

IN THE SUPREME COURT OF INDIA**CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NOS. 10866-10867 OF 2010****IN THE MATTER OF: -**

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das &Ors. etc. etc. ... Respondents

AND**OTHER CONNECTED CIVIL APPEALS****NOTE ON INTERPRETATION OF RULE 10 (A) READ
WITH RULE 10 (2) OF ORDER 26, CPC****BY DR. RAJEEV DHAVAN, SENIOR ADVOCATE**

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RE: INTERPRETING RULE 10(A) READ WITH RULE 10(2)

I. THE ISSUE RAISED

1.1. During the course of the hearing of Ayodhya case (collectively so called) a query was raised from the bench which, if stated in consequential terms, may be broadly summarized as follows:

- Where a Court issues a commission regarding any question which involves 'any scientific investigation', and if a party does not avail the opportunity 'to examine the Commissioner personally in open court, touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation', two consequences would necessarily follow:
 - a) The Report would be read into the record as complete and binding, even 'if objections have been made to the Court', which the Court has indicated it will examine after the closure of evidence at the time of final hearing.
 - b) The Report would be treated as ex-cathedra and unassailable, even in the First Appeal, as a part of the reply argument, after the appellants have relied on the Report.

Note:

In the present case:

- Parties were permitted to file objections to the ASI report and the said report was mainly objected by Sunni Central Board of Wakf. (*See Impugned Judgment Vol. I, Pg. 252-253, pr. 242*)
- After hearing the parties, the court held that the objections to the ASI report have to be considered after the closure of the evidence, and to be dealt with at the final stage.

'...Therefore, the Court held that the ASI report shall be subject to the objections and evidences of the parties in the suit and all this shall be dealt with when the matter is finally decided.'

(Impugned Judgment Vol. I, pg. 253-254, pr. 244)

- The Court categorically refused request made by plaintiff in Suit No. 5 to summon Dr. Bhuvan Vikram Singh (excavation team) for deposition. The said instance has been recorded in the Impugned Judgment as follows:-

'...it was observed that this Court has discretion to call any witness and examine him as Court's witness but that situation cannot be imposed upon the Court by a party to the suit by filing an application requesting to summon a witness and then to press to treat the witness as Court's witness. Whenever the Court shall feel it expedient or necessary it may exercise its power by summoning a witness as a Court's witness but such a discretion cannot be fastened upon the Court by a party to the suit.'

(Impugned Judgment Vol. I, pg. 254, pr. 245)

- 1.2. It is respectfully submitted that a legal consequence which will lay down the Indian law on the subject for the present, past and future is contrary to the CPC and would result in an incorrect and skewed interpretation.

II. THE RELEVANT PROVISIONS OF THE CPC:

- 2.1 The relevant provisions of the CPC are Order 26 Rule 9, 10, 10A, 10B, 10C read with Section 75(e) of the CPC as amended by Civil Procedure Code (Amendment Act 104) of 1976.

(It is not necessary to reproduce these provisions in this Submission at this stage)

- 2.2. These provisions were introduced as a result of the 54th, Report of the Law Commission of India (February 1973) with a view to

enable Commissions to conduct scientific investigation(s) germane to any suit.

The Report of the Law Commission does not portend any such unequivocal consequences and treats a scientific investigative Commission like any other Commission.

(A copy of the relevant parts of the 54th, Report of the Law Commission is annexed hereto)

III. ANALYSIS OF THE RELEVANT PROVISIONS

- 3.1. At the very outset, there were no provisions at all for a Commission for scientific investigation. Accordingly, Section 75 was amended to include such a power :

"Section 75: Power to issue commissions: Subject to such conditions and limitations as may be prescribed, the Court may issue a commission –

.....
(e) to hold a scientific, technical and expert investigation"

- 3.2 It follows, that such a Commission must investigate in the manner laid down and operate within the framework of the Commission and answer the remit without exceeding this remit, with the permission of the Court that commissioned it. If any part cannot be answered, it may say so, or ask for a modified or new remit.

This flows from the power of Court to lay down conditions and limitations.

- 3.3 Further, this is reinforced by Order 26 Rule 10(3), which lays down that, if for any reason the court is dissatisfied with the proceedings of the Commissioner (*kindly notethat this is specific to the proceedings of the Commissioner*), it may order such further inquiry as it thinks fit.

- 3.4 It should be noted that:

- a) Order 26 Rule 9 and 10A, 10B and 10C are substantive provisions.
- b) Order 26 Rule 10 is a procedural provision.

A question arises as to whether a procedural provision can restrict the substantive provision in the absence of any specific clausula, indicating that the non-compliance will result in loss of the right to question any part of the report of the Commission.

3.5 Significantly, Rule 10A(2) states:

‘10A. Commission for scientific investigations

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.’

(emphasis added)

Although the words are ‘shall’ apply, there is an addition of the phrase “as far as may be”

3.6 Order 26 Rule 10 is reproduced:

‘10. Procedure of Commissioner

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person - The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. -

(3) *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*

3.7 Read with Section 75(e), Order 26 Rule 10, the following sequential stages are discernible:

- a) **Stage I:** Ordering such a Commission with limitations and conditions.
- b) **Stage 2:** The Receipt of a written report which reduces the evidence to writing, and return the evidence and the report signed by him, to the court.
- c) **Stage 3 Part I:** The report and the evidence collected shall be evidence in the suit and form part of the record.

Evidence has a basic meaning de-hors questions of evaluation and weight. The definition of evidence in the Evidence Act as follows”

"Evidence" means and includes-

(1) *all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence.*

(2) *all documents produced for the inspection of the Court; such documents are called documentary evidence.*

d) **Stage 3 Part II** begins with the word “but” and indicates two discretionary possibilities:

- i. The Court “*may*” examine the Commissioner personally in open court on a number of aspects;
- ii. Any of the parties (not as of right) but “*may*” with the permission of the Court, examine the Commissioner personally in Court.

No part of this Rule is mandatory or carry the terrible consequences that failure to do so would forfeit the right

to do so and the Report will become unassailable forever and forever without even an appeal.

It is submitted that when the legislature envisages a complete forfeiture of a right, then the same is provided in clear terms. For instance:- Section 25 (3) of the Drugs & Cosmetics Act, 1940, which provides as follows:-

25. Reports of Government Analysts.—

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken [or the person whose name, address and other particulars have been disclosed under Section 18-A] has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

As is evident, the present provision of Order 26 Rule 10 does not envisage a complete forfeiture of the right to object in the event of non-examination of the Commissioner, as such a drastic consequence which completely takes away the right of the Party to raise objection(s) would have been specifically provided for in clear terms of the provision, had the legislature so intended.

- e) Stage 4: Order 26 Rule 10(3) gives the Court a further discretion to order further investigation.
- f) Stage 5: The Court forming an opinion whether the evidence is relevant and its acceptability.

3.8 It is important that Order 26 Rule 10(2) is a procedure that applies to all Commissions appointed and a skewed interpretation will

result in a law of forfeiture of all rights to make submissions on the Report and treat it as *ex-cathedra* for all times to come.

IV. SUBMISSIONS ON LAW

- 4.1 It has been suggested that the Court may not have the expertise to sit in judgment over experts. However, some aspects can certainly be examined by the Court without sitting in the judgment of the expertise. These are:
 - a) Has the Commission fulfilled the remit of the Court to provide an answer?
 - b) Have the conditionalities and limitations been observed?
 - c) Are the conclusions in conformity with the findings?
 - d) Are there obvious inconsistencies on the report?
 - e) Have the conclusions drawn beyond reasonable probabilities?
 - f) In First Appeal, is it incorrect to question the conclusions drawn by the Trial Court unrelated to and in excess of the Report?
 - g) Further, in the absence of the cross examination of the Commission's expert, should the entire report be negated if no cross examination has taken place by any party or Court?
 - h) Where the report favours one party to the detriment of another and both the parties do not cross examine the Commissioner, can it not be taken into evidence, but accepted without examining questions of consistency, relevance and probability?
- 4.2 If there is any ambiguity, it must be resolved to sub-serve justice and truth within reasonable probability.
- 4.3 A decision has precedential relevance as a proposition of law for the future.
- 4.4 This is not a *casus omissus*.

- 4.5 The provisions of Order 26 Rule 10(2) are discretionary and optional, not mandatory.
- 4.6 Meaning of the word 'may' has to be read in context
- 4.7 Procedural laws must not be read to inhibit substantive rights and powers unless the words or context clearly says so.

V. CONSEQUENCES IN THE PRESENT CASE

- 5.1 It is submitted that divergent views have been taken by various Courts on the consequences of non-examination of the Commissioner. While some cases have treated it to be fatal and remanded the matter back, some cases have stated that though the report of the commissioner has been taken to be evidence, the objections to its reliability may be taken.
- 5.2 In the present case, there can be 4 consequences in the given situation:-
- a) The matter can be remanded back
 - b) The entire ASI report can be rejected
 - c) The party in whose favour the report has been tendered can be permitted to take benefit of the same- without any objection(s) being permitted from the opposite side.
 - d) Permit the parties to take to take objections *qua* the report, by *inter alia* placing materials from the report itself.
- 5.3 It is apparent that the first two options, i.e. 5.2 (a) and (b) are impractical at the present stage and therefore the Muslim parties are not even praying for a remand or rejection of the ASI Report. However, it would be a travesty of justice to not permit the parties to point out glaring errors from the report itself, particularly when the provision of law does not forfeit this right which is available to the parties at all stages.



LAW COMMISSION OF INDIA

FIFTY-FOURTH REPORT

ON

THE CODE OF CIVIL
PROCEDURE, 1908

FEBRUARY, 1973

D.O. No. F.2(1)/71--L.C.

P. B. GAJENDRAGADKAR

CHAIRMAN

LAW COMMISSION

Shastri Bhavan

New Delhi—110091

February 6, 1973

My dear Minister,

I am forwarding herewith the Fifty-fourth Report of the Law Commission on the Code of Civil Procedure, 1908. The circumstances in which the subject was taken up by the Commission and the procedure adopted by it are described in the first few paragraphs of the Report.

With kind regards,

Yours sincerely,

P. B. GAJENDRAGADKAR

Hon'ble Shri H. R. Gokhale,
Minister of Law & Justice,
Government of India,
Shastri Bhavan,
New Delhi.

L/B(D)229MofLJ&JA—2(a)

CHAPTER 1-F

INCIDENTAL PROCEEDINGS

Introductory

1-F-1. Part 3, in the body of the Code (sections 75 to 78), deals with "incidental proceedings".

Section 75

1-F-2. Section 75 deals with the issue of Commissions. We notice that one matter relating to the section was discussed in the Report on the Code,¹ namely—whether the court has power to issue a commission for making inventories of account books and other articles. We see no reason why the Court should not have this power. In fact, we would go further, and invest the Court with a general power to issue commissions for the performance of all ministerial acts.

Apart from this general power, we are of the view that there should be a specific provision empowering the court to issue commissions for conducting scientific inquiries, when such an inquiry is needed for determination of any issue before the court. There should also be a power to appoint commissioners to hold sales (otherwise than in execution).

Recommendation

1-F-2A. To achieve the above object, we recommend—

- (i) an amendment of section 75, and
- (ii) insertion of new² rules in Order 26.

The amendments will be as follows:—

Clauses (bb), (bbb) and (bbbb) may be inserted in section 75.

The section will then read as follows:—

"Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—(a) and (b);

(bb) to hold a scientific investigation;

(bbb) to conduct sales of property which is in the custody of the court pending the determination of the suit and which cannot be conveniently preserved;

(bbbb) to perform any ministerial act;

(c) ...

(d)

1. 27th Report, page 113, note on section 75.

2. Order 26, Rules 10A and 10B.

Order 26, Rule 10A to 10C (proposed)

1-F.3. to 1-F.5. We also recommend that the following new rules may be inserted in Order 26—

"10A. (1) Where any question arising in a suit involves any scientific investigation, which cannot in the opinion of the court, conveniently be conducted before the court, the Court may, if it thinks it necessary or expedient in the interest of justice issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a commissioner appointed under this rule, as they apply in relation to a commissioner appointed under rule 9.

10B. (1) Where any question arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the court, conveniently be performed before the court, the court may, if it thinks it necessary or expedient in the interest of justice for reasons to be recorded, issue a commission to such person as it thinks fit, directing him to perform that act and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a commissioner appointed under this rule, as they apply in relation to a commissioner appointed under rule 9.

