Smt. Bachahan Devi & Anr vs Nagar Nigam, Gorakhpur & Anr on 5 February, 2008

Equivalent citations: AIR 2008 SUPREME COURT 1282, 2008 AIR SCW 1326, 2008 (3) ALL LJ 515, (2008) 148 DLT 428, (2008) 2 ALLMR 299 (SC), (2008) 1 CLR 439 (SC), (2008) 2 CTC 790 (SC), 2008 (5) SRJ 363, 2008 (3) SRJ 276, (2008) 64 ALLINDCAS 254 (SC), 2008 (64) ALLINDCAS 254, 2008 (2) ALL MR 299, 2008 (1) CLR 439, 2008 (2) CTC 790, 2008 (2) HRR 309, 2008 (12) SCC 372, 2008 (2) SCALE 224, (2008) 104 REVDEC 609, (2008) 1 ALL RENTCAS 677, (2008) 3 ICC 159, (2008) 71 ALL LR 166, (2008) 2 CIVILCOURTC 136, (2008) 3 MAD LJ 303, (2008) 2 MAD LW 674, (2008) 4 PUN LR 5, (2008) 2 RECCIVR 367, (2008) 2 SCALE 224, (2008) 2 ANDH LT 49, (2008) 2 ALL WC 1931, (2008) 3 CAL HN 229

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Bench: Arijit Pasayat, Lokeshwar Singh Panta

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           CASE NO.:
Appeal (civil)  992 of 2008

PETITIONER:
Smt. Bachahan Devi & Anr

RESPONDENT:
Nagar Nigam, Gorakhpur & Anr

DATE OF JUDGMENT: 05/02/2008

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
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J U D G M E N T CIVIL APPEAL NO 992 OF 2008 (Arising out of S.L.P (C) No. 24576 of 2004) Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by learned Single Judge of the Allahabad High Court setting aside the order passed by the First Appellate Court, and directing it to take decision on merit.

3. Essential facts are as follows:

> Respondent no.1 as plaintiff no.1 along with one Gabbu filed Suit No.23 of 1960 for declaration that the land in dispute belongs to it and the defendants have no concern with the property. Assertion was that the property in question had vested in it in view of the notification issued by the State Government after abolition of Zamindari. The suit was decreed on 17.1.1972. The trial court granted relief of permanent injunction in respect of suit property as described in the Schedule and also declared that plaintiff no.1 is the owner of the said plot. The decree was challenged by way of appeal by the appellants. During the pendency of the appeal, an application to amend the written statement was allowed by the Appellate Court. Thereafter certain additional issues were framed. The Appellate Court was of the view since the written statement had been amended during the pendency of the appeal, the matter should be remanded to the trial court for fresh decision. Challenging the order passed, an appeal was filed by respondent no.1 before the High Court. Stand of the plaintiff no.1 before the High Court was that the Appellate Court committed an illegality in remanding the matter for fresh consideration. It was submitted that the Appellate Court could have exercised its discretion under Order XLI Rule 25 of the Code of Civil Procedure, 1908 (in short 'the Code') and it could have recorded evidence itself. It was the opinion that the same was necessary for disposal of the appeal.

4. Stand of the defendants on the contrary was that two courses were available to the Appellate Court. First was to pass the remand order after setting aside the findings. The said course has been adopted. The other course was to call for findings on the issue by remitting it to the trial court. The High Court was of the view that the order of remand should be passed rarely and in the instant case that was not the case. That being so, the High Court set aside the order of the First Appellant Court and the matter was remanded to it for decision of the appeal on merit.

5. Learned counsel for the appellant submitted that the true scope and ambit of order XLI Rule 25 has been improperly pressed into service. In the background of the factual position, the order of the High Court cannot be maintained. The High Court, however, noted that if the Appellate Court is of the opinion that the evidence is insufficient, the matter may be remanded to the trial court for recording evidence in terms of Order XLI Rule 25 of the Code.

6. In response, learned counsel for the respondent submitted that it will not be in the interest of the parties to go on litigating and for that purpose the only course which was available has been adopted. Strong reliance was placed on a decision of this Court in Pasupuleti Venkateswarlu v. The Motor and General Traders (1975 (1) SCC 770).

7. Order XLI Rule 25 of the Code reads as follows:

> "ORDER XLI: APPEALS FROM ORIGINAL DECREES

> 25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.--Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]."

