
(1968) 08 PAT CK 0040
In the Patna High Court

N.K. Banerji

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 20-08-1968

Acts Referred:

Criminal Law (Amendment) Ordinance, 1944 — Section 10, 10(a), 8

Citation : (1969) CriLJ 1178

Hon'ble Judges : S.G. Misra, Acting C.J.;B.D. Singh, J

Bench : Division Bench

Judgement

B.D. Singh, J.—This appeal has been filed by N. K. Banerji, one of the accused in the Mahua Danr defalcation case, against the order of Shri S. N. Banerji, District Judge of Palamauj dated 27-5-64, passed in M, J. C. 21 of 1959, which arose on an application filed by the State of Bihar u/s 8 of the Criminal Law Amendment Ordinance No. 88 of 1944 (hereinafter referred to as the "Ordinance") for the attachment of certain movable and Immovable properties belonging to the said accused. The Court below on that application of the State of Bihar passed an ad-interim attachment. When notice was served upon the appellant he filed two objection petitions dated 8 4.59 and 7-11-1962 contending inter alia that none of the properties which were subjected to the ad interim attachment had been acquired by him at any time during or after the date when the offences were alleged to have been committed and some of the properties belonged to his wife and not to him. On the 2nd May, 1964, he filed a third objection petition raising further objections regarding the validity of attachment. Learned Court below after considering the objections and hearing both the parties rejected all the objections of the appellant and confirmed the attachment by the said order dated 27-5,64. Hence this appeal.

2. learned Counsel appearing on behalf of the appellant argued that the properties attached had not been acquired by the appellant at any time during or after the dates when the offences were alleged to have been committed by him and, therefore, those properties could not have been acquired out of the

defalcated sum. According to him, Section 8 of the Ordinance applies only in those cases where the properties are acquired out of the defalcated sum. In my opinion, this contention of learned Counsel cannot be accepted. Section 8 of the Ordinance reads as follows:

Where the Provincial Government has reason to believe that any person has committed (whether after the commencement of this Ordinance or not) any scheduled offence, the Provincial Government may, whether or not any Court has taken cognizance of the offence, authorise the making of an application to the District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on his business, for the attachment under this Ordinance of the money or other property which the Provincial Government believes the said person to have procured by means of the offence, or if such money or other property cannot for any reason be attached, of other property of the said person of value as nearly as may be equivalent to that of the aforesaid money or other property.

From this it is clear that if such money or other property cannot for any reason be attached, the other property of the said person of equivalent value may be attached. Besides, it has already been held by this Court by judgment dated 16-7-68 in M. A. 162 of 1962 : AIR 1969 Pat 80 that it is not necessary for the State of Bihar to establish that the properties bought to be attached under the said Ordinance were acquired out of that defalcated money. This contention of learned Counsel, therefore, fails.

3. It was next contended on behalf of the appellant that the original application filed by the Special Public Prosecutor for an order of ad interim attachment was made on 4-8-59 and the order of the Court below was passed on 6-3-59 and the cognizance in the said Mahua Danr defalcation case was taken on 80-4-1960. No application having been filed on behalf of the State for the extension of the period after three months of the order of ad interim attachment or DO order having been passed for the said extension by the District Judge as required by Section 10(a) of the Ordinance, according to learned Counsel, ad interim order of attachment become automatically vacated on the 6th of June, 1959. Therefore, according to him, the said ad interim attachment was ineffective since that date due to non-compliance of the provisions contained under the said Ordinance. Section 10 of the said Ordinance provides as follows:

An order of attachment of property under this Ordinance shall, unless it is withdrawn earlier in accordance with the provisions of this Ordinance, continue in force:

(a) where no Court has taken cognizance of the alleged scheduled offence at the time when the order is applied for, for three months from the date of the order under Sub-section (1) of Section 4 or Sub-section (2) of Section 6, as the case may be, unless cognizance of such offence is in the meantime so taken, or unless the District Judge on application by the agent of the Provincial Government

thinks it proper and just that the period should be extended and passes an order accordingly; or

(b) where a Court has taken cognizance of the alleged scheduled offence whether before or after the time when the order was applied for until orders are passed by the District Judge in accordance with the provisions of this Ordinance after the termination of the criminal proceedings.

According to learned Counsel the entire section must be read as a whole. He conceded that according to Section 10(b), after cognizance is taken, the question of extension of time as indicated in Clause (a) of the said section does not arise; but before cognizance is taken it is mandatory on the State Government to get the period :extended after a lapse of "three months, i.e. before the 6th of June, 1959. Since in this case it had not been done according to the provisions contained in Section 10(a), the ad interim order of attachment becomes automatically vacated and the said order is invalid.