10C. (1) Where, in any suit, it becomes necessary to sell any movable property which is in the custody of the court pending the determination of the suit and which cannot be conveniently preserved, the court may, if it thinks it necessary or expedient in the interest of justice, for reasons to be recorded, issue a commission to such person as it thinks fit, directing him to conduct such sale, and report thereon to the court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a commissioner appointed under this rule, as it applies in relation to a Commissioner appointed under rule 9.

(3) Every such sale shall be held, as far as may be, in accordance with the procedure prescribed for sales of movable property in execution of a decree."

1. Proviso annexed to Order 26, Rule 9 may be unnecessary in regard to the new rule.

2. Section 75 to be amended separately.

CHAPTER 26 COMMISSIONS

Introductory

26.1. Order 26 deals with commissions issued by Courts. Commissions are of four kinds—to examine witnesses, to make local investigations, to examine accounts and to make partition of immoveable property.

Most of the provisions for commissions to examine absent witnesses were adapted by the framers of the first Code (of 1859) from an Act of 1841¹.

The rules as to commissions for local investigations are ultimately derived from three old regulations.

Order 26, rule 1

26.2. Order 26, rule 1 provides as follows:—

"Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it."

Order 26, rule 1, and medical certificate

26.3. A suggestion was made to us, that for proving the sickness or infirmity of the witness, a certificate signed by a qualified medical practitioner should be accepted. Even now, we were told, it is being done in some courts; but the practice on the subject is not uniform, and in some places affidavits² about illness are usually required.

We have considered the matter, and see no objection to a provision permitting the use of such certificate in evidence, at the discretion of the court, for the purposes of Order 26, rule 1.

26.4. The examination, under the rule is "on interrogatories or otherwise". It is understood that an order for examination on interrogatories is sometimes issued when the examination should really be comprehensive.

26.5. It is, in our view, against the intendment of the rule to issue an order for examination on *interrogatories* except in special cases, and we think it desirable to so provide by amending the rule.

Recommendation

26.6. Accordingly, we recommend that Order 26, rule 1, should be revised as follows:—

"1. Any Court may, in any suit, issue a commission for the examination on interrogatories or otherwise of any person

1. Act 7 of 1841.

2. Cf. Order 19, rule 1.

resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Provided that commission for examination on interrogatories shall not be issued unless the court, for reasons to be recorded, thinks it necessary to do so.

Explanation—The Court may, for the purposes of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness."

Order 26, rule 4(1)

26.7. Under Order 26, rule 4(1), any Court may, in any suit, issue a commission for the examination of—

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) any person in the service of the Government, who cannot, in the opinion of the Court, attend without detriment to the public service.

26.8. The rule does not provide for issuing a commission for examination on interrogatories. We think that such a provision would be useful¹, although examination on interrogatories should be resorted to only in special cases².

26.9. There is another point arising out of Order 16, Rule 19.

Order 16, Rule 19, provides that a witness shall not be compelled to attend a Court in person unless he resides—

- (a) within the jurisdiction of the Court, or
- (b) outside the jurisdiction but within the specified distance (roughly, less than fifty miles, or, if there is an established public conveyance for five-sixth of the distance, then less than two hundred miles).

26.10. Thus, a witness living outside the jurisdiction and beyond the specified distance cannot be compelled to attend a court in person. For the examination of such person, the Code provides for the issue of a commission under Order 26, Rule 4. But the word used in Order 26, rule 4, is "may". Now, it is obvious that where the witness is beyond the jurisdiction and beyond the specified distance, and yet is one whose evidence is essential, the only mode of examination is by commission.

1. If necessary, the expression "registered medical practitioner" may be defined.

2. Cf. Order 26, rule 1.

3. Cf. amendment proposed to Order 26, rule 1.

It would, therefore, be better if the issue of a commission under Order 26, rule 4 is made obligatory in such cases, if the evidence of the witness is essential in the interest of justice. Such an amendment will give a more correct picture of what the law contemplates.

Recommendation

26.11. Accordingly, we recommend that Order 26, rule 4(1) be revised as follows:—

"4.(1) Any Court may, in any suit, issue a commission for the examination on interrogatories or otherwise of—

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) any person in the service of the Government, who cannot, in the opinion of the Court, attend without detriment to the public service;

Provided that where, under Order 16, rule 19, a person cannot be compelled to attend a Court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice:

Provided further that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary to do so."

Order 26, Rule 10A—10-B

26.11A. As already recommended¹, new rules 10A to 10C should be added in Order 26 to provide for scientific investigation etc.

Order 26, Rule 17

26.12. The Kerala Amendment to Order 26, rule 17 provides that where the Commissioner is not a Judge of the civil court, he shall not be competent to impose a penalty, but such penalty may be imposed on the application of the Commissioner by the court which issued the Commission.

In the Report² of the earlier Commission on the Code, this was noted. It was, however, considered unnecessary to adopt this minor amendment.

23.13. But we think that the amendment could be usefully adopted, though there may be not many occasions in practice where it would make much difference.

1. See discussion as to Order 16, Rule 19.

2. See discussion relating to section 75.

3. 27th Report, page 215, Note on Order 26, Rule 17.

Recommendation

26.14. We, therefore, recommend that the following proviso should be inserted below Order 26, Rule 17—

"Provided that when the Commissioner is not a Judge of a Civil Court, he shall not be competent to impose penalties; but such penalties may be imposed on the application of such Commissioner by the Court which issued the commission."

Order 26 and execution proceedings

26.15A. The Madras High Court¹ has held that the provisions of Order 26, rule 4 are not applicable to execution proceedings, and have not been made so by reason of the provisions of section 141.

1. *Venkayya v. Rallayya* A.I.R. 1939 Mad. 578.

PRINCIPLES OF STATUTORY INTERPRETATION

Including the General Clauses Act, 1897 with Notes

JUSTICE G P SINGH

M.Sc., LL.B., LL.D. (Hon.)

Chief Justice, High Court of Madhya Pradesh, 1978-1984;

Chairman, Madhya Pradesh Law Commission, 1990-1992;

Lokayukt, Madhya Pradesh, 1992-1997.

14TH EDITION

Revised by
Justice A K Patnaik
Former Judge, Supreme Court of India



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operation of acquittal only means that the stigma attached to the conviction and the rigour of the sentence are completely obliterated but that does not mean that the fact of conviction and sentence is wiped out and if a person was disqualified for being chosen to fill the seat for which an election is held on the date of scrutiny of his nomination paper by the returning officer because of his conviction, he will become qualified if later on his conviction is set aside in appeal.⁶³

6. MANDATORY AND DIRECTORY PROVISIONS

(a) General

The study of numerous cases on this topic 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. In an oft-quoted passage LORD CAMPBELL said: "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."⁶⁴ As approved by the Supreme Court:

63. *K. Prabhakaran v. P. Jayarajan*, (2005) 1 SCC 754, p. 772 : AIR 2005 SC 688 (Constitution Bench) overruling *Mannilal v. Parmil Lal*, (1970) 2 SCC 462 : AIR 1971 SC 2333 and *Vidyacharan Shukla v. Purshottam Lal Kaushik*, (1981) 2 SCC 84 : AIR 1981 SC 547.

64. *Liverpool Borough Bank v. Turner*, (1861) 30 LJ Ch 379, pp. 380, 381; referred to in *Howard v. Bodington*, (1877) 2 PD 203, p. 211 (LORD PENZANCE); *Vita Food Products Inc. v. Unus Shipping Co.*, (1939) 1 All ER 513, p. 523 (PC); *H.N. Rishbud v. State of Delhi*, AIR 1955 SC 196, p. 200 : (1955) 1 SCR 1150; *State of U.P. v. Baburam Upadhyaya*, AIR 1961 SC 751, p. 765 : (1961) 2 SCR 679; *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113, p. 119 : (1962) 2 SCR 880; *Banarasi Das v. Cane Commissioner, U.P.*, AIR 1963 SC 1417, p. 1424 : 1963 Supp (2) SCR 760; *Kailash v. Nanhku*, (2005) 4 SCC 480, pp. 496, 497 (9th Edn. of this book, p. 338 is referred). See further *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, AIR 1965 SC 895, p. 899 : (1965) 1 SCR 413; *Article 143 of the Constitution of India, In the matter of*, AIR 1965 SC 745, p. 769 : (1965) 1 SCR 970; *Montreal Street Rly. v. Normandin*, (1917) AC 170 : AIR 1917 PC 142, p. 144; *Hiralal Agrawal v. Rampadarath Singh*, AIR 1969 SC 244, p. 251 : (1969) 1 SCR 328; *Ramchandra v. Govind*, AIR 1975 SC 915, p. 917 : (1975) 1 SCC 559; *K.K. Srinivasan v. State of Karnataka*, (1987) 1 SCC 658, p. 675 : AIR 1987 SC 1059; *Rubber House v. Excelsior Needle Industries Pvt. Ltd.*, AIR 1989 SC 1160, p. 1165 : (1989) 2 SCC 413; *Chief Education Officer v. Quinn*, (1996) 3 All ER 72, p. 79 (HL); *Shashikant Singh v. Tarkeshwar Singh*, AIR 2002 SC 2031, p. 2034 : (2002) 5 SCC 738. In the matter of Special Reference No. 1, of 2002

[Footnote No. 64 Contd.]

"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."⁶⁵ "For ascertaining the real intention of the Legislature", points out SUBBARAO, J., "the court may consider *inter alia*, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered."⁶⁶ If object of the enactment

[Footnote No. 64 Contd.]

[Gujarat Assembly Election matter, (2002) 8 SCC 237, p. 322; Bhavnagar University v. Palitana Sugar Mill (P.) Ltd., (2003) 2 SCC 111, p. 126 : AIR 2003 SC 511, p. 520; Chandrika Prasad Yadav v. State of Bihar, AIR 2004 SC 2036, p. 2042 : (2004) 6 SCC 331].

65. Passage from CRAWFORD: Statutory Construction, p. 516; approved in *State of U.P. v. Manbodhan Lal Shrivastava*, AIR 1957 SC 912, p. 918 : 1958 SCR 533; *State of U.P. v. Baburam, Upadhyaya*, AIR 1961 SC 751, p. 765 : (1961) 2 SCR 679; Article 143 of the Constitution of India, In the matter of, *supra*, p. 769; *State of Mysore v. V.K. Kangan*, AIR 1975 SC 2190, p. 2192 : (1976) 2 SCC 895; *Govindlal Chhaganlal Patel v. Agriculture Produce Market Committee*, AIR 1976 SC 263, p. 267 : (1976) 1 SCC 369; *Ganesh Prasad Sah Kesari v. Lakshmi Narayan*, (1985) 3 SCC 53, pp. 59, 60 : AIR 1985 SC 964; *B.P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmik*, (1987) 2 SCC 407, p. 415 : AIR 1987 SC 1010; *Owners and Parties interested in M.V. "Vali Pero" v. Fernandes Lopez*, AIR 1989 SC 2206, p. 2213 : (1989) 4 SCC 671; *State of M.P. v. Pradeep Kumar*, (2000) 7 SCC 372, p. 377 : (2000) 10 JT 349; *Sarla Goel v. Krishanchand*, (2009) 7 SCC 658 pp. 668, 669 para 30 : (2009) 9 JT 21.

66. *State of U.P. v. Babu Ram Upadhyaya*, *supra*, p. 765. See further *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, *supra*, p. 899 (para 7), where it is said that the "object of the statute is determining factor". *Narsimhiah (K.) v. H.C. Singri Gowda*, AIR 1966 SC 330, p. 332 : (1964) 7 SCR 618; *Remington Rand of India Ltd. v. Workmen*, AIR 1968 SC 224, p. 226 : (1968) 1 SCR 164; *Hiralal Agrawal v. Rampadarath Singh*, AIR 1969 SC 244, p. 252 : (1969) 1 SCR 328; *Virji Ram Sutaria v. Nathalal Premji Bhanvadia*, AIR 1970 SC 765, p. 768 : (1969) 1 SCC 77; *Municipal Corporation of Greater Bombay v. BEST Workers' Union*, AIR 1973 SC 883, p. 891 : 1973 SCC (L&S) 177; *Satya Narain v. Dhuja Ram*, AIR 1974 SC 1185, p. 1190 : (1974) 4 SCC 237; *In re, Presidential Election, 1974*, AIR 1974 SC 1682, p. 1686 : (1974) 2 SCC 33; *Ajit Singh v. State of Punjab*, AIR 1983 SC 494, p. 499 : (1983) 2 SCC 217; *Dalchand v. Municipal Corporation, Bhopal*, (1984) 2 SCC 486 : AIR 1983 SC 303; *Rubber House v. Excelsior Needle*

[Footnote No. 66 Contd.]

will be defeated by holding the same directory, it will be construed as mandatory,⁶⁷ whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory.⁶⁸ But all this does not mean that the language used is to be ignored but only that the *prima facie* inference of the intention of the Legislature arising from the words used may be displaced by considering the nature of the enactment, its design and the consequences flowing from alternative constructions. Thus, the use of the words 'as nearly as may be' in contrast to the words 'at least' will *prima facie* indicate a directory requirement,⁶⁹ negative words a mandatory requirement,⁷⁰ 'may' a directory requirement⁷¹ and 'shall' a mandatory requirement.⁷²

For instance, section 3(f)(7) of the Haryana Apartment Ownership Act, 1983, defines 'common areas and facilities' to mean *inter alia*, 'such community and commercial facilities as may be provided for in the declaration'. The Supreme Court held that the expression 'may' used in section 3(f)(7) clearly indicates that no duty is cast on the coloniser/ land owner to give an undivided interest in community and commercial facilities

[Footnote No. 66 Contd.]

