

INTERPRETATION OF MANDATORY AND DIRECTORY PROVISIONS IN STATUTES: A CRITICAL APPRAISAL IN THE LIGHT OF JUDICIAL DECISIONS.

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ABSTRACT

The study of numerous cases on the question of interpretation of mandatory and directory provisions in statutes does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. No universal rule can be laid down 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 considered. The Supreme Court of Indian has pointed out on many occasions that 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.

Introduction

The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions. But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

No universal rule can be laid down 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 considered. The Supreme Court of Indian has pointed out on many occasions that 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 case of statutes that are said to be imperative, the court 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 the provisions to be directory, they say that although such provisions may not have been complied with, the subsequent proceedings do not fail. No universal rule can be laid down, while construing statutes, to determine whether mandatory enactments should be considered directory, or obligatory with an implied nullification for disobedience.

The Supreme Court of India has been stressing time and again that the question whether statute is mandatory or directory is not capable of generalization and that in each case the court should try and get at the real intention of the legislature by analyzing the entire provisions of the enactment and the scheme underlying it. ¹

A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others. ²

According to Crawford ³—

“ A statute, or one or more of its provisions, may be either mandatory or directory. While usually in order to ascertain whether a statute is mandatory or directory, one must apply the rules relating to the construction of statutes; yet it may be stated, as general rule, that those whose provisions relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely a matter of convenience rather than of substance, are directory”.

In DA Koregaonkar v State of Bombay ⁴ it was held that, one of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.

DIFFERENCE BETWEEN MANDATORY AND DIRECTORY PROVISIONS:

According to Sutherland ⁵

“The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of, or omission to adhere to, statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid Acts or proceedings pursuant to the statute, or rights, powers, privileges or immunities claimed there under. If the violation or omission is invalidating, the statute is mandatory; if not, it is directory”.

According to Crawford ⁶, a mandatory statute may be defined as one whose provisions or requirement, if not complied with, will render the proceedings to which it relates illegal and void, while a directory statute is one where non-compliance will not invalidate the proceedings to which it relates. Thus, where certain conditions are prescribed by a statute for the conduct of any business or profession, and such conditions are not observed, agreements made in course of such business or profession become void, if it appears that the object in imposing the conditions is the maintenance of public order or safety, or the protection of persons dealing with those on whom the conditions have been imposed. On the other hand, where the conditions are imposed merely for administrative purposes and no specific penalty is imposed for breach or violation of such conditions, agreements in breach of them are valid.

According to Craies ⁷ ---

“ When a statute is passed for the purpose of enabling something to be done and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute , but those which are not essential, and may be disregarded without invalidating the thing to be done, are called directory”.

In Sharif-ud Din v Abdul Gani Lone ⁸, the Supreme Court very pertinently pointed out the difference between a mandatory and a directory rule. It was observed by the Court that the fact that the statute uses the word shall while laying down a duty is not conclusive on the question whether it is a mandatory or a directory provision. 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 will be defeated by non-compliance with it , it has to be regarded as mandatory. But when a provision of law related to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as directory.

A procedural rule ordinarily should not be should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that a failure to comply 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.

RULES FOR DETERMINATION OF MANDATORY AND DIRECTORY STATUTE:

Intention of the legislature:

In determination of the question, whether a provision of law is directory or mandatory, the prime object must be to ascertain the legislative intent from a consideration of the entire statute, its nature, its object and the consequences that would result from construing it in one way or the other, or in connection that with other related statutes, and the determination does not depend on the form of the statute.

It appears to be well settled that in order to judge the nature and scope of a particular statute or rule, ie, whether it is mandatory or directory, the purpose for which the provision has been made, and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to person resulting from whether the provision is read one way or the other , have ll to be taken into account in arriving at the conclusion whether a particular provisions mandatory or directory⁹.

In Hari Vishnu Kamath v Ahmad Ishaque¹⁰, the Supreme Court observed that the various rules for determining when a statute might be construed as mandatory and when directory are only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend upon the context. An enactment, mandatory in form, might in substance be directory. The use of word ‘shall’ does not conclude the matter.

