Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6181 OF 2002

Union of India & Ors. …Appellants

Versus

A.K. Pandey …Respondent

JUDGEMENT

R.M. Lodha, J.

The question which falls to be determined in this appeal by special leave is : is the provision in Rule 34 of the Army Rules, 1954 that the interval between the accused being informed of charge for which he is to be tried and his arraignment shall not be less than ninety-six hours mandatory?

2. Mr. A.K. Pandey – respondent – was enrolled in Army on September 18, 1987. Subsequently, he was posted to 12 Corps Signal Regiment (AREN) unit on August 21, 1994 at Jodhpur. The respondent remained on casual leave for thirteen days from September 5, 1995 to September 17, 1995. When he resumed his duty on September 23, 1995 he brought with him one country

made pistol and one round of small ammunition to the unit which he sold to signalman J.N. Narasimlu of the same unit. J.N. Narasimlu while leaving the unit was caught by the regimental police carrying the above weapon and one round of small ammunition in one bag. On being questioned, J.N. Narasimlu told that he had purchased the weapon and one round of small ammunition from the respondent. The respondent and J.N. Narasimlu were placed in closed arrest with effect from September 23, 1995. Summary of evidence against both the persons is said to have been recorded by Major Sudhir Handa of 12 Corps Signal Regiment.

3. The respondent was charged vide charge-sheet dated October 26, 1995 which was served upon him on November 2, 1995 at 1800 hours. He was informed that he would be tried by General Court Martial on November 6, 1995 at 1130 hrs.

4. On November 6, 1995, General Court Martial commenced its proceedings at 1010 hours wherein the respondent is said to have pleaded guilty of both the charges. Based on that, the respondent was awarded punishments; (i) to suffer rigorous imprisonment for three years and (ii) dismissal from service.

5. The respondent aggrieved thereby submitted a petition under Section 164(2) of the Army Act, 1950 before the Chief of the Army staff for setting aside the findings and sentence of the General Court Martial held on November 6, 1995.

6. The Chief of Army Staff rejected the petition submitted by the respondent on December 23, 1996 and the respondent was informed of the said decision on December 31, 1996.

7. The respondent then approached the High Court of Judicature for Rajasthan at Jodhpur praying therein for issuance of appropriate writ, order or direction to quash the General Court Martial proceedings dated November 6, 1995 and the punishments awarded to him and to reinstate him in service with effect from November 6, 1995 with all consequential benefits.

8. The present appellants contested the writ petition by filing a counter in opposition before the High Court.

9. The Learned Single Judge allowed the writ petition on December 3, 1999 and quashed and set aside General Court Martial proceedings held on November 6, 1995 as well as the order of punishment.

10. The present appellants preferred intra court appeal which was found devoid of any merit and came to be dismissed on April 11, 2001. Hence, the present appeal by special leave.

11. Mr. Mohan Jain, Learned Additional Solicitor General strenuously urged that the interval of ninety-six hours provided in Rule 34 is directory and, in any case, the respondent having pleaded guilty of both the charges, no prejudice can be said to have been caused to him by non-compliance of the time provided therein. In support of his submissions, he heavily relied upon a decision of this Court in the case of *State Bank of Patiala and Others* v. *S.K. Sharma*[1].

12. Rule 34 of the Army Rules, 1954 with which we are concerned reads as follows :

> **"34. Warning of accused for trial.**—(1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desired to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.
>
> The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.
>
> (2) The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.

[1] (1996) 3 SCC 364

(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the court, and where officers in waiting are named, also of those officers in courts-martial other than summary courts-martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with this rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced."

13. The key words used in Rule 34 from which the intendment is to be found are "shall not be less than ninety-six hours". As the respondent was not in active service at the relevant time, we are not concerned with the later part of that rule which provides for interval of twenty-four hours for the accused in active service.

14. In his classic work, "Principles of Statutory Interpretation" (seventh edition), Justice G.P. Singh has quoted passage of *Lord Campbell in Liverpool Borough Bank* v. *Turner*[2] that read : *"no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory whether implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of Legislature by carefully attending to the whole scope of the statute to be considered."*

[2] 1861 30 LJ Ch 379

15. In Crawford's Statutory Construction (1989 reprint), the following excerpt from *People* v. *Sutcliffe*[3] is quoted :

"It is a rule of statutory construction that where a statute is framed in terms of command, and there is no indication from the nature or wording of the act or the surrounding circumstances that it is to receive a permissive interpretation, it will be construed as pre-emptory."