- Industries Pvt. Ltd.*, AIR 1989 SC 1160, pp. 1165, 1166 : (1989) 2 SCC 413; *Karnal Leather Karamchari Sanghatan v. Liberty Footwear Co.*, AIR 1990 SC 247, p. 254 : (1989) 4 SCC 448; *Mohan Singh v. International Air Port Authority*, 1996 (8) Scale 251, p. 260 : 1995 (10) JT 311 : (1997) 9 SCC 132.
67. *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113, p. 119 : 1962 (2) SCR 880; *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, AIR 1965 SC 895, p. 900 (para 9) : (1965) 1 SCR 970.
68. *Montreal Street Railway v. Normandin*, AIR 1917 PC 142, p. 144, referred to in *Bishwanath Khemka v. Emperor*, AIR 1945 FC 67, p. 68; *State of U.P. v. Manbodhan Lal Shrivastava*, AIR 1957 SC 912, p. 917 : 1958 SCR 533; *L. Hazari Mal Kuthiala v. I.T.O., Special Circle, Ambala Cantt.*, AIR 1961 SC 200, p. 202 : 1961 (1) SCR 892; *State of U.P. v. Babu Ram Upadhyaya*, AIR 1961 SC 751, p. 765 : 1961 (2) SCR 679; *Banwarilal Agarwalla v. State of Bihar*, AIR 1961 SC 849, p. 853 : 1962 (1) SCR 33; *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, AIR 1965 SC 895, p. 899 : 1965 (1) SCR 970; *Kailash v. Nanhku*, (2005) 4 SCC 480, p. 497 : AIR 2005 SC 2441 (passage from 9th Edn. of this book pp. 339, 340 is approved).
69. *Jaishankar Prasad v. State of Bihar*, AIR 1993 SC 1906, p. 1911 : 1993 (2) SCC 597 [construction of proviso to article 316(1) of the Constitution]; *Kailash v. Nanhku*, (2005) 4 SCC 480, p. 493 : AIR 2005 SC 2441 (Construction of section 87 of the Representation of the People Act 1951). The expressions 'as far as it can be made applicable' or 'as far as applicable' will also be *prima facie* construed as directory: *Tarlok Singh v. Municipal Corpn. of Amritsar*, (1986) 4 SCC 27 : AIR 1986 SC 1957; *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 : AIR 1990 SC 1607.

70. See title 6(c) p. 446.

71. See title 6(k) p. 519.

72. See title 6(e) p. 449.

exclusively to apartment owners of any particular colony, since the same have to be enjoyed by other apartment owners of the entire complex.⁷³ On the other hand, section 154 of the CrPC, which deals with information in cognizable offences and registration of FIRs, uses the word 'shall'. Accordingly, a Constitution Bench of the Supreme Court held that section 154 postulates the mandatory registration of the FIR on receipt of information of a cognizable offence. However, if the information given does not disclose a cognizable offence, a preliminary inquiry may be ordered, and if the inquiry discloses commission of a cognizable offence, the FIR must be registered.⁷⁴

If a provision is mandatory an act done in breach thereof will be invalid, but if it is directory the act will be valid although the non-compliance may give rise to some other penalty if provided by the statute.⁷⁵ An illustration of this can be seen in the context of section 154(2) of the Criminal Procedure Code, 1973, which provides that a copy of the information (FIR) recorded under section 154(1) 'shall' be given forthwith, free of cost, to the informant. The Supreme Court held that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance with the provision could render the entire proceedings invalid, and depends on the intent of the Legislature, and that the language used was not determinative of this issue. Applying this test, the Court reached the inescapable conclusion that the section is merely directory and not mandatory, as it prescribes only a duty to give a copy of the FIR.⁷⁶

It has often been said that a mandatory enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.⁷⁷ The latter half of this proposition is, however, not

73. *DLF Ltd. v. Manmohan Lowe & Ors.*, (2014) 12 SCC 231, p. 254.

74. *Lalita Kumari v. Government of Uttar Pradesh & Ors.*, (2014) 2 SCC 1, pp. 59, 60, 61.

75. *Drigraj Kuer (Rani) v. Amar Krishna Narain Singh (Raja)*, AIR 1960 SC 444, pp. 449, 451 : 1960 (2) SCR 431; *L. Hazari Mal Kuthiala v. I.T.O., Ambala Cantt.*, AIR 1961 SC 200, p. 202 : 1961 (1) SCR 892; *Banwarilal Agarwalla v. State of Bihar*, *supra*, p. 851; *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113, p. 119 : 1962 (2) SCR 880; *Union of India v. Tulsiram Patel*, (1985) 3 SCC 398, p. 484 : AIR 1985 SC 1416; (Breach of a directory provision does not entail any invalidity.) *Rubber House v. Excelsior Industries Pvt. Ltd.*, AIR 1989 SC 1160, p. 1165 : (1989) 2 SCC 413; *Ram Deen Maurya v. State of U.P.*, (2009) 6 SCC 735 para 43 (11th edition of this book is referred).

76. *State v. N.S. Gnanaswaran*, (2013) 3 SCC 594, p. 603.

77. *Woodward v. Sarsons*, (1875) LR 10 CP 733, p. 746 : (1874-80) All ER Rep 262, p. 268; *Punjab Co-operative Bank Ltd. v. C.I.T., Lahore*, AIR 1940 PC 230, p. 233; *Pratap Singh v. Srikrishna Gupta*, AIR 1956 SC 140, p. 141 : 1955 (2) SCR 1029; *Banarasi Das v. Cane Commr. U.P.*, AIR 1963 SC 1417, p. 1424 : 1963 Supp (2) SCR 760; *Hiralal Agarwal v. Rampadarath Singh*, AIR 1969 SC 244, p. 253 : 1969 (1) SCR 328; *Ram Autar Singh Bhadoria v. Ram Gopal Singh*, AIR 1975 SC 2182, p. 2189 : (1976) 1 SCC 43; *Dove Investment (P.) Ltd. v. Gujarat Industrial Investment Corpn.*, (2006) 2 SCC 619 (para 47) : AIR 2006 SC 1454.

quite accurate as even a complete non-compliance of a directory provision has been held in many cases as not affecting the validity of the act done in breach thereof.⁷⁸ It has been suggested that directory requirements fall under two heads: (1) those which should be substantially complied with to make the act valid; (2) those which even if not at all complied with have no effect on the act.⁷⁹ The correct position appears to be that substantial compliance of an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements.⁸⁰ The point may be explained by taking an example of a set of service rules which provide that adverse remarks shall be communicated to the civil servant concerned ordinarily within seven months.⁸¹ The object of communicating the adverse remarks is to give an

78. See for example *State of U.P. v. Manbodhan Lal Shrivastava*, AIR 1957 SC 912, p. 917 : 1958 SCR 533; *Drigraj Kuer (Rani) v. Amar Krishna Narain Singh (Raja)*, AIR 1960 SC 444, pp. 449, 451 : (1960) 2 SCR 431; *L. Hazari Mal Kuthiala v. I.T.O., Ambala Cantt.*, AIR 1961 SC 200, p. 202 : 1961 (1) SCR 892. See also cases in note 68, *supra*.

79. *London and Clydeside Estates Ltd. v. Aberdeen District Council*, (1979) 3 All ER 876, p. 882 (HL).

80. See HALSBURY'S Laws of England, 4th Edition, Volume 44, page 584 (fn. 1). For example, see *Pope v. Clarke*, (1953) 2 All ER 704; *K. Kamaraja Nadar v. Kunju Thevar*, AIR 1958 SC 687, p. 697 (S. 117 R.P. Act) : 1959 SCR 583; *Chandrika Prasad Tripathi v. Shiv Prasad Chanpuria*, AIR 1959 SC 827, p. 831 : 1959 Supp (2) SCR 527; *Ch Subbarao v. Member, Election Tribunal, Hyderabad*, AIR 1964 SC 1027, p. 1031 (para 14), p. 1033 (para 25) (S. 81(3) R.P. Act) : (1964) 6 SCR 213; *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, AIR 1965 SC 895, pp. 900, 901 (Section 94(3) U.P. Municipalities Act) : (1965) 1 SCR 970; *Virji Ram Sutar v. Nihalal Premji Bhanvadia*, AIR 1970 SC 765, p. 767 (Article 173 Constitution) : (1969) 2 SCR 627; *M. Karunanidhi v. H.V. Handa*, AIR 1983 SC 558 : (1983) 2 SCC 473. But see *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233, p. 245 (last 13 lines of para 26) : 1955 (1) SCR 1104; *Delhi Administration v. Chandan Shah*, AIR 1969 SC 1108 : 1969 1 SCC 787 (It was wrongly held that if a directory provision is not substantially complied with, the resultant act is invalid.)

81. *State of Haryana v. P.C. Wadhwa*, (1987) 2 SCC 602, pp. 611, 612 : AIR 1986 SC 1201. But see *Baikunth Nath Das v. Chief District Medical Officer Boripada*, AIR 1992 SC 1020 : 1992 (2) SCC 410 (Uncommunicated remarks can be taken into account in compulsorily retiring a civil servant). The case of *Baikunth Nath Das* distinguished in *Madan Mohan Choudhary v. State of Bihar*, JT 1998 (1) SC 459 : AIR 1999 SC 1018 : (1999) 3 SCC 396 : AIR 1999 SC 1018, where remarks were not made in normal course. It has now been held that all remarks whether adverse or good should be communicated to the employee within a reasonable time as this requirement flows from constitutional obligation of fairness, non-arbitrariness and natural justice : *Devi Dutt v. Union of Indiq*, (2008) 8 SCC 725 : AIR 2008 SC 2513. See further for this case text and note 78 p. 496; *Pyare Mohan Lal v. State of Jharkhand*, (2010) 10 SCC 693 paras 21, 22, 28 : AIR 2010 SC 3753 (The entire service record including uncommunicated entries can be taken into account in deciding compulsory retirement).

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limiting as to imply a negative. In an appeal from West Africa, the Privy Council approved of a passage from the judgment of the President of West African Court of Appeal (SIR HENLEY COUSSEY) in which referring to the relevant sections of the Ordinance in question, the President stated: "It is true that there are no negative words in the section referred to but the affirmative words are absolute, explicit, and peremptory; and when you find in an Ordinance only one particular mode of effecting the object, one train of formalities to be observed, the regulative provisions which the section prescribes, are essential and imperative."⁵⁵ The rule stated by VINER is to the same effect: "Every statute limiting anything to be in one form, although it be spoken in the affirmative, yet it includes in itself a negative."⁵⁶ As an example of an Indian statute of this description, the provisions of sections 54, 59, 107 and 123 of the Transfer of Property Act, 1882, prescribing modes of transfer by sale, mortgage, lease or gift may be mentioned. The formalities prescribed by these provisions for effecting a transfer of the nature mentioned in them are mandatory and the language used although affirmative clearly imports a negative.⁵⁷

(e) Use of 'shall' or 'shall and may'; 'must' and 'should'

The use of word 'shall' raises a presumption that the particular provision is imperative.⁵⁸ For instance, rule 57(2) of Schedule II to the Income-tax Act, 1961, provides that the full amount of purchase money payable

[Footnote No. 54 Contd.]

the Collector'. Section 89 of the Registration Act has been held to be permissive and enabling but section 70 of the Stamp Act has been held to be prohibitory: *Dharamdeo Rai v. Ram Nagina Rai*, AIR 1972 SC 928 : 1972 (1) SCC 460.