In Ramkrishnamma v Lakshmibayamma¹¹, it was held that, in order to determine whether a particular provision is mandatory or directory, it would be necessary whether a particular provision is mandatory or directory, it would be necessary to ascertain whether the failure to comply with the requirement affects the very foundation of being validated, It is always difficult to demarcate with any degree of accuracy in a particular case what is mandatory and what is directory, or what is irregularity and what is a nullity. When a question arises as to how far the proceedings are affected by the contravention of any provision, it is necessary to see the scope and object of the particular provision which is said to be violated.

Purpose behind the Statute:

In Chandrika Prasad Yadav v State of Bihar¹², it was held that, the question as to whether a statute is directory or mandatory would not depend upon the phraseology used therein. The principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve.

If an object of the enactment is defeated by holding the same director, it should be construed as mandatory; whereas if by holding it mandatory serious general inconvenience will be created for innocent persons of the general public without furthering the object of enactment, the same should be construed as directory but all the same, it would not mean that the language used would be ignored altogether.

In Howard v Bodington¹³, Lord Penzance observed as follows—

“ I believe, as far as any rule is concerned , you cannot safely go further that, in each case you must look to the subject –matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory”

According to Sutherland¹⁴,

“It can be stated as a general proposition that, as regards the question of mandatory and directory operation, the courts will apply that construction which best carries into effect the purpose of the statute under consideration. To this end the court may inquire into the purpose behind the enactment of the legislation, requiring construction as one of the first steps in treating the problem. The ordinary meaning of language may be overruled to effectuate the purpose of the statute”.

In *Food Inspector, Cannanore Municipality, Cannanore v M. Gopalan*¹⁵, the Kerala High Court undertook a detailed case based analysis on the character of the rule, which specified the time period within which the public Analyst should submit his report. The Court chose to characterize the rule as directory because to deem it mandatory would provide an opportunity to manipulative accused persons to have the submission of the report delayed and thus render the statute otiose. The Court did not accept the contention that the delay could prejudice the accused by causing the sample to spoil. If such spoilage happens the Court opined—

“The analyst would refuse to undertake the analysis. Hence there was no need to make the rule relating to time periods mandatory to ensure that the analyst undertakes the analysis before the sample spoils or perishes”.

In *Aeron Steel Rolling Mills v State of Punjab*¹⁶, the question before the court was whether section 33B of the Industrial Disputes Act 1947, which empowered the State Government to transfer a proceeding under the Industrial Disputes Act from one Tribunal to another, was mandatory or directory. The relevant portion of the provision read as follows—“ The appropriate Government may, by order in writing and for reasons to be stated therein withdraw any proceeding under this Act pending before a Labour Court Tribunal, or National Tribunal and transfer the same to another Labour Court, Tribunal or National Tribunal, as the case may be, for the disposal of the proceeding”. The Court observed that the provision empowered the Government to transfer cases from one tribunal to another and specified the manner in which the power shall be exercised. The provision required the government to specify the reason upon which the order of transfer was based with and was not related to the essence of the thing to be performed and compliance with its terms is a matter of convenience rather than of substance. The Court held—

“A failure to comply with this provision is not likely to result in any injury or prejudice to the substantial rights of interested person, or in the loss of any advantage, the destruction of any right or the sacrifice of any benefit. On the other hand, insistence on a strict compliance with it is likely to result in serious general inconvenience of injustice to hundreds of innocent person who have no control over Government without promoting the real aim and object of the legislature. The power to transfer is not so limited by the direction to give reasons that it cannot be exercised without following the directions given. No penalty has been provided for failure to comply with the terms of provision and the enactment is silent in regard to the consequence of non-compliance. No substantial rights depend on a strict observance of this provision; no injury can result from ignoring it; and no Court can declare that the principal object of the legislature that case should be capable of being transferred has not been achieved. Considerations of convenience and justice plainly require that this provision should be held to be directory and not mandatory”.

In *Lila Gupta v Laxmi Nariain* ¹⁷, the court was interpreting the proviso to section 15 of the Hindu Marriage Act 1955 (which was repealed in 1976). The expression read as follows- “Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed form the date of the decree in the court of the first instance”. The court observed that when a statue prohibits a certain thing being done thereby making it unlawful without providing for consequence of the breach, it was not legitimate to say that such a thing when done was void because that would be tantamount to saying that every unlawful act is void. On the basis of this reasoning, the Court held that a marriage in violation of the proviso would not be a nullity, irrespective of the use of the word ‘shall’ in the provision.