16. In his discussion on the subject, "Mandatory and Directory or Permissive Words" Crawford in the afore-noticed treatise says:

"Ordinarily the words "shall" and "must" are mandatory, and the work "may" is directory, although they are often used inter-changeably in legislation. This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legislature. Nevertheless, it will always be presumed by the court that the legislature intended to use the words in their usual and natural meaning. If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature, then words which ordinarily are mandatory in their nature will be construed as directory, or vice versa. In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the words "shall" and "must" to be directory, they should be given that meaning. Similarly, under the same circumstances, the word "may" should be given a mandatory meaning, and especially where the statute concerns the rights and interests of the public, or where third persons have a claim *de jure* that a power shall be exercised, or whenever something is directed to be done for the sake of justice or the public good, or is necessary to sustain the statute's constitutionality.

Yet the construction of mandatory words as directory and directory words as mandatory should not be lightly adopted. The opposite meaning should be unequivocally evidenced before it is accepted as the true meaning; otherwise, there is considerable danger that the legislative intent will be wholly or partially defeated."

[3] 7 N.Y.S. (2) 431

17. Crawford further says in his treatise that prohibitive or negative words can rarely, if ever, be directory…….. Negative, prohibitory and exclusive words or terms are indicative of the legislative intent that the statute is to be mandatory.

18. In *Thomson* vs. *Stimpson*[4], Lord Parker C.J. (Queen's Bench Division) while dealing with the wording of Section 16 of the Rent Act, 1957 which provided that no notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of the Act) as a dwelling shall be valid unless it is given not less than four weeks before the date of which it is to take effect held that four weeks' notice contemplated in Section 16 should be construed as four clear weeks. This is what Lord Parker, C.J. observed :

"…….Parliament here, however, has gone further and used the words which have been interpreted in the past as providing for four clear weeks. Like Bennett, J., in *Re Hector Whaling, Ltd.* (1935) All E.R.303, I think that there ought to be certainty on this matter, and I prefer the view that the word should be construed as four clear weeks."

19. A Constitution Bench of this Court in *M. Pentiah and Others* v. *Muddala Veeramallappa and Others*[5] construed the expression, "not less than two-third of the whole number of

[4] (1960) 3 All E.R 500
[5] AIR 1961 SC 1107

members" in Section 77 of Hyderabad District Municipalities Act, 1956 as follows :

"This section confers on the Committee an express power couched in a negative form. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative. If the section is recast in an affirmative form, it reads to the effect that the Committee shall have power to transfer any immovable property, if the conditions laid down under the section are complied with."

20. In *Lachmi Narain and Others* v. *Union of India and Others*[6], this Court construed the expression, "not less than three months' notice" in Section 6(2) of Delhi Laws Act and held:

"68. Section 6(2), as it stood immediately before the impugned notification, requires the State Government to give by notification in the Official Gazette "not less than 3 months' notice" of its intention to add to or omit from or otherwise amend the Second Schedule. The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory. (Crawford, *The Construction of Statutes,* pp. 523-24). Here the language of sub-section (2) of Section 6 is emphatically prohibitive, it commands the Government in unambiguous negative terms that the period of the requisite notice must not be less than three months.

69. In fixing this period of notice in mandatory terms, the legislature had, it seems taken into consideration several factors. According to the scheme of the Bengal Act, the tax is quantified and assessed on the quarterly turnover. The period of not less than three months' notice conforms to that scheme and is intended to ensure that imposition of a new burden or exemption from tax causes least dislocation and inconvenience to the dealer in collecting the tax for the Government, keeping accounts and filing a proper return, and to the Revenue in assessing and collecting the same. Another object of this

[6] (1976) 2 SCC 953

provision is that the public at large and the purchasers on whom the incidence of the tax really falls, should have adequate notice of taxable items. The third object seems to be that the dealers and others likely to be affected by an amendment of the Second Schedule may get sufficient time and opportunity for making representations, objections or suggestions in respect of the intended amendment. The dealers have also been ensured adequate time to arrange their sales, adjust their affairs and to get themselves registered or get their licenses amended and brought in accord with the new imposition or exemption.

70. Taking into consideration all these matters, the legislature has, in its judgment solemnly incorporated in the statute, fixed the period of the requisite notice as "not less than three months" and willed this obligation to be absolute. The span of notice was thus the essence of the legislative mandate. The necessity of notice and the span of notice both are integral to the scheme of the provision. The sub-section cannot therefore be split up into essential and non-essential components, the whole of it being mandatory. The rule in *Raza Buland Sugar Co.'s case* (supra) has therefore no application."