55. *Edward Ramia Ltd. v. African Woods Ltd.*, (1960) 1 All ER 627, p. 630 (PC).

56. VINER's Abr, Vol. 15 Tit Negative, A, pl 2, p. 540.

57. *Pir Bux v. Mohamed Tahar*, AIR 1934 PC 235, p. 237; *GHC Ariff v. Jadunath Majumdar*, AIR 1931 PC 79, p. 80; *Makhan Singh Tarsikka v. State of Punjab*, AIR 1952 SC 27 : 1952 CrLJ 321; *N. Varada Pillai v. Jeevarathnammal*, AIR 1919 PC 44, p. 46; *Lim Charlie v. Official Receiver*, AIR 1934 PC 67, p. 68. (The property belonging to a person can vest in the State or in some other body only by transfer in the mode prescribed by the Transfer of Property Act or under a statutory enactment providing for vesting.) *Noorulla Ghazanfarull v. Municipal Board, Aligarh*, 1995 (1) Scale 643, p. 649 : AIR 1995 SC 1058, pp. 1063, 1064 : 1995 Supp (2) SCC 667. See further *Syndicate Bank v. Prabha D. Naik*, AIR 2001 SC 1968, p. 1974 : (2001) 4 SCC 713 ("Affirmative Statute introductive of a new law do imply a negative").

58. *State of U.P. v. Manbodhan Lal Srivastava*, AIR 1957 SC 912, p. 917 : 1958 SCR 533; *State of U.P. v. Babu Ram Upadhyay*, AIR 1961 SC 751, p. 765 : (1961) 2 SCR 679; *Sainik Motors v. State of Rajasthan*, AIR 1961 SC 1480, p. 1485 : (1962) 1 SCR 517; *Govindlal Chagganlal Patel v. Agriculture Produce Market Committee*, AIR 1976 SC 263, p. 267 : 1975 (2) SCC 482; quoted with approval in *Pesara Pushpamala Reddy v. G. Veera Swamy*, (2011) 4 SCC 306 (para 28) : (2011) 3 JT 210.

'shall' be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of sale of property. The Supreme Court relied on the word 'shall' as well as earlier decisions of the Court on *pari materia* provisions in Order XXI of the CPC, to hold that making of the deposit by the intending purchaser is mandatory.⁵⁹ Similarly, section 45 of the Arbitration and Conciliation Act, 1996, provides that a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, 'shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'. The Supreme Court held that the language of section 45 of the Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it is obligatory upon the Court to make a reference to arbitration.⁶⁰

However, this *prima facie* inference about the provision being imperative may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word 'shall' has, therefore, been construed as merely directory.⁶¹ The word 'shall', observes Hidayatullah, J.,

59. *C.N. Paramisvam & Anr. v. Sunrise Plaza & Ors.*, (2013) 9 SCC 460, pp. 472 to 474.

60. *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641, pp. 708, 718.

61. *Burjore and Bhawani Pershad v. Bhagana*, ILR 10 Cal 557, pp. 561, 562 : 11 IA 7 (PC); *Shew Bux Mohata v. Tulsimanjari Dasi*, AIR 1961 SC 1453, pp. 1454, 1455 : 1962 (1) SCR 643 (Order 45, Rule 7, CPC); *Bishwanath Khemka v. Emperor*, AIR 1945 FC 67 (Section 256, Government of India Act, 1935); *State of U.P. v. Manbodhan Lal Srivastava*, *supra* (Article 320(3)(c), Constitution); *Drigraj Kuer v. Amar Krishna Narayan Singh*, AIR 1960 SC 444 : 1960 (2) SCR 431 (Section 56, U.P. Court of Wards Act, 1912); *L. Hazari Mal Kuthiala v. ITO, Ambala Cantt.*, AIR 1961 SC 200 : 1961 (1) SCR 892 (Section 5(5), Patiala Income-tax Act, 2001); *Sainik Motors v. State of Rajasthan*, AIR 1961 SC 1480 (Rule 8 of Rajasthan Passenger and Goods Taxation Rules); *Banarsi Das v. Cane Commr., U.P.*, AIR 1963 SC 1417 : 1963 Supp (2) SCR 760 (Section 18(2) U.P. Sugar Factories Control Act, 1938); *K. Venkataramiah v. Seetharama Reddy*, AIR 1963 SC 1526 : (1964) 2 SCR 35, (Order 41, Rule 27, CPC); *Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*, AIR 1965 SC 895 : (1965) 1 SCR 20 (Section 94(3), U.P. Municipalities Act, 1916); *K. Narasimhiah v. Singri Gowda*, AIR 1966 SC 330 : 1964 (7) SCR 618 (Section 27(3) of the Mysore Town Municipalities Act, 1951, requiring that three clear days' notice shall be given was construed having regard to the context and section 36 as directory); *State of M.P. v. Azad Bharat Finance Co.*, AIR 1967 SC 276 : 1966 Supp SCR 473 (Section 11 of the Opium Act, 1955 as amended in M.P. using language 'shall be confiscated' construed as permissive); *Krishna Kumar Mediratta v. Phulchand Agarwala*, AIR 1977 SC 984, pp. 986, 987 : (1977) 2 SCC 5. (Rule 9(2) of the Mineral Concession Rules, 1960); *Ganesh*

[Footnote No. 61 Contd.]

[Chap 5

Syn 6]

Mandatory and Directory Provisions

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“is ordinarily mandatory but it is sometimes not so interpreted if the con-
text or the intention otherwise demands”,⁶² and points out SUBBARAO, J.:
“When a statute uses the word ‘shall’, *prima facie* it is mandatory,
but the court may ascertain the real intention of the Legislature by care-
fully attending to the whole scope of the statute”.⁶³ This principle
was used in the interpretation of section 202 of the CrPC, which provides
that the Magistrate ‘shall’, in a case where the accused is residing at a

[Footnote No. 61 Contd.]

Prasad Shah Kesari v. Lakshmi Narayan Gupta, (1985) 3 SCC 53 : AIR 1985 SC 964; (The words ‘shall order’ the defence to be struck off in section 11-A of the Bihar Buildings (Lease Rent and Eviction Control) Act, 1947 were construed as directory.) *Paradise Printers v. Union Territory of Chandigarh*, AIR 1988 SC 354, p. 358 : (1988) 1 SCC 440 (Rule 8(3) of the Rules made under the Capital of Punjab Act, 1952); *Ammal Chandra Dutt v. II Addl. Dist. Judge*, AIR 1989 SC 255 : (1989) 1 SCC 1 (construction of Rule 18(1) of the U.P. Urban Buildings Rules, 1972. Words ‘shall accept the finding’ in earlier proceedings under the repealed Act ‘as conclusive’ in proceedings under the new Act were construed as directory ‘shall’ was read as ‘may’); *Rubber House v. Excelsior Needle Industries Pvt. Ltd.*, AIR 1989 SC 1160 : (1989) 1 SCC 413 (Rule 4(c) of Haryana Urban Rules, 1970); *Shibu Chandra Dhar v. Pasupati Nath Auddya*, AIR 2002 SC 1252 : (2002) 3 SCC 617 (word ‘shall’ in section 17(2B) of the W.B. Premises Tenancy Act, 1969 construed as ‘may’ having regard to other related provisions); *P.T. Rajan v. TPM Sahir*, (2003) 8 SCC 498, p. 516 : AIR 2003 SC 4603 (use of ‘shall’ in a procedural provision will be construed as directory if thereby no prejudice is caused); *U.P. State Electricity Board v. Shiv Mohan Singh*, (2004) 8 SCC 402 : AIR 2004 SC 5009 (section 4(4) of the Apprentice Act, 1961 requiring a contract of apprenticeship to be sent to apprenticeship advisor for registration is held to be directory and an apprentice under the Act, declared to be a trainee and not a workman under section 18, does not become a workman under the Industrial Disputes Act, 1947 even though his contract is not sent for registration and the definition of ‘workman’ under the ID Act includes an apprentice). See also *Indo China Steam Navigation Co. v. Jagjit Singh*, AIR 1964 SC 1140, p. 1151 : (1964) 6 SCR 594 (‘shall be liable to confiscation’ held mandatory by a constitution bench) followed in *State of Karnataka v. Sareen Kumar Shetty*, AIR 2002 SC 1248, p. 1251 : (2002) 3 SCC 426 (‘shall be liable to confiscation’ held mandatory) and *Chern Ta-ong Shang v. Commander S.D. Baijal*, AIR 1988 SC 603 : 1988 (1) SCC 507 (words ‘shall also be liable to confiscation’ construed as mandatory). Compare *State of M.P. v. Azad Bharat Finance Co.*, *supra*, where similar words were construed as permissive, but in this case the constitution bench decision in *Indo China Navigation Co.* case was not noticed.

62. *Sainik Motors v. State of Rajasthan*, AIR 1961 SC 1480, p. 1485 : 1962 (1) SCR 517.

63. *State of U.P. v. Babu Ram*, AIR 1961 SC 751, p. 765 : (1961) 2 SCR 679, *Govindlal Chagganlal Patel v. Agriculture Produce Market Committee*, AIR 1976 SC 263, p. 267 : 1975 (2) SCC 482; *Mohan Singh v. International Air Port Authority*, 1996 (8) Scale 251, p. 260 : 1996 (10) JT 311 : (1997) 9 SCC 132. See further *Basavraj R. Patil v. State of Karnataka*, AIR 2000 SC 3214, p. 3222 : (2006) 8 SCC 740 (A mandatory obligation on the court arising from the use of ‘shall’ may be diluted to prevent hardship in exceptional cases. Section 313(1)(b) CrPC 1973 construed to be obligatory requiring examination of accused in person, yet not preventing the court to dispense with his presence in appropriate cases.)

place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. The Supreme Court held that the word 'shall' is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. However, on looking at the intention of the Legislature, the Court found that the provision is aimed at preventing innocent persons from being harassed by unscrupulous persons making false complaints, and therefore the inquiry or investigation contemplated by the provision before issuing summons was held to be mandatory.⁶⁴

If different provisions are connected with the same word 'shall', and if with respect to some of them the intention of the Legislature is clear that the word 'shall' in relation to them must be given an obligatory or a directory meaning, it may indicate that with respect to other provisions also, the same construction should be placed.⁶⁵ If the word 'shall' has been substituted for the word 'may' by an amendment, it will be a very strong indication that use of 'shall' makes the provision imperative.⁶⁶ Similar will be the position when the Bill as introduced used the word 'may' and the Parliament substituted the word 'shall' in its place while passing the Act.⁶⁷ The use of word 'may' at one place and 'shall' at another place in the same section may strengthen the inference that these words have been used in their primary sense and that 'shall' should be construed as mandatory.⁶⁸ When the expressions 'shall' and 'may' are defined in the Act (for example 'shall

64. *Vijay Dhanuka & Ors. v. Najima Mantaj & Ors.*, (2014) 14 SCC 638.

65. *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233, p. 245 : 1955 (1) SCR 1104; *Ram Autar Singh Bhadauria v. Ram Gopal Singh*, AIR 1975 SC 2182, p. 2189 : (1976) 1 SCC 43; *State of U.P. v. Manbodhan Lal Srivastava*, AIR 1957 SC 912, p. 917 : 1958 SCR 533. But this indication is not conclusive, see *Bombay Union of Journalists v. State of Bombay*, AIR 1964 SC 1617 (discussed in text and notes 40 and 41, p. 405); see also *Raza Buland Sugar Co. v. Municipal Board, Rampur*, AIR 1965 SC 895, p. 905 : 1965 (1) SCR 970 (MUDHOLKAR, J.); *Juthika Bhattacharya (Smt.) v. State of Madhya Pradesh*, AIR 1976 SC 2534, p. 2536 : 1976 SCC (Lab) 561.

66. *Jaywant S. Kulkarni v. Minochar Dosabhai Shroff*, AIR 1988 SC 1817, p. 1820 : (1988) 4 SCC 108 ('shall pass a decree' substituted for 'may pass a decree').

67. *Tamil Nadu Cauvery Neerppasana Vilaiporulgal Padhugappa Sangam v. Union of India*, AIR 1990 SC 1316, p. 1321 (section 4 of Inter-State Water Disputes Act, 1956).