In *Bhavnagar University v Palitana Sugar Mill Private Limited* ¹⁸, the Supreme Court observed that—

“we are not oblivious to the law that when a public functionary is required to do a certain thing within a specified time, the same is ordinarily directory. But it is equally well settled that when consequence for inaction on the part of the statutory authorities within such specified time is expressly provided, it must be held to be imperative”.

In *C.B Gautam v Union of India* ¹⁹, while construing section 269 UD of the Income Tax Act 1961, the Supreme Court ruled that wherever there is a statutory requirement of a copy of some order to be passed with reasons to be recorded in writing be served on the party, the copy served must contain reasons as the same is a mandatory requirement.

Use of prohibitory words— In *State of Himachal Pradesh v MP Gupta* ²⁰, the Court was interpreting section 197 of the Code of Criminal Procedure 1973, which provided ‘that no court shall take cognizance of any offence alleged to have been committed by a public servant, judge, magistrate, or member of the armed forces’. It was held that the use of the words ‘no’ and ‘shall’ make it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete.

In *DA Koregaonkar v State of Bombay* ²¹, it was held that the legislature can incorporate in a statute or in the Constitution a provision mandatory in character by expressing it in the form of a positive injunction rather than in the form of a negative injunction. For example, if the legislative intent is expressed clearly and strongly, such as the use of ‘must’ instead of ‘shall’, that itself will be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the inquiry further. ²²

According to *Corpus Juris* ²³—

“ It is a general rule that a statute which is negative or prohibitory, although it provides no penalty for no-compliance, or which contains exclusive terms , shows a legislative intent to make the provision mandatory, and it has been said that negative words in grant of power are never construed as directory; but provision framed in negative language have, in some cases, been construed as merely directory. On the other hand, while the use of affirmative words only is a

circumstance to be construed in determining whether the statute is mandatory or directory, an intention that it shall be directory is not conclusively drawn by the absence of negative words, since affirmative words may and often do imply a negative of what is not affirmed. So, affirmative words, if absolute, explicit and peremptory, showing that no discretion was intended to be given, render the statute mandatory. But the rule, that an affirmative statute without any negativity expressed or implied is directory merely and leaves the common law in force, has more special reference to statutes giving a new remedy”

In *State of Orissa v Ganesh Chandra Jew* ²⁴ , the Supreme Court remarked that the mandatory character of the protection afforded to a public servant is brought out by the expression ‘no court shall take cognizance of such offence except with the previous sanction’ used in section 197 of the Code of Criminal Procedure 1974. The use of the words ‘no’ and ‘shall’ make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete.

MANDATORY AND PERMISSIVE WORDS:

In *Sidhu Ram v Secretary Railway Board* ²⁵ , the Court had to consider the import of Rule 1732 of the Railway Establishment Code. The relevant portion of the Rule read thus—

“where the penalty of dismissal , removal from service, compulsory retirement, reduction in rank or withholding of increment has been imposed, the appellate authority may give the railway servant either at his discretion or if so requested by the latter a personal hearing, before disposing of the appeal”

The Court has to consider whether the obligation to give a personal hearing was mandatory or directory. On plain reading of the Rule, the Court held that if the expression ‘may’ were to be read as ‘must’, it would impose a duty on the appellate authority to give a right of personal hearing in each case. In the opinion of the Court, if that was the intendment of the legislature, it would have expressed it in much simpler and explicit terms. Hence, the Court held that the provision was directory and not mandatory. In arriving at this decision, the Court observed—

“Ordinarily the words ‘shall’ and ‘must’ are mandatory and the word ‘may’ is directory although they are often used interchangeably. It is this use, without regard to the literal meaning, that generally makes it necessary for the court to resort to construction in order to ascertain the real intention of the draftsman. Nevertheless, it is generally presumed that the words are intended to be used in their natural meaning. Law reports do show that when a statute deals with the right of the public, or where a third person has a claim in law to the exercise of the power, or something is directed to be done for the sake of justice of public good, or when it become necessary to sustain the constitutionality of a statute, the word ‘may’ is sometimes used as ‘must’. In the final analysis, it is always a matter of construction of the statute in question”

It may, however be noted that the presumption that the legislature used mandatory and permissive terms in their primary sense is a rebuttable one. The intention of the legislature will control and prevail over the literal meaning of these words. The literal and ordinary meaning of

imperative and permissive terms, will give way when the interpretation of the statute according to the literal meaning of its words lead to absurd, inconvenient, or unreasonable results.

