need be asked.

There exists a view that the remedy provided by S.42 of the Specific Relief Act was based more upon the Scotish remedy of declaratory than on English Practice. The Scotish declaratory may be applied for construing or clearing any kind of right, relation, liberty, domination, or obligation and that there is no right but is capable of declaratory. One cannot reasonably say that the particular Language of Section 42 of the Specific Relief Act is not capable of such elasticity. In India the principles governing the award of declaratory judgements are the same as in England. Under S.34 'any legal character or any right as to any property' can be the subject matter of the declaratory decree. But a declaration need not be in exact layout of the wording of the section. The term "legal character" in the section can take a wide meaning. Hence, a declaration that a person has a right to vote or to stand for an election or where the Plaintiff is deprived of any present


right to property\textsuperscript{26} or as to the right to a reduction of tax assessment\textsuperscript{27} or as to the illegality of the dismissal or suspension of Government servants\textsuperscript{28} will certainly be covered by the section.

Apart from S.34 of the Specific Relief Act, the Courts may pass declaratory orders to the effect that administrative action, rule or statute is ultra vires under Articles 32 and 226. Under these articles, the Courts can not only issue a Writ but also make order or direction as it may consider appropriate. Thus the Courts have discretion to make a declaration under Articles 32 and 226 if that be the proper remedy.\textsuperscript{29} A Petitioner can be sure that his petition will not be rejected simply because he has not prayed for the proper writ of declaration.\textsuperscript{30}

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  \item \textsuperscript{26} Mahjular Haque v Bisseswara Banerjee A.I.R. (1943) Cal. 361; Fisher V. Secretary of State (1899) I.L.R. 22 Mad. 270 (PC) Ramachandra v. Beera A.I.R. (1936) mad. 531.
  \item \textsuperscript{27} Rajah of Venkatagiri V. Province of Madras (1947) I.L.R. Mad. 190.
  \item \textsuperscript{29} K.K.Kochunni V. Madras A.I.R. (1959) SC 725.
  \item \textsuperscript{30} Chiranjit Lal V. Union of India A.I.R. 1951 S.C.41.
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