68. *Chairman Canara Bank, Bangalore v. M.S. Jasra*, AIR 1992 SC 1341, p. 1346 : AIR 1992 SC 1100 [Section 45(5)(i) of the Banking Regulation Act, 1949]; *Malaxmi Rice Mills v. State of U.P.*, AIR 1999 SC 147, p. 149; (1998) 6 SCC 590.

presume' and 'may presume' in section 4 of the Evidence Act, 1872) the expressions have to be given the meaning as defined.⁶⁹

The words 'shall and may' are construed imperatively.⁷⁰ As pointed out by LORD BROUGHAM: "If the words are it 'shall and may' be so and so done, by such and such officer and body then the word 'may' is held in all soundness of construction to confer, a power but the word 'shall' is held to make that power, or the exercise of that power compulsory."⁷¹ Similarly, the words 'shall and lawfully may', are in their ordinary import obligatory.⁷² The use of the word 'shall' with respect to one matter and use of word 'may' with respect to another matter in the same section of a statute, will normally lead to the conclusion that the word 'shall' imposes an obligation, whereas the word 'may' confers a discretionary power.⁷³ But that by itself is not decisive and the court may having regard to the context and consequences come to the conclusion that the part using 'shall' is directory.⁷⁴

The use of the word 'must' in place of 'shall' will itself be sufficient to hold the provision to be mandatory and it will not be necessary to pursue the enquiry any further.⁷⁵ The use of the word 'should' instead of 'must' may not justify the inference that the provision is directory if the context shows otherwise.⁷⁶

(f) Considerations of general inconvenience in statutes imposing public duty; provisions as to time; provisions for consultation

Where a statute imposes a public duty and lays down the manner in which and the time within which the duty shall be performed, injustice or

69. *M. Narsinga Rao v. State of Andhra Pradesh*, AIR 2001 SC 318, p. 322 : (2001) 1 SCC 691 : 2001 CrLJ 515 (meaning of these expressions as defined in section 4 of the Evidence Act applied also for construction of section 20 of the PC Act, 1988).

70. *A.G. v. Lock*, (1744) 26 ER 897, 898; *Queen v. Alloparao*, (1847) 3 MIA 488, p. 492; *Davies v. Evans*, (1882) 9 QBD 238, p. 243.

71. *Queen v. Alloparao*, *supra*, p. 492.

72. *Chapman v. Milvain*, (1850) 19 LJ Ex 228 : (1850) 155 ER 27, p. 28 (PARKE B.).

73. *Labour Commr., M.P. v. Burhanpur Tapti Mill*, AIR 1964 SC 1687, p. 1689 : (1964) 7 SCR 484; *Jamatraj v. State of Maharashtra*, AIR 1968 SC 178, p. 181 : 1967 (3) SCR 415; *T.R. Sharma v. Prithipal Singh*, AIR 1976 SC 367, p. 370 : 1976 SCC (L&S) 1 : (1976) 1 SCC 226. For construction of word 'May' see title 6(k) "May; 'It shall be lawful'; 'shall have power'".

74. *Ganesh Prasad Shah Kesari v. Lakshmi Narayan Gupta*, (1985) 3 SCC 53, p. 59 : AIR 1985 SC 964.

75. *Lachmi Narain v. Union of India*, AIR 1976 SC 714, p. 726 : 1976 SCC (Tax) 213.

76. *Juthika Bhattacharya (Smt.) v. State of Madhya Pradesh*, AIR 1976 SC 2534, p. 2536 : 1976 SCC (L&S) 561 : (1976) 4 SCC 96.

order may be declared invalid.⁵⁰ Even in cases of 'no notice' or 'no hearing', the superior courts may in exercise of their discretion decline to interfere by judicial review (under Article 32 or 226 as the case may be) where on admitted or undisputed facts the view taken by the impugned order is the only possible view and it would be futile to issue any writ to compel observance of natural justice.⁵¹ This is called the useless formality theory.⁵² For example, when the petitioner was appointed even though he was not qualified on the cut off date (last date for receipt of applications) and was ineligible to be considered for appointment, cancellation of his appointment without hearing him was not interfered with as it would have been a futile exercise.⁵³ Sympathy for the petitioner as he became qualified before

50. *State Bank of Patiala v. S.K. Sharma*, AIR 1996 SC 1669, pp. 1683, 1684 : 1996 (3) SCC 364; *P.D. Agrawal v. State Bank of India*, (2006) 8 SCC 776 (para 39) : AIR 2006 SC 2064; *Haryana Financial Corporation v. Kailash Chandra Ahuja*, (2008) 9 SCC 31 paras 44, 45 : (2008) 8 JT 70 (Departmental enquiry-Non-supply of inquiry report does not make the action taken invalid unless there is finding of prejudice). See further *Union of India v. Mustafa & Najibai Trading Co.*, JT 1998 (5) SC 16, pp. 36, 37 : AIR 1998 SC 2526 : 1998 (6) SCC 79; *State of U.P. v. Harendra Arora*, AIR 2001 SC 2319 : (2001) 6 SCC 392 (non-furnishing of enquiry report under Rule 55A of the Civil Services (Classification Control and Appeal) Rules, 1930); *Oriental Insurance Co. Ltd. v. S. Balkrishnan*, AIR 2001 SC 2400 : (2003) 11 SCC 734 (non-supply of enquiry report); *Canara Bank v. Debasis Das*, (2003) 4 SC 557, p. 578 : AIR 2003 SC 2041; *State of Maharashtra v. Jalgaon Municipal Council*, *supra*, pp. 1678, 1679; *Commissioner of Income Tax Chandigarh v. Pearl Mech. Eng. and Foundry Works*, (2004) 4 SCC 597; AIR 2004 SC 2345. (In a proceeding for a acquisition of property under section 269 of the Income-tax Act, 1961, the acquisition does not become invalid if notice to the owner is issued before publication of the notice in the Official Gazette and not after it for it causes no prejudice); *Union of India v. Jesus Sales Corporation*, AIR 1996 SC 1509, p. 1512 : (1996) 4 SCC 69 (Hearing does not always mean personal hearing); *Ganesh Santa Ram Sirur v. State Bank of India*, AIR 2005 SC 314, pp. 323, 324. (Personal hearing not always necessary); *Transmission Corpn. of A.P. Ltd. v. Shri Rama Krishna Rice Mill*, (2006) 3 SCC 74 (para 9) : AIR 2006 SC 1445 (cross-examination of a person whose statement is relied upon not always necessary); *Punjab National Bank v. Manjeet Singh*, (2006) 8 SCC 647 (paras 17, 18) : AIR 2007 SC 262 (In case of an industrial dispute individual workers are not required to be heard. Hearing given to unions is sufficient); *H. V. Nirmala v. Karnataka State Financial Corporation*, (2008) 7 SCC 639 paras 10, 20 and 21 : AIR 2008 SC 2440 [Appointment of enquiry officer if not objected to during enquiry cannot be raised later if no prejudice caused].

51. *Aligarh Muslim University v. Mansoor Ali Khan*, AIR 2000 SC 2783, pp. 2787, 2788 : (2000) 7 SCC 529; *M.C. Mehta v. Union of India*, JT 1999 (5) SC 114 : AIR 1999 SC 2583; *S.L. Kapoor v. Jagmohan*, 1980 (4) SCC 379 : AIR 1981 SC 136; *Venkateshwara Rao v. Government of Andhra Pradesh*, 1966 (2) SCR 172 : AIR 1966 SC 828. See further note 26, p. 858.

52. *M.C. Mehta v. Union of India*, *supra*, (paras 22, 23) (AIR); *State of Manipur v. Y. Token Singh*, (2007) 5 SCC 65 (paras 22, 30) : (2007) 3 JT 606.

53. *Ashok Kumar Sarkar v. Union of India*, (2007) 4 SCC 54 (para 28) p. 66 : (2007) 6 JT 127.

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(b) *Subordinate legislation.*—A power conferred to make subordinate legislation must be exercised in conformity with the express and implied limitations contained in the empowering statute. It has been said that the limitations which apply to the exercise of administrative or *quasi*-judicial power conferred by a statute,⁵⁵ except the requirement of natural justice, also apply to the exercise of legislative power.⁵⁶ So the exercise of a legislative power derived from a statute can be assailed on the grounds that it is in conflict with the Constitution or the governing statute; that there has been non-consideration of essential facts; and that it is manifestly arbitrary.⁵⁷ A detailed discussion of various aspects of judicial review of delegated legislation occurs in Chapter 12.

(c) *Ordinances and orders under the Constitution.*—A power to make law by Ordinance under the Constitution must, however, be distinguished from a statutory power to make subordinate legislation. Unlike the exercise of a statutory power, an Ordinance made by the President under Article 123 or by the Governor under Article 213 of the Constitution cannot be questioned on the ground of non-application of mind or *mala fides* or on the ground that the prevailing circumstances did not warrant the issue of the Ordinance.⁵⁸ But the Ordinance making power cannot be used to circumvent the Legislature by repromulgating an Ordinance time and again, after the Legislature is prorogued, in a routine manner.⁵⁹ Interference by the court in that event is illustrative of the general principle that the function of construing the provisions of the Constitution and the laws and consequently the function of determining whether the act of a constitutional or statutory functionary falls within the limits of the power entrusted to it or is vitiated by an erroneous application of the ambit of the power are

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54. *Ibid*, para 33 pages 68-70.

55. See text and note 13, p. 442.

56. *State of U.P. v. Renuagar Power Co.*, AIR 1988 SC 1737, p. 1763 : (1988) 4 SCC 59; *Shri Sitaram Sugar Co. Ltd. v. Union of India*, AIR 1990 SC 1277, p. 1297 : (1990) 3 SCC 223; *West Bengal Electricity Regulatory Commission v. C.E.S.C. Ltd.*, AIR 2002 SC 3588, p. 3600 : (2002) 8 SCC 715. See further *Boddington v. British Transport Police*, (1998) 2 All ER 203, pp. 218, 219 (HL).

57. *Ibid*. For judicial review of Act passed by Parliament or State Legislature, see pp. 591 - 601, *post*.

58. *T. Venkata Reddy v. State of A.P.*, (1985) 3 SCC 198, pp. 211, 212 : AIR 1985 SC 724; *K. Nagaraj v. State of Andhra Pradesh*, (1985) 1 SCC 523, pp. 548, 549 : AIR 1985 SC 551; *Gurudevdatia VKSS Maryadit v. State of Maharashtra*, AIR 2001 SC 1980, p. 1987 : (2001) 4 SCC 534.

59. *D.C. Wadhwa (Dr.) v. State of Bihar*, (1987) 1 SCC 378 : AIR 1987 SC 579. See further *Krishna Kumar Singh v. State of Bihar*, JT 1998 (4) SC 58 : 1998 (5) SCC 643.

matters falling within the jurisdiction of the court.⁶⁰ Thus though the exercise of power by the President in the matter of grant or refusal of pardon under Article 72 of the Constitution cannot be questioned on merits, it can be subjected to judicial review when it is vitiated by self denial on an erroneous assumption that he has no power to go into the merits after it has been judicially concluded by the highest court.⁶¹ The order granting pardon under Article 72 or 161 is subject to judicial review on the grounds that order has been passed without application of mind, or the same suffers from vice of *mala fide* or the order has been passed on extraneous or on wholly irrelevant consideration or that the order suffers from arbitrariness.⁶² Similarly an order of remission of life sentence passed by the Governor under Article 161, when certain vital facts about the prisoner, who was an MLA, were not disclosed can be quashed by the High Court in judicial review under Article 226.⁶³ Considerations of religion, caste or political loyalty are irrelevant in exercising the power of remission. Therefore, remission granted of about seven years unexpired sentence under Article 161 essentially on the ground that the convict was a good congress worker was

60. *Kehar Singh v. Union of India*, AIR 1989 SC 653, p. 659 : 1989 (1) SCC 204.

61. *Ibid*; *Maru Ram v. Union of India*, (1981) 1 SCC 107 para 31 sub-para (8,9) : AIR 1980 SC 2147 (The power of remission by President or Governor is to be exercised on the advice of the appropriate Government which is binding. Scope of interference by court limited but interference will be made if it is exercised on 'wholly irrelevant, irrational, discriminatory or *mala fide*' considerations); *Maru Ram's* case is also referred in *C.A. Pious v. State of Kerala*, (2007) 8 SCC 31. See further *Reckley v. Minister of Public Safety and Immigration*, (1996) 1 All ER 562 (PC) (Exercise of prerogative of mercy under section 92 of the Constitution of Bahamas is not open to judicial review); *De Freitas v. Benny*, (1976) 1 AC 239, p. 247 (PC) (similar view under the constitution of Trinidad and Tobago. As pithily put by LORD DIPLOCK: "Mercy is not the subject of legal rights. It begins where legal rights end."). For criticism, see CHRISTOPHER GOLBER, "Reckley (No. 2) and the Prerogative of Mercy: Act of grace or constitutional safeguard", 1997 Modern Law Review 572.