USE OF WORD 'MAY':

It is well settled that the use of word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word 'may'. The court has to consider various factors, namely the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well-settled that where the word 'may' involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words a directory significance would defeat the very object of the Act, the word 'may' should be interpreted to convey a mandatory force.²⁶

In *Alcock, Ashdown & Company Ltd v Chief Revenue Authority*²⁷, the appellants claimed exemption from excess profit duty, but this contention was rejected. They applied to the High Court for an order directing the respondent to state a case of the opinion of the High Court and the question was whether the High Court had jurisdiction to do so. Section 15 of the Excess Profits Duty Act 1919 made section 51 of the Indian Income Tax Act 1918 applicable to proceedings under the former Act. Section 51 of the latter Act provides that if—

“ in the course of any assessment a question has arisen with reference to the interpretation of any of the provisions of the Act , the Chief Revenue Authority may draw up a statement of the case and refer it to the High Court:.

It was held that it was true that 'may' does not mean 'shall' but when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it. In their Lordships' view, always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the court to control him and to order him to state a case.

Lord Cairns in the case of *Julius v Lord Bishop of Oxford*²⁸, held that –

“ There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done , something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so”.

In *Nagendra Rao and Company v State of Andhra Pradesh*²⁹, it was held that the purpose of Section 6A (2) of the Essential Commodities Act 1955 is to protect the goods seized by the Collector whether they are eatables or foodstuffs or iron and steel, and if they are spoilt or they

deteriorate then it is a loss not only to the owner but to the society as well. Loss in value of goods or its deterioration in quality and quantity would be in violation of the purpose and spirit of the Act. Even though the section uses the word 'may', keeping in view the objective of the Act and the context in which it has been used it should be read as 'shall' otherwise it would frustrate the objective of the subsection. Therefore, the Collector has to form an opinion if the goods seized are of one or the other category mentioned in section 6A (2) and once he comes to the conclusion that they belong to one of the categories he has no option but to direct their disposal or selling off in the manner provided.

In *Siddheshwar Sahakari Sakhar Karkhana Ltd v CIT Kolhapur*³⁰, it was argued that the expression 'may' followed by the words 'convert such deposits into shares after repayment of loans etc' provided in bye-law 61 A under the Maharashtra Co-operative Societies Act 1960, connoted that the provision was only directory. The Court held that it would be appropriate to read the expression 'may' as 'shall', observing that discretion is always coupled with a duty and that a discretion cannot be sued to circumvent an obligation cast by law. Conversely, the use of the term 'shall' may indicate the use in optional or permissive sense.

In *Societe De Taction v Kaman Engineering Co Ltd*³¹, it was held that, though in general sense 'may' is enabling or discretionary and 'shall' is obligatory, the connotation is not inelastic and inviolate.

In *Keshav Chandra Joshi v Union of India*³², the Supreme Court observed that under Rule 27 of the Uttar Pradesh Forest Service Rules 1952, if the Governor is satisfied that the operation of any rule regarding conditions of service of the members caused undue hardship in a particular case, he 'may' consult the Public Service Commission notwithstanding anything contained in the rules and dispense with or relax the requirement of the conditions of service and extend the necessary benefit as is expedient so as to relieve hardship and to cause just and equitable results. The word 'may' has been used in the context of discharge of statutory duty. The Governor is obligated to consult the Public Service Commission. Therefore, the word 'may' must be construed as to mean 'shall' and it is mandatory on the part of the Governor to consult the Commission before exempting or relaxing the operation of the rule.

USE OF WORD SHALL:

The word 'shall' is not always decisive. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. No universal principle of law could be laid in that behalf as to whether a particular provision or enactment shall be considered mandatory or directory. It is the duty of the court to try to get at the real intention of the legislature by carefully analyzing the whole scope of the statute or section or a phrase under consideration.