21. In *Mannalal Khetan and Others* v. *Kedar Nath Khetan and Others*[7] while dealing with Section 108 of the Companies Act, 1956 a three Judge Bench of this Court held :

"17. In *Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur [(1965) 1 SCR 970]* this Court referred to various tests for finding out when a provision is mandatory or directory. The purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the general inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to other provisions dealing with the same subject and the language of the provision are all to be considered. Prohibition and negative words can rarely be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing the forbidden act. Therefore, negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. (See *Maxwell on Interpretation of Statutes,* 11th Edn., p. 362 seq.; Crawford: *Statutory Construction, Interpretation of Laws,* p. 523 and *Seth Bikhraj Jaipuria* v. *Union of India [(1962) 2 SCR 880, 893-894].*

18. The High Court said that the provisions contained in Section 108 of the Act are directory because non-compliance with Section 108 of the Act is not

[7] (1977) 2 SCC 424

declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down penalty for non-compliance with the provision contained in Section 108 of the Act the provision is to be considered as directory. The High Court failed to consider the provision contained in Section 629(*A*) of the Act. Section 629(*A*) of the Act prescribes the penalty where no specific penalty is provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty.

19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See *Mellis* v. *Shirley L.B.[(1885) 16 QBD 446*)] A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See *St. John Shipping Corporation* v. *Joseph Rank [(1957) 1 QB 267*) (See also *Halsbury's Laws of England,* Third Edn., Vol. 8, p. 141.)

20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim *A pactis privatorum publico juri non derogatur* means that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See *Mellis* v. *Shirley L.B.*) What is done in contravention of the provisions of an Act of the legislature cannot be made the subject of an action.

21. If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

22. Penalties are imposed by statute for two distinct purposes:

(*1*) for the protection of the public against fraud, or for some other object of public policy; (*2*) for the purpose of securing certain sources of revenue either to the State or to certain public bodies. If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable.

23. The provisions contained in Section 108 of the Act are for the reasons indicated earlier mandatory. The High Court erred in holding that the provisions are directory."

22. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof. If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word "shall" is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory and imperative becomes loud and clear and ordinarily has to be inferred as such. There being nothing in the context otherwise, in our judgment, there has to be clear ninety-six hours interval between the accused being charged for which he is to be tried and his arraignment and interval time in Rule 34 must be read absolute. There is a purpose behind this

provision: that purpose is that before the accused is called upon for trial, he must be given adequate time to give a cool thought to the charge or charges for which he is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. He may even decide not to defend the charge(s) but before he decides his line of action, he must be given clear ninety-six hours. A trial before General Court Martial entails grave consequences. The accused may be sentenced to suffer imprisonment. He may be dismissed from service. The consequences that may follow from non-observance of the time interval provided in Rule 34 being grave and severe, we hold, as it must be, that the said provision is absolute and mandatory. If the interval period provided in Rule 34 is held to be directory and its strict observance is not insisted upon, in a given case, an accused may be called upon for trial before General Court Martial no sooner charge/charges for which he is to be tried are served. Surely, that is not the intention; the timeframe provided in Rule 34 has definite purpose and object and must be strictly observed. Its non-observance vitiates the entire proceedings.

23. The Learned Additional Solicitor General heavily relied upon a decision of this Court in *State Bank of Patiala* wherein this Court summarised the legal position relating to disciplinary proceedings and orders of punishment thus :

"**33.** We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (*a*) the provision violated is of a substantive nature or (*b*) whether it is procedural in character.

(2) A substantive provision has *normally* to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under — "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it.

The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can *also* be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (*a*) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(*b*) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it *or* that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar [(1993) 4 SCC 727]*. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/ statutory provisions and the only obligation is to observe the principles of natural justice — or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action — the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between “no opportunity” and no *adequate* opportunity, i.e., between “no notice”/“no hearing” and “no fair hearing”. (*a*) In the case of former, the order passed would undoubtedly be invalid (one may call it ‘void’ or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law,
i.e., in accordance with the said rule (audi alteram partem). (*b*) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear

that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

24. The judgment of this Court in *State Bank of Patiala* hardly helps the appellants. We have already held that the provision contained in Rule 34 regarding interval of ninety-six hours from the service of the charge/charges for which an accused is to be tried and his arraignment is mandatory. This situation would be covered by sub-para 4(b) of para 33 as aforequoted.

25. That the respondent was informed of the charges for which he was to be tried by General Court Martial on November 2, 1995 at 1800 hours is not in dispute. Although the respondent was informed that he would be tried by General Court Martial on November 6, 1995 at 1130 hours but the proceedings of the General Court Martial clearly show that the trial commenced at 1010 hours. That interval between the respondent having been

informed of the charges for which he was to be tried and his arraignment was less than ninety-six hours is an admitted position. Merely because the respondent pleaded guilty is immaterial. The mandatory provision contained in Rule 34 having been breached, the Division Bench cannot be said to have erred in affirming the order of the Single Judge setting aside the proceedings of the General Court Martial.

26. In the result, the appeal must fail and is dismissed with no order as to costs.

…….J
(B.N. Agrawal)

…….J
(Aftab Alam)

……..J
(R. M. Lodha)

New Delhi
September 16 , 2009