62. *Epuru Sudhakar v. Govt. of A.P.*, (2006) 8 SCC 161 (para 34) : AIR 2006 SC 3385 and *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353 (para 28).

63. *Swaran Singh v. State of U.P.*, JT 1998 (2) SC 452 : AIR 1998 SC 2026 : (1998) 4 SCC 75. See further *State (Govt. of NCT) v. Preem Rai*, (2003) 7 SCC 121 : 2003 SCC (Cri) 1586 (court has no power to commute sentence under section 433(c) CrPC. Difference between commutation, Pardon, Remission, Amnesia. Articles 72 and 161 also considered). In *Ramdeo Chauhan alias Rajnath Chauhan* delivered on November 19, 2010 AFTAB ALAM and ASHOK KUMAR GANGULY, JJ. held that National Human Rights Commission can recommend to the Governor for remission of death sentence into life imprisonment and the order of remission passed by the Governor on the recommendation of council of ministers cannot be questioned on the ground that it gives no reasons: *Hitwada December 6, 2010*.

[Chap 5]

Syn 6]

Mandatory and Directory Provisions

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quashed by the Supreme Court.⁶⁴ The powers of President under Article 72 and of Governor under Article 161 are not restricted by sections 432, 433 and 433A of the Code of Criminal Procedure though the authority has to meet the requirements of the rule of law while exercising the ... power.⁶⁵ If the remission policy at the time of conviction of the accused is made liberal as compared to the policy prevalent at the time when his case is taken up for consideration the prisoner is to be given the benefit of the more liberal policy.⁶⁶ The Governor's order on pardon is open to judicial review if it has been passed on extraneous or wholly irrelevant considerations. He cannot also pronounce on the innocence of the accused.⁶⁷ The principle of limited judicial review has also been applied to exercise of powers in certain sensitive areas under the Constitution. Limited judicial review has been exercised for examining the validity of a proclamation issued by the President under Article 356 of the Constitution.⁶⁸ Similarly satisfaction of the President under clause (c) of second Proviso to Article 311(2) of the Constitution, that in the interest of the security of the State it is not expedient to hold an enquiry, is also open to limited judicial review on the ground of *mala fides* and also on the ground that it was based on wholly extraneous ground.⁶⁹ President's order removing a Governor under Article 156 is also open to limited judicial review.⁷⁰

Welfare schemes passed by Parliament under Article 114 such as MPLAD, are valid and do not require separate enactment to make them valid.⁷¹

Proceedings in Parliament cannot be called into question on the ground of irregularity of procedure and the House is not subject to the control of the courts in the administration of its internal proceedings.⁷²

64. *Epuru Sudhakar v. Govt. of A.P.*, (2006) 8 SCC 161 (paras 56, 65) : AIR 2006 SC 3385.

65. *State of Haryana v. Jagdish*, (2010) 4 SCC 216 para 38 : AIR 2010 SC 1690.

66. Para 54.

67. *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353 paras 28, 29, 34 : AIR 2011 SC 1216.

68. See pages 794-796, *infra*.

69. *A.K. Kaul v. Union of India*, AIR 1995 SC 1403, p. 1415 : 1995 (4) SCC 73. See further *Indian Railway Construction Co. Ltd. v. Ajaykumar*, AIR 2003 SC 1843, pp. 1848 to 1850 : (2003) 4 SCC 579 (Principles of judicial review in a case where departmental enquiry was dispensed with under Article 311(2)).

70. *B.P. Singhal v. Union of India*, (2010) 6 SCC 331 : (2010) 5 JT 640.

71. *Bhim Singh v. Union of India*, (2010) 5 SCC 538 : (2010) 5 JT 166.

72. *Ramdas Athawale v. Union of India*, (2010) 4 SCC 1 paras 34, 39 : AIR 2010 SC 1310 [President's address is required only when the House is prorogued and not when the House is merely adjourned. (Articles 85, 87, 122). But when it is a case of illegality and not merely of irregularity judicial review is not excluded.]

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Even power of Parliament/State Legislature to punish for its contempt⁷³ or to expel a member⁷⁴ for breach of its privilege is not final and conclusive and is subject to the power of judicial review under Articles 32, 136 and 226 of the Constitution. Even a finality clause in a Constitution Amendment Act does not deprive the superior courts of their power of judicial review which forms part of the basic structure of the Constitution.⁷⁵

(i) Manner of expression of exercise of power

The power to make an order must also be distinguished from the manner of expressing an order which may have been prescribed with a view to give the prescribed manner of expression an evidentiary value. In such a case the non-compliance with the prescribed manner of expression does not invalidate the order if the same is proved otherwise to have been validly made. It is on this principle that section 40 of the 9th Schedule to the Government of India Act, 1935,⁷⁶ and Article 77,⁷⁷ and Article 166⁷⁸ of the Constitution have been held to be directory. If, while passing an order in exercise of a power, the source of the power is not quoted or a wrong provision is quoted, it will not invalidate the order, and the exercise of the

73. *M.S.M. Sharma v. Srikrishna Sinha*, AIR 1959 SC 395 : 1959 Supp (1) SCR 806; *In re Keshav Singh* (special Reference No. 1 of 1964) AIR 1965 SC 745.

74. *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184 : (2007) 2 JT 1. Followed in *Amarinder Singh v. Special Committee Punjab Vidhan Sabha*, (2010) 6 SCC 113 paras 53, 54, 55, 59 : (2010) 4 JT 350.

75. See pages 863-870, *post*.

76. *J.K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor*, AIR 1947 PC 38.

77. *Major E.G. Barsay v. State of Bombay*, AIR 1961 SC 1762, p. 1776 : 1962 (2) SCR 195.

78. *Dattatraya Moreshwar v. State of Bombay*, AIR 1952 SC 181 : 1952 SCR 612; *State of Bombay v. Purushottam Jog Naik*, AIR 1952 SC 317 : 1952 SCR 674; *Joseph John, P. v. State of Trav-Co.*, AIR 1955 SC 160 : (1955) 1 SCR 1011; *Ghaio Mall & Sons v. State of Delhi*, AIR 1959 SC 65 : 1959 SCR 1424; *State of Rajasthan v. Sripal Jain*, AIR 1963 SC 1323, p. 1326 : (1964) 2 SCR 722; *R. Chitralekha v. State of Mysore*, AIR 1964 SC 1823, p. 1829 : (1964) 6 SCR 238; *Bijoya Lakshmi Cotton Mills Ltd. v. State of W.B.*, AIR 1967 SC 1145 : 1967 (2) SCR 406; *State Govt. Houseless Harijan Employees Association v. State of Karnataka*, AIR 2001 SC 437, p. 447 : (2001) 1 SCC 610; *Crawford Bayley & Co. v. Union of India*, (2006) 6 SCC 25 (para 26) : AIR 2006 SC 2544 (Rules of Business issued under Articles 77 and 166 of the Constitution are not mandatory). But mere passing of a cabinet resolution is not enough till some action is taken in terms of Article 166 for issuance of a Government order: *J.P. Bansal v. State of Rajasthan*, 2003 AIR SCW 1848, p. 1853 : (2003) 5 SCC 134 : AIR 2003 SC 1405. See further *Central Bureau of Investigation v. Ravishankar Srivastava*, (2006) 7 SCC 188 : AIR 2006 SC 2872; *M. Balakrishna Reddy v. CBI*, (2008) 4 SCC 409 : AIR 2008 SC 1754 (case law on the question whether Article 166 is mandatory or directory, reviewed).

[Chap 5

Syn 6]

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power will be referable to a jurisdiction which confers validity upon it.⁷⁹ The same principle applies when a subordinate legislation such as a bye-law which although within jurisdiction is expressed to be made under a wrong provision.⁸⁰ But the principle has no application when the provision to which the exercise of power is sought to be referred contains certain conditions which are not shown to have been satisfied.⁸¹ So a penalty imposed under one provision cannot be supported under another provision when no notice under that provision was issued to the party on whom the penalty is imposed.⁸² Further, the principle cannot be used to widen the effect of a notification issued expressly under one provision so as also to relate it under some other provision.⁸³ Thus an exemption of excise duty by a notification under rule 8(1) of the Central Excise Rules, 1944 cannot be construed to cover exemption from special duty of excise levied under the Finance Act, 1979.⁸⁴

(j) Statute conferring private rights and benefits

When certain requirements are prescribed by a statute as preliminary to the acquisition of a right or benefit conferred by the statute, such prescriptions are mandatory for acquisition of the right or benefit. Thus, if it is desired to have a partnership firm registered under the Income-tax Act, the requirements of the Act and the Rules framed under it must be strictly

79. *Balakotiah v. Union of India*, AIR 1958 SC 232, p. 236 : 1958 SCR 1052; *L. Hazari-mal Kuthiala v. I.T.O.*, AIR 1961 SC 200, p. 202 : (1961) 1 SCR 892; *Berar Swadeshi Vanaspati v. Municipal Committee, Shegaon*, AIR 1962 SC 420 : (1962) 1 SCR 596; *Gopal Narain v. State of U.P.*, AIR 1964 SC 370, p. 377 : (1964) 4 SCR 869; *Roshan Lal Gautham v. State of U.P.*, AIR 1965 SC 991, p. 994 : (1965) 1 SCR 841; *J.K. Steel Ltd. v. Union of India*, AIR 1970 SC 1173, p. 1188 : (1969) 2 SCR 481; *N.B. Sanjana v. Elphinstone Spinning & Weaving Mills Co. Ltd.*, AIR 1971 SC 2039, p. 2045 : (1971) 1 SCC 337; *P. Radhakrishna Naidu v. Government of Andhra Pradesh*, AIR 1977 SC 854, p. 858 : (1977) 1 SCC 561; *Municipal Corporation, Ahmedabad v. Benttiraben Manilal*, AIR 1983 SC 537, p. 539 : (1983) 2 SCC 422; *Union of India v. Tulsiram Patel*, (1985) 3 SCC 398, p. 501 : AIR 1985 SC 1416; *Union of India v. Khazan Singh*, AIR 1992 SC 1535 : 1993 Supp (1) SCC 583, pp. 585, 586; *State of Karnataka v. Krishnaji Srinivas Kulkarni*, (1994) 2 SCC 558, p. 563; *M.T. Khan v. State of A.P.*, (2004) 2 SCC 267, p. 273 : AIR 2004 SC 2934; *Union of India v. Azadi Bachao Andolan*, AIR 2004 SC 1107, p. 1125 (para 46) : 2003 Supp (1) 220.
80. *Afzal Ullah v. State of U.P.*, AIR 1964 SC 264, p. 268 : 1964 (4) SCR 991; *Hukum-chand Mills Ltd. v. State of M.P.*, AIR 1964 SC 1329, p. 1332 : 1964 (6) SCR 857; *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*, AIR 1992 SC 1033, p. 1043 : 1992 (2) SCC 343; *Om Prakash v. State of U.P.*, (2004) 3 SCC 402, p. 409 : AIR 2004 SC 1896.
81. *Amritsar Improvement Trust v. Baldev Inder Singh*, AIR 1972 SC 182, p. 186 (pa-ras 18 and 19) : 1972 (1) SCC 165.
82. *Commissioner of Sales Tax U.P., Lucknow v. Anoop Wines Khuldabad, Allahabad*, AIR 1988 SC 2042, p. 2044 : 1988 Supp SCC 731.
83. *Union of India v. Modi Rubber Ltd.*, (1986) 4 SCC 66, pp. 74-77 : AIR 1985 SC 1992.
84. *Ibid.*

complied with because, by securing registration under the Act, the partners of the firm obtain the benefit of lower rates of assessment, and no tax is directly charged on the income of the firm.⁸⁵ And a dealer claiming benefit of a statutory exemption or concession from payment of sales tax on the ground that sales were made to registered dealers or the Government must prove that the sales were to registered dealers or the Government by production of declaration forms as required by the statute; and he is not entitled to the exemption if declaration forms are not produced.⁸⁶ Similarly, if a person wants a stage carriage permit, it is necessary for him to make an application in the manner and within the time as prescribed by the Motor Vehicles Act, 1939.⁸⁷ If a statute confers a concession or privilege and prescribes a mode of acquiring it, the mode so prescribed must be adopted as even affirmative words in such cases are construed imperative.⁸⁸ The principle applies even to procedural statutes and if a notice is required to be served before instituting an action the provision as to notice is construed as mandatory.⁸⁹ And if a person wants to exercise his right of appeal he must prefer his appeal in accordance with the statute conferring the right and if the statute requires filing of a certified copy of decree or order appealed against along with the memo of appeal, he must do so otherwise the appeal will become incompetent.⁹⁰ Similarly, any requirement as to sanction before

85. *Parekh Wadilal v. C.I.T., Nagpur*, AIR 1967 SC 448, p. 449 (para 4) : (1967) 1 SCR 998; *Steel Bros. v. C.I.T.*, AIR 1958 SC 315 : (1958) 33 ITR 1; *SRM Service v. CIT, Hyderabad*, AIR 1973 SC 1445, p. 1448 : 1974 (3) SCC 116. See also *Progressive Financers v. Commissioner of Income-tax*, JT 1997 (2) SC 729 : AIR 1997 SC 1021 : (1997) 3 SCC 79.