In *Mohan Singh v International Airport Authority of India*³³, the court had to consider whether the conditions laid down in section 4 (1) of the Land Acquisition Act, 1894, were mandatory or directory. The relevant portion of the provision read as follows—" a notification to that effect shall be published in the official Gazette.. and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality, the last of the

dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification”

On reading of the provision , the Court held that the effect of the use of the word ‘shall’ was that section 4(1) contemplated three mandatory conditions to be complied with—publication in Official Gazette, followed by publication in two daily newspapers; and lastly issuing public notice. The conditions under the provision were held to be mandatory. In arriving at this decision, the Court observed—

“The word ‘shall’, though prima facie gives impression of being of mandatory character, it requires to be considered in the light of the intention of the legislature by carefully attending to the scope of the statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. In that behalf, the court is required to keep in view the impact on the profession, necessity of its compliance; whether the statute, if it is avoided, provides for any contingency for non-compliance; if the word ‘shall’ is construed as having mandatory character, the mischief that would insure by such construction; whether the public convenience would be subserved or public inconvenience or the general inconvenience that may ensue if it is held mandatory and all other relevant circumstances are required to be taken into consideration in construing whether the provision would be mandatory or directory”

In *Owners and Parties Interested in M.V. ‘Vali Pero’ v Fernando Lopez* ³⁴, the Supreme Court while holding the use of the word ‘shall’ in the expression ‘deposition shall be signed by witnesses’ in Rule 4 of the Calcutta High Court Rules 1914 as directory, pointed out that if the word ‘shall’ used in this expression is construed as mandatory, non-compliance of which nullifies the deposition, drastic consequence of miscarriage of justice would ensue even where the omission of the witness signature is by inadvertence and correctness of the deposition as well as its authenticity is undisputed. On the other hand, if the word is treated as directory the Court will have power to prevent miscarriage of justice where the omission does not cause any prejudice and the defect is only technical. The object of the provision being merely to obtain acceptance of the witness to the correctness of the deposition, that object would be achieved if the word ‘shall’ is treated as directory.

In *State of UP v Manbodhan Lal Srivastava* ³⁵, before disciplinary action was taken against the respondent , the State Public Service Commission was consulted, but the explanation of the respondent was not sent to the Commission before such consultation . The respondent contended that there was a violation of Article 320 (3) of the Constitution. The Article provided—

“ The State Public Service Commission , shall be consulted on all disciplinary matters affecting a person serving the Government of a State in a civil capacity”

It was held that the provision was not mandatory and that it did not confer any right on a public servant, so that, the absence of consultation or irregularity in it did not afford him a cause of action. The following reasons were given for the conclusion namely—

1. The proviso to the Article contemplates that the President of Governor may make regulations specifying matters in which it shall not be necessary to consult a Public Service

Commission. If the provision of Article 320 were mandatory, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary.

2. The Government, when it consults the Commission, does it not by way of a mere formality, but with a view to getting proper assistance in assessing the guilt or otherwise of the person proceeded against and of the suitability and adequacy of the penalty sought to be imposed. But it is clear that the requirement of consultation does not extend to making the advice of the Commission binding on the Government.
3. Chapter II of Part XIV of the Constitution of India, containing Article 320 does not confer any rights or privileges on an individual public servant, nor any constitutional guarantee of the nature contained in Chapter I containing Article 311.

Hence the use of the word 'shall' in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect.

In *Shivjee Singh v Nagendra Tiwary*³⁶, the Supreme Court ruled that procedural principles under the Code of Criminal Procedure 1973 are meant for doing substantial justice. If violation of a procedural provision does result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of the word 'shall'.

In *Raza Buland Sugar Co v Municipal Board, Rampur*³⁷, the Court had to consider section 131 (3) of the UP Municipalities Act 1916 which read as follows- "The Board shall, thereupon publish in the manner prescribed in section 94 the proposal framed under sub-section (2) along with a notice in the form set forth in Schedule III". The Court had to decide whether the expression 'shall' in the provision was mandatory or directory. The Court held that as long as publication was made in substantial compliance with the manner provided in section 94 (3), it would serve the purpose of the mandatory part of the section which provided for publication. It would therefore not be improper to hold that the manner of publication provided in section 94 (3) was directory and so long as there is substantial compliance with that purpose of the mandatory part of section 131 (3) would be served.