4. Therefore, the main question which arises in this case is whether the provisions contained in Clause (a) of the aforesaid section is mandatory or directory. The learned Advocate-General appearing on behalf of the State of Bihar, the respondent, has urged that all the accused including the appellant, have already been convicted and sentenced to. imprisonment and heavy fines have also been imposed upon them and further their convictions and sentences have already been upheld by this Court in Criminal Appeals Nos. 886, 406,. 392, 376 and 898 of 1964 and G. A. No. 83 of 1964 D/-24-8-1967 (Pat). Therefore, apart from the provisions contained in the Ordinance, their properties are open to attachment by the provisions contained in the Procedure Code to enable the State Government to realise fines imposed upon them. That being so even if it is held that the attachment was invalid no relief will be available to the appellant. Therefore, according to him, in the circumstances of this case no finding is required by this Court as to whether the attachment was valid or not. In my opinion, since in this case this point was argued at great length by the appellant's counsel and since there is no other decision on this point, I think it is necessary to decide whether the provisions contained in Clause (a) of the aforesaid section is mandatory or directory. In Article 656 of Halsbury's Laws of England, Third Edition, Volume 36, at pages 484 and 435 it is stated:

Where a Statute requires an act to be done at 01 within a particular manner, the question arises whether the validity of the act is affected by a failure to comply with what is prescribed. If it appears that Parliament intended disobedience to render the act invalid, the provision in question is described as "mandatory," "absolute," "imperative or "obligatory," if, on the other band, compliance was not intended to govern the validity of what is done, the provision is said to be "directory." No universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the Legislature must be ascertained by looking at the whole scope of the statute and, in particular, at the importance of the provision in question in relation to the

general object to be secured. Thus it is not possible to generalise by reference to the nature of what is prescribed. No great reliance can be placed, either, on the suggestion that provisions framed purely in affirmative language are normally construed as directory though the converse proposition, that negative provisions are prima facie mandatory, would seem on principle to be less open to criticism.

Lord Campbell's observation in *Liverpool Borough Bank v. Turner* (1860) 29 LJ Ch 827, affirmed in (1860) 80 LJ Ch 379 to the effect:

No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed." has been quoted with approval in *Howard v. Bodington* (1877) 2 PD 208. Before quoting the said passage, Lord Penzance has said at page 210:

In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void-On the other hand, when the Courts hold a provision to be mandatory "or directory" they say that, although such provision may not have been complied with, the subsequent proceedings do not fail.

In Crawford's *Statutory Construction* it has been said at page 515 in Section 261: --

...if the provision involved relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or directs certain actions with a view to the proper, orderly, and prompt conduct of public business, the provision may be regarded as directory, but where it directs acts or proceedings to be done in a certain way and indicates that a compliance with such provisions is essential to the validity of the act or proceeding, or requires some antecedent and pre requisite conditions to exist prior to the exercise of the powers can be exercised, the statute may be regarded as mandatory.

In the same book at page 516 the following passage from the decision in *People v. De Renna* 2 NYS (1) 694 : 166 Misc. 582 has been quoted, which has also been quoted with approval by the Supreme Court of India in *State of U.P. Vs. Manbodhan Lal Srivastava*, ;--

The question as to whether a statute is mandatory "or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....

In the same book in Section 269 at page 585, it is stated:

As a general rule, a statute which specifies a time for the performance of an official duty will be construed as directory so far as the time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure. But there are various exceptions. For instance, the language may be such that the performance of the act within or at the specified time, is imperative. As a result, if the statute contains prohibitive or negative words relating to the time within which the act is to be performed, it will be considered mandatory...

Reference may also be made to a few passages from Sutherland Statutory Construction, 3rd Edition, Volume III, Section 5813 at page 95, which reads as follows:--

with respect to the question of mandatory and directory operation, as with any question of statutory construction; the primary consideration is that of determining the intent of the legislature. Each case stands pretty much on its own facts, to be determined on an interpretation of the particular language used. Various methods of attacking the problem are employed. One oft-repeated formula is that statutory requirements that are of the essence of the thing required by statute are mandatory, while those things which are not of the essence are directory....

In the same book Section 5816 at page 102 says:--

...A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.

5. In the light of the above principles of interpretations I now proceed to examine whether the provisions u/s 10 of the Ordinance are mandatory or directory. From the preamble of the Ordinance the intention of the Legislature is apparent that the main purpose of the ordinance was to provide for preventing the disposal or concealment of money or other property procured by means of certain offences punishable under the Indian Penal Code. Further, the provisions contained in Sections 10(a) and 10(b) of the Ordinance, if read together, clearly indicate that the intention of the legislature while laying down the requirement for the extension of the period till cognizance is taken, was only for the purpose of speedy disposal of the case so that the decisions regarding the attachment of the property should not be protracted. Therefore, the said requirement for extension of time, in my opinion, is not of the essence of the thing required by the statute and the intention of the Legislature in complying within the required period is for convenience rather than substance. It is only with a view to proper, orderly and prompt conduct of the public business. Therefore, in my opinion, it is only directory. It cannot be said to be mandatory. In the said section no prohibitive or negative words are used relating to the time within which the act is to be performed nor there is any indication as to what will happen if the provision

is not complied. Therefore, it can safely be inferred that the provision contained under Clause (a) of the said section is directory and not mandatory. My view is also partly supported from a Bench decision in *Ram Chandra Prasad Sahi v. State of Bihar* AIR 1965 Pat 250 where their Lordships were considering Rule 3 of the Bihar Panchayat Election Rules, 1959, as it stood before the amendment of 1968. The said rule reads as follows:--

The first election of the Mukhiya, the Sarpanch, the elected panches and the elected members of the Executive Committee shall take place within a period of four months from the date of the publication under Sub-section (1) or (3) of Section of the said Rules (Act):

Provided that the District Magistrate may, at any time by order in writing, under intimation to the Director of Gram Panchayats, extend such period.