86. *Kedar Nath Jute Mfg. Co. Ltd. v. Commercial Tax Officer*, AIR 1966 SC 12 : 1965 (3) SCR 626; *Sales Tax Commissioner v. Prabhudayal Premnarin*, AIR 1988 SC 1775 : 1988 Supp SCC 729; *State of Andhra Pradesh v. Hyderabad Asbestos Cement Production Ltd.*, JT 1994(3) SC 456 : AIR 1994 SC 2364 : (1994) 5 SCC 100; *Phool Chand Gupta v. State of Andhra Pradesh*, AIR 1997 SC 914 : 1997 (1) Scale 419 : (1997) 2 SCC 591; *India Agencies (Regd.) Bangalore v. Additional Commissioner of Commercial Taxes*, (2005) 2 SCC 129, p. 141. For a similar case of concessional rate of octroi, see *Indian Aluminium Company Ltd. v. Thane Municipal Corporation*, AIR 1992 SC 53, pp. 57, 58 : 1992 Supp (1) SCC 480.

87. *Shrinivasa Reddy v. State of Mysore*, AIR 1960 SC 350 : 1960 (2) SCR 130.

88. *Edwards Ramia Ltd. v. African Woods Ltd.*, (1960) 1 All ER 627, p. 630 (PC). But see *Krishna Kumar Mediratta v. Phulchand Agarwala*, AIR 1977 SC 984, pp. 986, 987 : (1977) 2 SCC 5. (In this it has been held that the requirement of deposit of fees along with the application for a prospecting licence under Rule 9(2) of the Mineral Concession Rules, 1960 is directory).

89. See cases in notes 24 to 26, p. 408 under title 6(c) 'Use of negative words'.

90. *Jagat Dhish Bhargava v. Jawahar Lal Bhargava*, AIR 1961 SC 832 : 1961 (2) SCR 918; *State of U.P. v. C. Tobit*, AIR 1958 SC 414 : 1958 SCR 1275. But the requirement of filing three copies of record for preferring a Letters' Patent Appeal under the Punjab High Court Rules has been held to be directory; *State of Punjab v. Shamlal Murari*, AIR 1976 SC 1177 : (1977) 1 SCC 719.

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initiation of any criminal proceeding has been held to be mandatory.⁹¹ But procedural provisions, which are merely technical and have no special object behind them may be held directory if substantive requirements have been fulfilled.⁹²

(k) Enabling words, e.g., 'may', 'it shall be lawful', 'shall have power'. Power coupled with duty

Ordinarily, the words 'May' and 'It shall be lawful' are not words of compulsion. They are enabling words and they only confer capacity, power or authority and imply discretion.⁹³ "They are both used in a statute to indicate that something may be done which prior to it could not be done".⁹⁴ The use of words 'Shall have power' also connotes the same idea.⁹⁵

For instance, the Supreme Court has held that the use of the word 'may' in the Explanation to section 162 of the CrPC makes it clear that it is not every omission or discrepancy that amounts to a material contradiction, and that the word 'may' introduces an element of discretion which has to be exercised by the court to decide whether it is a case of a contradiction, or a material contradiction, which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.⁹⁶ Similarly, the Supreme Court relied on the fact that section 14 of the Kerala Abkari Act, 1902, uses the expression 'the Commissioner may', 'with the approval of the Government', and that rule 4 of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975, also uses the expressions 'the Commissioner may', 'if he is satisfied' after making such enquiries as 'he may consider necessary', and 'licence may be issued', to hold that all these expressions confer discretionary powers on the Commissioner as well as the State Government, and that the power is not coupled with duty.⁹⁷

91. *Gour Chandra Rout v. Public Prosecutor*, AIR 1963 SC 1198 : 1963 Supp (2) SCR 447. For difference between requirement of a complaint in writing by a prescribed officer and sanction, see *Electrical Manufacturing Co. v. D.D. Bhargava*, AIR 1968 SC 247, pp. 249, 250 : 1968 (1) SCR 394.

92. *Mangalore Chemicals & Fertilisers Ltd. v. Deputy Commissioner of Commercial Taxes*, AIR 1992 SC 152, pp. 157, 158 : 1992 (3) JT 482 : 1992 Supp (1) SCC 21.

93. *Madanlal Fakrichand Dudhediya v. S. Changdeo Sugar Mills*, AIR 1962 SC 1543, p. 1557 : 1962 Supp (3) SCR 973; *Chinnamar Kathiam v. Ayyavoo*, AIR 1982 SC 137, p. 140 : 1982 (1) SCC 159.

94. *Ibid.*

95. *Commissioner of Police v. Gordhandas Bhauji*, AIR 1952 SC 16, p. 20 : 1952 SCR 135.

96. *Shyamal Ghosh v. State of West Bengal*, (2012) 7 SCC 646, p. 674.

97. *State of Kerala & Ors. v. Kandath Distilleries*, (2013) 6 SCC 573, p. 584.

The Legislature may also use other form of words to confer discretion. For example, the words 'nothing is this Article shall prevent the State from making any provision for the reservation' in favour of backward class of citizens as used in Article 16(4) of the Constitution have been held to be only enabling not imposing any constitutional duty nor conferring any fundamental right for reservation.¹

Generally a power conferred on an authority by use of the word 'may' to rule on a particular matter does not confer an exclusive jurisdiction and take away the jurisdiction of some other authority to decide the same matter. Thus the power conferred by section 16 of the Arbitration and Conciliation Act, 1996 on the arbitral tribunal that it 'may rule' on any objection as to existence of an arbitration agreement does not exclude the jurisdiction of the Chief Justice of India or his designate to decide that question, if need be, in a petition under section 11 seeking appointment of arbitrator.²

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,³ or the manner in which it may only be exercised.⁴ In other words the legal and factual context in which the power is to be exercised may combine the power with an obligation to exercise it even though it is conferred by use of the word 'May'.⁵ As stated by COTTON, L.J.: "'May' can never mean must, so long as the English language retains its meaning; but it gives a power and then it may be a question, in what cases, when any authority or body has a power given it by the word 'may', it becomes its duty to exercise that power."⁶ As observed by LORD CAIRNS: "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

1. *Ajit Singh v. State of Punjab*, JT 1999 (9) SC 542, p. 543 : 1999 (7) Scale 395 : (1999) 7 SCC 209.

2. *Wellington Association v. Kirit Mehta*, AIR 2000 SC 1379, p. 1383 : (2000) 4 SCC 272.

3. *Alcock Ashdown and Company v. Chief Revenue Authority*, AIR 1923 PC 138, p. 144; *Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd.*, AIR 1950 SC 218, pp. 220, 221 : 1950 SCR 536; *Commissioner of Police v. Gordhandas*, supra, p. 21, *Bhaiya Punjalal v. Bhagwat Prasad*, AIR 1963 SC 120, p. 127 : (1963) 3 SCR 312; *Ramji Missar v. State of Bihar*, AIR 1963 SC 1088, p. 1092, 1093 : 1963 Supp (2) SCR 745; *State of U.P. v. Jogendra Singh*, AIR 1963 SC 1618, p. 1620 : 1964 (2) SCR 197; *Sardar Govind Rao v. State of Madhya Pradesh*, AIR 1965 SC 1222 : 1964 SCN 269 : 1965 MPLJ 566, p. 570 (SC). See further *Leach v. The Queen*, (2007) 81 ALJR 598, p. 608 (para 38) (The word 'may' is sometimes used not to confer a discretion but a power to be exercised upon the satisfaction of the matters described in the provision).

4. *Societe De Traction v. Kamani Engineering Co. Ltd.*, AIR 1964 SC 558, p. 562 : 1964 (3) SCR 116.

5. *Official Liquidator v. Dharti Dhan*, AIR 1977 SC 740, p. 744 : (1977) 2 SCC 166.

6. *In re, Nichols v. Baker*, 59 LJ Ch 661, p. 663.

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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."⁷ It was further pointed out by LORD CAIRNS: "Where a power is deposited with a public officer for the purpose of being used for the benefit of persons specifically pointed out with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."⁸ LORD BLACKBURN stated in the same case: "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."⁹ In the words of BEG, J.: "If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfilment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner."¹⁰ Following these principles it was held by the Privy Council interpreting section 51 of the Income-tax Act, 1918, that in case there was a serious point of law to be considered there was a duty on the Chief Revenue Authority to state a case to the High Court.¹¹ This principle was also applied by the Supreme Court in interpreting section 57 of the Stamp Act, 1899, and it was held that it imposes a duty on the Chief Controlling Revenue Authority to make a reference to the High Court when an important question of law arises for consideration.¹² And in construing rule 63 of the Central Provinces and Berar Motor Vehicles Rules, 1940 which reads 'the authority by which a permit is renewed, may likewise renew any counter-signature of the permit', the

7. *Julius v. Lord Bishop of Oxford*, (1874-80) All ER Rep 43, p. 47 : (1880) 5 AC 214 (HL). See further *State (Delhi Administration) v. I.K. Nangia*, AIR 1979 SC 1977, p. 1980 : (1980) 1 SCC 258; *Tara Prasad Singh v. Union of India*, AIR 1980 SC 1682, p. 1698 : (1980) 4 SCC 179; *Ambica Quarry Works v. State of Gujarat*, (1987) 1 SCC 213, p. 218 : AIR 1987 SC 1073; *Superintending Engineer, Public Health v. Kuldeep Singh*, AIR 1997 SC 2133, p. 2137 : (1997) 9 SCC 199.

8. *Ibid*, p. 49, referred to in *L. Hirday Narain v. I.T.O. Bareilly*, AIR 1971 SC 33, p. 36 : (1970) 2 SCC 355.

9. *Ibid*, p. 59; referred to in *Punjab Sikh Regular Motor Service, Raipur v. R.T.A., Raipur*, AIR 1966 SC 1318 : (1996) 2 SCR 221; *Hirday Narain v. I.T.O. Bareilly*, *supra*, p. 36; *Ambica Quarry Works v. State of Gujarat*, *supra*; *Sub Committee of Judicial Accountability v. Union of India*, AIR 1992 SC 320, p. 352 : 1991 (4) SCC 699.

10. *Official Liquidator v. Dharti Dhan*, AIR 1977 SC 740, p. 745 : (1977) 2 SCC 166.

11. *Alcock Ashdown & Company v. Chief Revenue Authority*, AIR 1923 PC 138. See further *Jaswant Rai v. Central Board of Direct Taxes and Revenue*, AIR 1998 SC 1891, p. 1894 : (1998) 5 SCC 77 (Power of Commissioner under section 273A of the Income-tax Act 1961 is coupled with a duty).

12. *Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd.*, AIR 1950 SC 218 : 1950 SCR 536; *Banarasidas Ahluwalia v. Chief Controlling Revenue Authority, Delhi*, AIR 1968 SC 497, p. 502 : 1968 (2) SCR 685.