In arriving at the decision the Court observed—

"The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it used the word 'shall' as in the present case, is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory".

In *T.V Usman v Food Inspector, Tellicherry Municipality*³⁸, the interpretation of section 7 (3) of the Prevention of Food Adulteration Rules was in question. Under this provision, a public analyst 'shall' within a period of forty five days' deliver his report to the concerned authority. The Supreme Court held the provision directory unless it prejudicially affects the right of the accused. Thus, the interpretation is consistent with the principle that when a public duty is required to be performed within a specified period such statute is directory in nature unless the rights of the related person are adversely affected.

In *Sunita Devi v Abhdesch Kumar Sinha*³⁹, it was held that two main considerations for regarding a rule as directory are—

1. Absence of any provision for the contingency of any particular rule not being complied with or followed, and
2. Serious general inconvenience and prejudice to the general public would result if the act in question is declared invalid for non-compliance with the particular rule.

In *Delhi Airtech Services v State of UP*⁴⁰, the appellant owned a piece of land which was sought to be acquired by the State under the Land Acquisition Act 1894, and a notification to that effect had been issued. However, the appellant claimed that no award for compensation had been passed even after the lapse of years since the notification was passed. The appellant argued that the notification ought to be declared null and void, because the award had not been made within two years (as prescribed by section 11A) and eighty percent compensation had not been paid to the appellant prior to taking possession of the land (as prescribed by section 17 (3A)). The question before the Court was whether the aforementioned provisions were mandatory or directory ie, would non-compliance with them render a notification null and void.

The Court held that the word 'shall' may not always make the provision mandatory, and other factors such as object and scope of the enactment and the consequences of making the provision mandatory must be taken into account. The effects of non-compliance should also be interpreted keeping in mind the object, intent and scope of the Act. The Court further held that the legislature had not made any attempt to provide penal consequences or the re-vesting of land in the hands of the original owner if the provisions of Section 17 (3A) were not complied. Hence, the intent of the legislature was clear in stating that once the land was vested in the state, it could not be returned to its original owner in case of non-compliance with section 17 (3A). Hence, the onus to pay compensation prior to acquisition in section 17 (3A) was not mandatory irrespective of the use of the word 'shall', but non-payment of compensation may lead to other consequences such as payment of additional amounts. Hence, non-compliance with section 11A or section 17 (3A) would not render the acquisition notification null and void.

In *Salem Advocate Bar Association v Union of India*⁴¹, the Supreme Court held that the use of the word 'shall' in Order 8 Rule 1 of the Code of Civil Procedure, 1908 by itself is not conclusive to determine whether the provision is mandatory or directory. Ordinarily it is indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislature, the same can be construed as directory. Rule 1 has to advance the cause of justice and not to defeat it. The order extending time to file

written statement cannot be made in routine. The time can be extended beyond ninety days only in exceptionally hard cases.

In *Dal Chand v Municipal Corporation, Bhopal*⁴², the Supreme Court observed that –

“There are no ready tests or any invariable formula to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence of holding a provision to be mandatory or directory is vital and more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief but the enforcement of a particular provision literally to its letter will lead to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. There is no general rule, however that an enactment expressed in negative and prohibitory language must be considered as absolute. Nor on the other hand, is there any general rule that an enactment expressed in affirmative language must not be considered as absolute”.

In *Dharmendra Krishna v Nihar Ganguly*⁴³, it was held by Pal J.—

“In the absence of an express provision, the intention of the legislature is to be ascertained by weighing the consequences of holding the statute to be directory or imperative.... In each case the subject-matter is to be looked to and the importance of the provision in question in relation to the general object intended to be secured by the Act, is to be taken into consideration in order to see whether the matter is compulsory or merely directory”.

Denman J. also observed in *Caldow v Pixell*⁴⁴ —

“In the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative”.

In *Poona Electric Co v State of Bombay*⁴⁵, section 33 (1) of the Electricity Act 1910 was under scrutiny. Section 33 (1) provided that in case of an accident which was caused by electric wires or poles, a notice of the accident was required to be given within a period of 24 hours after the accident, before any action could be taken. The court held that section 33 could not be considered mandatory, and the absence of a written notice within the time prescribed would not defeat the action where the party injured was incapable of complying with the provision by reason of his injuries. The Court observed that where the enactment was absolute, ie if it is mandatory in character, it required exact compliance, whereas if it is merely directory, a substantial compliance with its provisions is sufficient.

