
(2003) 04 AHC CK 0100

In the Allahabad High Court

Case No : C.M. Stay Vacation Application No. 47270 of 2003 on behalf of
Principal Agra College, Agra in C.M.W.P. No. 7529 of 2003

Dr. R.C. Chaudhary

APPELLANT

Vs

Vice Chancellor, B.R. Ambedkar University and Others

RESPONDENT

Date of Decision : 24-04-2003

Acts Referred:

Constitution of India, 1950 — Article 226, 226(3)

Citation : AIR 2004 All 95 : (2003) 3 AWC 2582

Hon'ble Judges : Ghanshyam Dass, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : Anil Bhushan, for the Appellant; Pankaj Mithal, for the Respondent

Judgement

B.S. Chauhan, J.—This application has been filed to vacate the ex parte interim order dated 17.2.2003, passed by the Court in favour of the petitioner staying the operation of the impugned order dated 1.2.2003 by which the Principal of the college had passed the impugned order removing the petitioner from the post of the Head of the Department.

2. Facts and circumstances giving rise to this application are that petitioner had been removed from the post of the Head of the Department by the respondent No. 3 vide order dated 1st February, 2003 and this Court vide order dated 17.2.2003 stayed the operation thereof. The applicant respondent No. 3 filed an application on 12th March, 2003 to vacate the said order dated 17.2.2003. Petitioner's counsel did not make any attempt to get the matter listed and at this stage, we are considering the application dated 12th March, 2003. Learned counsel for the applicant has submitted that in view of the provisions of Clause (3) of Article 226 of the Constitution if an application for vacating the ex parte interim order passed by the Court is not heard within a period of two weeks from the date of its filing, the interim order passed earlier stands vacated automatically, and therefore, this Court does not require to pass any formal order. Stay order passed earlier stands vacated by operation of law.

3. Sub-clause (3) of Article 226 of the Constitution provides that if an interim order has been passed without giving an opportunity of being heard to the other side and the said party makes an application to the Court to vacate the interim order, the Court should dispose of such application within two weeks from the date of its filing and if such application is not disposed of in the said stipulated period, the interim order shall stand vacated automatically on expiry of the stipulated period.

4. Issue involved herein came up for consideration before the Calcutta High Court in Krishan Kumar Agarwala Vs. Reserve Bank of India and others, and after examining the entire scheme of the amendment Act of the Constitution, the Court came to the conclusion that the provisions are mandatory and if the application for vacation of interim order is not disposed of within the stipulated period ; the ex parte interim order shall automatically stand vacated. However, the Court further held that there is nothing in the constitutional provisions which prevents the Court to grant an Interim order afresh after hearing the parties, if there are sufficient grounds to pass such fresh order. The Court further observed that interpreting the said provisions of the Constitution as directory would be contrary to the intent of the Legislature and the plain language of the statute does not suggest it. The Court observed as under :

"..... Interpreting the provisions of the Constitution, inserted by a careful amendment thereof almost after three decades of the working of the Constitution and I must not construe any such provision as to render that provision almost meaningless with such, clear word, staring at the face categorically providing for the consequences of non-compliance and enjoying that "the interim order.....shall stand vacated"."

The Court has further compared it with the provisions of Rule 3A of Order XXXIX of the CPC inserted by the amendment Act of 1976 which provides that where an ex parte injunction is granted, the Court is duty bound to dispose of the application of interim relief within thirty days and if it is not so heard, the Court is under obligation to record the reasons for such inability. As the Legislature did not put any such similar provision in Clause (3) of Article 226 and provides for a clear, specific categorical direction for automatic vacation of an ex parte interim order, it leaves an inescapable conclusion that the provisions of Article 226(3) are mandatory.

5. In Gheesa Lal and Others Vs. State of Rajasthan and Others, the same provision was held by Court to be mandatory. The Court observed as follows :

"It is obvious that the intention of keeping the provisions of automatic vacation of such order.....is that the party who obtains an ex parte stay order should not be allowed to abuse or misuse the process of the Court by proceeding in a leisurely manner..... In case, after obtaining ex parte stay order petitioner fails to discharge his duty and prolongs ex parte stay order either by non-service on the respondents or by not taking active steps to get the case listed in Court,

he can do so at his own peril."

The Court further observed that it is the solemn duty of the party obtaining the interim order also to take steps to get the matter listed immediately after filing of the stay vacation application.

6. In *Committee of Management of Shri Maheshwari Inter College and Anr. v. State of U.P. and Ors.* (1994) 1 UPLBEC 63, this Court examined the provisions of the proviso to Rule 1 of Chapter XXII of the Allahabad High Court Rules, 1952, which provide for considering the stay vacation application, and came to the conclusion that the object behind this procedural safeguard is to ensure that an ex parte order passed behind the back of the opposite party remains subject to the exception contained in the second proviso of Rule 1 of Chapter XXII of the said Rules, which is pari materia of Clause (3) of Article 226, the Constitution of India and the said Rules have been framed in consonance with the provisions of said Clause (3) and inserted by amending the said Rules in 1981. It has further been observed therein that the provisions are mandatory in character.

7. The same view was reiterated by this Court in *Ram Ashish Ram v. Security Officer and Anr* (1991) 18 FLR 24 observing as under :

"Clause (3) of Article 226 of Constitution of India, gives a mandate to decide the application for vacating interim order within period of two weeks from the date it is received in Court or served on the petitioner. The provisions of Clause (3) of Article 226 have an object of avoiding hardship and injustice to such respondents who knocked the doors of Court within reasonable time and pray for hearing of applications for vacating the interim order. It creates an obligation on the part of Court to hear such applications at the earliest and in case, even for any unavoidable reason, the application for vacating stay order is not decided the stay order shall stand vacated, by operation of law."

8. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the Legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribe the formalities for doing certain things.

9. A Constitution Bench of the Hon"ble Supreme Court, in *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, considered the issue as to whether the provision involved in the said case was mandatory and held as under :

"For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of

the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

While deciding the said case, the Hon^{ble} Supreme Court also placed reliance upon the Maxwell on "Interpretation of Statutes", 10th Edn. p. 381, wherein It has been observed as under :

"On the other hand, where the prescription of a statute relates to the performance of a public duty and where the invalidation of the act done in neglect of them would work serious general inconvenience or injustice to persons who have no control over, who have been entrusted with the duty without promoting the social aim of the legislation, such prescription seems to be generally understood as mere instruction for the guidance and governance of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal in deed, but it does not affect the validity of the act done in disregard of them."

10. In Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, and State of Mysore and Others Vs. V.K. Kangan and Others, , whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the Intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

11. In Sharif-ud-din Vs. Abdul Gani Lone, the Hon^{ble} Supreme Court, while considering the provisions of Sub-section (3) of Section 89 of the J and K Representation of People Act, 1957, held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory. The Apex Court held as under :

"In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of the law is required to be defeated by non-compliance with it, it has to be regarded as mandatory.....Whenever the statute provides that a particular act is to be done in a particular manner and also lays down that the failure to compliance with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

12. Similar view has been reiterated in Ganesh Prasad Sah Kesari and Another Vs. Lakshmi Narayan Gupta, ; B.P. Khemka Pvt. Ltd. Vs. Birendra Kumar Bhowmick and Another, ; Owners and Parties Interested in Owners and Parties

interested in M.V. "ValiPero" Vs. Fernando Lopez and Others, ; Lakshmanasami Gounder Vs. Commissioner of Income Tax , Selvamani and Others, ; Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, ; Collector of Customs, Calcutta Vs. Tin Plate Co. of India Ltd., and Dinkar Anna Patil and Others Vs. State of Maharashtra and Others, .

13. In Rubber House Vs. Excellsior Needle Industries Pvt. Ltd., the Hon''ble Supreme Court considered the provisions of the Haryana (Control of Rent and Eviction) Rules, 1976, which provided for mentioning the amount of arrears of rent in the application and after placing reliance upon large number of Judgments, including Seth Bikhraj Jaipuria Vs. Union of India (UOI), ; Raza Buland Sugar Co. Ltd., (supra) ; K. Kamaraja Nadar Vs. Kunju Thevar and Others, ; Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, ; Ajit Singh and Others Vs. State of Punjab and Another, the provision was held to be directory though the word "shall" has been used in the statutory provision for the reason that non-compliance of the rule, i.e., non-mentioning of the quantum of arrears of rent did involve no invalidating consequence and also did not visit any penalty.

14. In Shri B.S. Khurana and Others Vs. Municipal Corporation of Delhi and Others, , the Hon''ble Supreme Court considered the provisions of the Delhi Municipal Corporation Act, 1957, particularly those dealing with transfer of immovable property owned by the Municipal Corporation. After considering the scheme of the Act for the purpose of transferring the property belonging to the Corporation, the Court held that the Commissioner could alienate the property only on obtaining the prior sanction of the Corporation and this condition was held to be mandatory for the reason that the effect of non-observance of the statutory prescription would vitiate the transfer though no specific power had been conferred upon the Corporation to transfer the property.

15. In Shashikant Singh Vs. Tarkeshwar Singh and Another, , the Hon''ble Supreme Court considered the provisions of Section 319 of the Code of Criminal Procedure and held as under :

"Where a statute does not consist merely of one enactment, but contains number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential ; that is to say, some of the provisions may be disregarded without rendering invalid the things to be done but others not.....The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together with the accused is directory.":

16. In State of Haryana and Another Vs. Raghubir Dayal, the Supreme Court has observed as under :

"The use of the word "shall" is ordinarily mandatory but it is sometimes not so Interpreted if the scope of the enactment, on consequences to flow from such

construction would not so demand. Normally, the word shall prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the Legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word "shall", therefore, ought to be constructed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word "shall" ; as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory."

17. The law on this issue can be summarised that the real test to determine whether the provision is mandatory or directory is, if non-compliance with the provisions renders the proceeding invalid, it would be mandatory. However, the intent of the Legislature is a most relevant factor to determine the issue and not the language used therein. In clause (3) of the Article 226 Legislature, in its wisdom, has provided that if the application of vacation of stay order is not disposed of within two weeks of its filing, the interim order shall, on the expiry of that period stand vacated.

18. In view of the above, the provisions under consideration are mandatory in nature and strict adherence has to be observed to these provisions.

19. But such a party is under obligation to approach the Court within reasonable time from the date of notice to it ; if the stay vacation application is filed in a leisurely manner, the party cannot claim that "interim order stands automatically vacated by operation of law as it would amount to giving such a party premium for its non-action within a reasonable period and the very purpose for which the provision has been enacted, would stand frustrated".

20. In view of the above, we declare that the interim order passed by this Court on 17.2.2003, stood vacated automatically by operation of law as the learned counsel for the petitioner made no attempt to get the application listed within two weeks from the date of its filing.