Supreme Court held that 'may' in the context was obligatory: that is to say the exercise of power under this rule depends not upon the discretion of the authority but upon proof of the particular case requiring renewal of the counter-signature.¹³ Further in dealing with section 35 of the Income-tax Act, 1922, which provided that the authorities 'may rectify any mistake apparent on the face of the record', the Court held that authorities were bound to exercise the power if conditions for its exercise were shown to exist by a person interested. In holding so, SHAH, J., observed: "Even if the words used in the statute are *prima facie* enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private—of a citizen."¹⁴ Similarly, a power to comply with natural justice before taking an adverse action against an employee conferred by *prima facie* enabling words will be construed as mandatory.¹⁵ For instance, section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976, provides that the competent authority 'may', by notice in writing, order a person in possession of land vested in the Government to surrender possession of the same. However, the word 'may' has been understood as 'shall', and the requirement of giving notice was held to be mandatory on the ground that the Legislature could not have intended that a landholder be dispossessed of his property under section 10(6) of the Act for non-compliance of an order under section 10(5), without having received notice of the same.¹⁶

Another illustration is to be found in the interpretation of section 489 of the Bombay Municipal Corporation Act, 1888. Section 354(1) of the Act provides that the Commissioner may, by written notice, require the owner or occupier of any structure in a ruinous condition to pull down, secure or repair such structure and to prevent all cause of danger therefrom. Section 489 of the Act provides, *inter-alia*, that if an order is made by the Commissioner by written notice, and the order is not complied with, the Commissioner 'may' take such measures or cause such work to be executed as, in his opinion, is necessary for giving due effect to the order. The Supreme Court noted that the primary object of section 354 is to safeguard the public from the danger of being forced to live in such a structure in a ruinous condition. Hence, though a plain reading of section 489 gives an impression that it is only an enabling provision, keeping in view the purpose of its enactment and the setting in which it is placed, the Court held that the Commissioner is duty bound to ensure that the written notice given to the

13. *Punjab Sikh Regular Motor Service, Raipur v. R.T.A., Raipur*, AIR 1966 SC 1318 : 1966 (2) SCR 221.

14. *L. Hirday Narain v. I.T.O., Bareilly*, AIR 1971 SC 33, p. 36 : (1970) 2 SCC 355, p. 359.

15. *Wasim Beg v. State of Uttar Pradesh*, AIR 1998 SC 1291, p. 1296 : 1998 (3) SCC 321.

16. *State of Uttar Pradesh v. Hari Ram*, (2013) 4 SCC 280, p. 298.

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owner or occupier under section 354(1) is implemented in letter and spirit. The Court further held that the duty cast on the Commissioner is in the nature of a public law obligation and, in an appropriate case, the Court can issue directions for its enforcement.¹⁷

A power conferred by the Environmental Protection Act, 1986 having regard to its object cannot be treated as power simpliciter, but it is a power coupled with a duty and so it is the duty of the State to make sure that the conditions or directions under the Act are fulfilled.¹⁸

A Government memorandum providing that in the event of the candidate who is appointed to a statutory post resigning within six months 'the reserved list may be operated' to fill the vacancy where it may not be possible to keep the post vacant till the completion of fresh recruitment, when read along with the relevant statutory provision that the vacancy 'shall be filled up by the Central Government as soon as practicable' was construed to confer a discretion coupled with a duty to appoint the person next in order of merit from the approved reserved list to the post becoming vacant.¹⁹ Power conferred on the State Government to constitute an Advisory Committee under section 3 of the Uttar Pradesh Sheera Niyantran Adhiniyam, 1964 in terms 'may by notification, in the Gazette constitute' was held to be coupled with a duty and it was obligatory on the Government to constitute Advisory Committee.²⁰

When permissive words are employed by the Legislature to confer a power on a Court to be exercised in the circumstances pointed out by the statute, it becomes the duty of the Court to exercise that power on proof of those circumstances. As pointed out by JERVICES, C.J.: "When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority, when the case arises and its exercise is duly applied for by a party interested and having a right to make that application."²¹ "The use of permissive words in such cases", said JAMES, L.J. "is the usual courtesy of Legislature in dealing with the judicature".²² The words 'it shall be lawful' may be used for the purpose of conferring a new jurisdiction which was not lawful for the authority concerned to exercise till then and when a case for the exercise of that

17. *Makarand Dattatreya Sugavkar v. Municipal Corporation of Greater Mumbai & Ors.*, (2013) 9 SCC 136, p. 149.

18. *N.D. Jayal v. Union of India*, AIR 2004 SC 867, p. 878 (para 24) : (2004) 9 SCC 362.

19. *A.P. Aggarwal v. Govt. of National Capital Territory of Delhi*, AIR 2000 SC 206, p. 207 : (2000) 1 SCC 600.

20. *Dhampur Sugar Mills Ltd. v. State of U.P.*, (2007) 8 SCC 338 para 52 : AIR 2008 SC 48 para 45.

21. *MacDougall v. Paterson*, (1851) 11 Ch 755, p. 773 : 138 ER 672, p. 679.

22. *Re, Neath and Brecon Ry. Co.*, (1874) LR 9 Ch 263, p. 264.

jurisdiction is made out, it would be the duty of the said authority to grant the relief and not to refuse to exercise its authority merely at its discretion.²³ As observed by AYYANGER, J.: "Though the word 'may' might connote merely an enabling or a permissive power in the sense of the usual phrase 'it shall be lawful', it is also capable of being construed as referring to a compellable duty, particularly when it refers to a power conferred on a court or other judicial authority."²⁴ It has, therefore, been held that the words 'an order under this Act may be made by any court' as they occur in section 11 of the Probation of Offenders Act, 1958, imposed a duty to pass an order under the Act subject to conditions and limitations imposed by the Act and that a court had no unfettered discretion in refusing to pass an order when an occasion to pass the same arose within the four corners of the Act.²⁵ Similarly, the words 'the court may pass a decree for eviction', have been construed as not conferring a discretion for refusing to pass a decree where a landlord in a suit has proved the fulfilment of all conditions entitling him to possession, and the court in such cases is bound to pass a decree in his favour in spite of the use of the word 'may'.²⁶ Further, the words 'the Magistrate may take cognizance of any cognizable offence' in section 190(1)(b) of the Code of Criminal Procedure, 1973, have been construed to mean 'must take cognizance' leaving no discretion to the Magistrate.²⁷ And so, a rule requiring that 'the court may engage a counsel to defend the person' in a capital sentence case was held to cast an obligatory duty on the court to provide a counsel if the conditions of the rule were satisfied.²⁸ Similarly, though rule 2-A(i) of the High Court of Karnataka Rules, 1959, provides that the Court 'may' appoint any advocate from a panel to represent an accused in a criminal case if he *inter alia*, has insufficient means, the expression 'may' was interpreted as laying down a mandatory direction to the court to engage advocate for the accused if the conditions in the rule are satisfied.²⁹

When an Act conferring the power does not mention the conditions or the circumstances in which the power is to be exercised it will be construed as discretionary and directory. On this principle section 442 of the Companies Act, 1956, which empowers that the court 'may stay or

23. *Shelly v. London County Council*, (1948) 2 All ER 898, p. 901 (HL).

24. *Ramji Missar v. State of Bihar*, AIR 1963 SC 1088, p. 1092 : 1963 Supp (2) SCR 745.

25. *Ibid*, p. 1093.

26. *Bhaiya Punjalal v. Bhagvat Prasad*, AIR 1963 SC 120, p. 127 : 1963 (3) SCR 312.

27. *Sub-Divisional Magistrate, Delhi v. Ram Kali (Mst.)*, AIR 1968 SC 1, p. 5. *Seefur-ther Jamatraj Kewalji Govani v. State of Maharashtra*, AIR 1968 SC 178, p. 181 : (1967) 3 SCR 415.

28. *Bashira v. State of U.P.*, AIR 1968 SC 1313 : 1969 (1) SCR 32.

29. *Chalivogowda & Ors. v. State*, (2012) 13 SCC 538, p. 544.

restrain' a proceeding against a company after the presentation of a winding up petition, has been construed to be discretionary and directory.³⁰ But even in cases where the conditions or circumstances are not expressly indicated by the Act, a duty may arise to exercise the power conferred if it could be shown that on facts of the case exercise of the power would alone carry out the object of the Act. This is so because judicial power has to be justly and properly exercised.³¹

The word 'may' may also be used in the sense of 'shall' or 'must' by the Legislature while conferring power on a high dignitary.³² When the context shows that the power is coupled with an obligation, "the word 'may' which denotes discretion should be construed to mean a command".³³ The use of the word 'may' in such cases is "out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed".³⁴ It was, therefore, held that the words 'the Government may, in respect of a gazetted Government servant on his own request, refer his case to the Tribunal,' in the context of Rule 4(2) of the U.P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, conferred a power coupled with an obligation on the Governor to exercise the power when a request was made by a gazetted Government servant in that behalf and that the Governor had no discretion in the matter.³⁵ Rule 30 of the Rajasthan Minor Mineral Concession Rules, 1955, which is to the effect that 'a mining lease may be granted for a period of five years unless the applicant himself desires a shorter period', has been construed to confer no discretion on the Government to fix a period less than five years if the applicant did not desire a shorter period. A proviso to the rule dealing with renewal has been similarly construed.³⁶ Section 5(3) of the Central Provinces and Berar Revocation of Land Revenue Exemptions Act, 1948 provided that 'the State Government may make a grant of money or pension—for suitable maintenance of any family of a descendant from a former ruling Chief'. In construing this provision it was held that except in those cases where there were good grounds for not granting the pension, the Government was bound to make a grant to those who fulfilled the required condition and the word 'may' had to be read as 'must'. It was also held that the

30. *Official Liquidator v. Dharti Dhan*, AIR 1977 SC 740, p. 744 : (1977) 2 SCC 166.

31. *Ibid*, p. 745.

32. *State of U.P. v. Jogendra Singh*, AIR 1963 SC 1618, p. 1620 : 1964 (2) SCR 197.

33. *Ibid*; *Rangaswami, Textile Commissioner v. Sagar Textile Mills (P.) Ltd.*, AIR 1977 SC 1516, p. 1517 : (1977) 2 SCC 578.

34. *State of U.P. v. Jogendra Singh*, AIR 1963 SC 1618, p. 1620 : 1964 (2) SCR 197.

35. *Ibid*.

36. *State of Rajasthan v. Harishanker Rajendrapal*, AIR 1966 SC 296 : 1965 (3) SCR 402.

Act laid a duty to be performed in a judicial manner.³⁷ Clause 20 of the Cotton Textiles (Central) Order, 1948 authorised the Textiles Commissioner to issue directions to manufacturers regarding the classes or specifications of cloth or yarn and the maximum and the minimum quantities thereof which they shall or shall not produce 'during such periods as may be specified in the directions'. It was held that the power conferred to issue directions is coupled with the duty to specify the particular period for which the directions shall be operative and directions issued without specifying the period will be *ultra vires*.³⁸ But, 'may' will not be construed as mandatory if such a construction would defeat the purpose of the Act or would lead to unjust results.³⁹ Further, if the word 'may' was substituted in place of 'shall' during the Bill's progress in Parliament, it may not be possible to construe 'may' as 'shall'.⁴⁰

The principle that the word 'may' is sometimes used in the sense of shall or must, while conferring power on a high dignitary out of deference to him, has also been applied when power is conferred on Parliament to enact a law. Interpreting Article 124(5) of the Constitution, which provides that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge, it has been held, that it is an enabling provision for 'the procedure for presentation of an address' but it is a compulsive provision for providing the procedure 'for the investigation and proof of the misbehaviour or incapacity of a Judge'.⁴¹

(1) Words conveying discretion; as he deems fit; think necessary; consider necessary

Where a statute provides for the grounds on which a person is entitled to a certain relief and confers power on a Tribunal to pass orders 'as it deems fit', the exercise of the power to grant the relief is not dependent upon the discretion of the Tribunal.⁴² In a case where the tenancy had terminated

37. *Sardar Govindrao v. State of M.P.*, AIR 1965 SC 1222 : 1965 (1) SCR 678, distinguished in *Sahodara Devi v. Govt. of India*, AIR 1971 SC 1599 : 1972 (3) SCC 156. (Case dealing with Rule 27 of the Cantonment Land Administration Rules, 1937).

38. *Rangaswami, Textile Commissioner v. Sagar Textile Mills (P) Ltd.*, AIR 1977 SC 1516 : (1977) 2 SCC 578.

39. *Chief Settlement Commissioner v. Ram Singh*, (1987) 1 SCC 612, p. 614 : AIR 1987 SC 1834.

40. *CIT v. P.K. Noorjahan*, AIR 1999 SC 1600, p. 1601 : (1997) 11 SCC 198.

41. *Sub Committee of Judicial Accountability v. Union of India*, AIR 1992 SC 320, p. 352 : 1991 (4) SCC 699.

42. *R. v. Boteler*, (1864) 33 LJMC 101, p. 103; referred to in *Raja Ram Mahadeo Paranjype v. Aba Maruti Mali*, AIR 1962 SC 753, p. 757 : 1962 Supp (1) SCR 739.