The language employed is not always a sure index and it is scarcely possible to lay down a hard and fast rule of general application. In *Ajit Kumar Sen and Another v State of West Bengal*⁴⁶, it was held that, broadly speaking, however, there are three fundamental tests which are often applied with remarkable success in the determination of this question. They are based on—

1. Considerations of the scope and object, sometimes called the scheme and purpose of the enactment,
2. Considerations of justice and balance of convenience, and
3. Consideration of the nature of the particular provision, namely whether it affects the performance of a public duty or relates to a right, privilege or power—in the former case the enactment is generally directory and in the latter mandatory.

STATUTES RELATING TO JUDICIAL DUTIES AND PROCEEDINGS:

A statutory requirement relating to a matter of practice or procedure in the court should be interpreted as mandatory if it confers upon a litigant a substantial right, the violation of which will injure him or prejudice his case. On the other hand, a statutory provision regulating a matter of practice or procedure will generally be read as directory when disregard of it or the failure to follow it exactly will not materially prejudice a litigant's case or deprive him of a substantial right.

In *Kasi Bishwanath Dev v Paramananda Routrai*⁴⁷, the matter before the Court was whether under 35B of Civil Procedure Code, the payment of costs would be a mandatory condition precedent to the proceedings of the suit. The relevant portion of the provision read as follows—

“The Court may for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date and such order shall be condition precedent to the further prosecution of”

The court held that the cause of justice was paramount and a procedural law could not be raised to the pedestal of a mandatory provision as would take away the court's right in a given case to exercise its discretion in the interest of justice. Hence, the language in which section 35B of the Civil Procedure Code had been expressed must be considered to be directory.

In the case of *Hari Vishnu v Ahmad Ishaque*⁴⁸, rule 47 (1) (c) of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951 provided that a ballot paper shall be rejected if it is spurious or if it was so damaged or mutilated that its identity as a genuine ballot paper could not be established. The Court held that due to the nature of the provision, there could be no degrees of compliance as far as rejection of ballot paper was concerned. In the opinion of the Court, that was conclusive to show that the provision is mandatory.

CONCLUSION:

The question as to whether mandatory provisions contained in statutes should be considered merely as directory or obligatory has often been considered in judicial decisions. In dealing with the question no general or inflexible rule can be laid down. It is always a matter of trying to determine the real intention of the legislature in using the imperative or mandatory words and such intention can be gathered by a careful examination of the whole scope of the statute and the object intended to be achieved by the particular provision containing the mandatory clause. If it

is held that the mandatory clause is obligatory, it inevitable follows that contravention of the said clause implies the nullification so the contract.

Generally, a mandatory provision is to be construed strictly while a directory provision is to be construed liberally. There have been many instances where the court has held that a substantial compliance with the statute or with the rules framed there under is enough even if there be no literal compliance. Whether an enactment is mandatory or directory depends on the scope and the object of the statute.

From the above discussion, the following rules regarding can be summarized regarding the mandatory and directory statutes—

1. When the legislature used ‘must’ instead of ‘shall’ it uses a word which is most strongly imperative.
2. In some cases the word ‘must’ or the word ‘shall’ may be substituted for the word ‘may’ but only for the purpose of giving effect to the clear intention of the legislature.
3. Normally, however the word ‘may’ must be taken in its natural, that is, permissive sense and not in its obligatory sense.
4. In matters of procedure, mandatory words may be construed as directory.
5. ‘May and ‘shall’ are generally used in contradistinction to each other and normally should be given their natural meaning especially when they occur in the same section. But in phrases like, it “shall be lawful for the court’, ‘shall be liable to pay costs’ and “shall be liable to be forfeited”, the meaning is not mandatory. The first expression means the court has discretion; the second expression gives a discretion to the court to award costs or interest, and the third not that there should be an absolute forfeiture but a liability to forfeiture which might or might not be enforced.
6. Similarly, it may happen that in an Act the word ‘may’ is used in such a way as to create a duty that must be performed.

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