In the case which was before their Lordships, the period of four months was not extended by the District Magistrate as required under the rule. The question before their Lordships for decision was whether the election so held without the period having been extended as required by the said rule, was valid or not. Their Lordships after full discussion of the rules of interpretation laid down at page 252:

...In my opinion, the requirement of Rule 8 is merely directory and gives a direction to the public authorities to hold the election as soon as possible preferably within a period of four months from the date of the establishment of the Gram Panchayat u/s 8 of the Act....

Therefore, in the facts and circumstances of this case, I find no reason to disturb the finding of the Court below.

6. In the result, the appeal is dismissed with costs.

S.G. Misra, A.C.J.

7. I agree. I may, however, deal with the contention advanced by the learned Counsel for the appellant to the effect that under Clause (a) of Section 10 of the Ordinance it is provided that an order of attachment of property shall be effective for three months from the date of the order where no cognizance of the offence has been taken. If cognizance is taken, however, during the period or the period of attachment has been extended beyond three months by the State Government, the attachment will continue. Where, however, neither of the two alternatives contemplated in Clause (a) has been resorted to, the attachment will come to an end. In the present case, neither cognizance was taken during the period of three months from the date of the order of attachment nor was the period extended ; in consequence, the order of attachment came to an end. The order of the learned District Judge of Palamau, therefore, holding to the contrary, is legally unsupportable. As to Clause (b) which, undoubtedly, is in more comprehensive terms inasmuch as it refers to a case where cognizance has been taken of a scheduled offence, whether before or after the time when an order for attachment is applied for, such an order will continue until after the termination

of the criminal proceedings.

learned Counsel has contended that even if the two clauses are read together, this applies only to a case where cognizance has been taken after the order of attachment within three months from that date as provided in Clause (a). When that has happened, in terms of Clause (b), the order of attachment will continue until after the termination of the criminal proceedings. If Clause (b) were not interpreted in this manner, this will have the effect of tendering Clause (a) nugatory and the precaution of taking of cognizance within a period of three months from the date of passing of the order of attachment will have no significance. My learned brother has dealt with this aspect from the point of view as to whether the provisions of Clause (a) is merely directory or it is mandatory. But apart from that it may be added that plain meaning should be attached to the words used in both the clauses. If no cognizance is taken within a period of three months from the date of the order under Sub-section (1) of Section 4 or sub.s. (2) of Section 6, the order of three months comes to an end, unless extended by the provincial Government. If any transfer of such property is made by the accused persona, such transfer will be bit by the order of attachment passed in terms of this Ordinance, Where, however, property has not been transferred and the interest of a third person has not arisen in due course of law by virtue of a bona fide transfer of title, but cognizance has been taken thereafter, there is no reason why the general provision of Clause (b) will not come into operation in such a case. To hold otherwise that as soon as the period of three months has expired after an order of attachment, without cognizance being taken, the order will fall through, will diminish the scope of Clause (b) which the words used in this clause do not warrant. The two clauses, there, fore, are to be read together in the sense referred to above by me that Clause (a) also must be held to be effective for a period of three months and if no cognizance is taken during that period, any transfer of title by the accused person may not be vitiated by the order of attachment. But where no such transfer has been made and cognizance has been taken, thereafter Clause (b) shall come into operation and the effect of attachment shall continue till after the date of termination of the criminal proceedings.

8. learned Counsel for the appellant has contended that this will in any case, necessitate a fresh application for attachment to invoke the provisions of Clause (b). In my opinion, however, the contention cannot be accepted. There is no provision for a fresh application in Clause (b) and it enacts comprehensively that when a Court has taken cognizance of the alleged scheduled offence whether before or after the time when the order was applied for, it will last till after the termination of the criminal proceedings. In the absence of any provision in Clause (b) to the effect that a fresh application for attachment should be made, it is difficult to hold that without any fresh application for attachment being made Clause (b) will not be operative. The combined effect, therefore, of the two clauses seems to be that attachment will last only for three months if no cognizance is taken or if the period is not extended by the State Government in

the exigencies of a case. Where, however, cognizance has been taken, Clause (b) is bound to come into play without any further step being taken. In certain cases a gap, no doubt, may occur in the way in which the two clauses have been framed but the only effect of the gap may be to cover a situation to which I have already adverted. In the present case, however, no such situation has arisen and, therefore, the order passed by the learned District Judge cannot be interfered with.