8. There is no scope for any doubt that in a suit as well as the first appeal all disputed facts are open for decision. A point of fact is not to be decided in second appeal where only a substantial question of law is to be looked into. There is some amount of controversy as to whether the provisions are mandatory, notwithstanding the fact that the word 'may' has been used. The First Appellate Court is the last Court of facts.

9 Under Order XLI Rule 25, if it appears to the Appellate Court that any fact essential for the decision in the suit was to be determined, it could frame an issue on the point and refer the same for trial, to the Court from whose decree the appeal is preferred and in such case, shall direct such court to take additional evidence required. The order of remand should not be passed as a matter of routine. The First Appellate Court which has the power to analyse the factual position can decide the issue and the additional issues. In the instant case the First Appellate Court, inter alia, observed as follows:

> "As such, it would not be proper for the first Appellate Court in such matter to itself record the evidence and to give its findings in regard to newly created issues. The Hon'ble High Court has also held that in the present matter under the provision of Order 41 Rule 25 of Civil Procedure Code, becomes mandatory (shall) though in this provision, the word 'may' has been used. No doubt in the present matter also the Appellate Court has framed 6 additional issues which are legal in nature and also factual, with the result if the Appellate Court gives its findings relating to said legal and factual issues after itself recording (receiving) evidence then the aggrieved party would be prevented from his right of filing first appeal. Accordingly, the aforesaid ratio laid down by the Hon'ble High Court is fully applicable in the present matter."

10 A bare reading of the provision makes it clear that the same comes into operation when the Court, from whose decree the appeal is preferred, has omitted to frame or try and issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order XLI Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no

compulsion on the part of the appellate Court to do so. This is clear from the use of the expression 'may'. But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor. Requirement for recording the finding of facts and the reasons disclosed from the facts is because the appellate court at the first instance has come to the conclusion that the lower court has omitted to frame or try any issue or to determine any question of fact material for the right decision of the suit on merits. It has to be noted that where a finding is called for on the basis of certain issues framed by the appellate court, the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of the first instance. This position was highlighted in Gogula Gurumurthy and Others v. Kurimeti Ayyappa (1975(4) SCC 458), where it was inter-alia observed in para 5 as follows:

> "We consider that when a finding is called for on the basis of certain issues framed by the appellate Court the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of first instance. We find the same view taken in Gopi Nath Shukul v. Sat Narain Shukul (AIR 1923 All 384)."

11. The delicate question that remains to be examined is what is the position in law when both the expression "shall" and "may" are used in the same provision.

12. Mere use of word 'may' or 'shall' is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue.

13. Several statutes confer power on authorities and officers to be exercised by them at their discretion. The power is in permissive language, such as, 'it may be lawful', 'it may be permissible', 'it may be open to do', etc. In certain circumstances, however, such power is 'coupled with duty' and must be exercised.

14. More than a century ago, in Baker, Re, (1890) 44 Ch D 262, Cotton, L.J. stated;

I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be question in what cases, where a Judge has a power given by him by the word 'may', it becomes his duty to exercise it.

(emphasis supplied)

15. In the leading case of Julius v. Lord Bishop of Oxford (1880) 5 AC 214:49 LJ QB 580:(1874-80) All ER Rep 43 (HL), the Bishop was empowered to issue a commission of inquiry in case of alleged misconduct by a clergyman, either on an application by someone or suo motu. The question was whether the Bishop had right to refuse commission when an application was made. The House of Lords held that the Bishop had discretion to act pursuant to the complaint and no mandatory duty was imposed on him.

16. Earl Cairns, L.C., however, made the following remarkable and oft-quoted observations:

> "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power and they do not of themselves do more than confer a faculty or power. But 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 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."

17. Explaining the doctrine of power coupled with duty, de Smith, ('Judicial Review of Administrative Action', 1995; pp.300-01) states:

> "Sometimes the question before a court is whether words which apparently confer a discretion are instead to be interpreted as imposing duty. Such words as 'may' and 'it shall be lawful' are prima facie to be construed as permissive, not imperative. Exceptionally, however, they may be construed as imposing a duty to act, and even a duty to act in one particular manner."

(emphasis supplied)

18. Wade also says (Wade & Forsyth; 'Administrative Law:

> 9th Edn.): p.233):
>
> "The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in

> which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances, prescribed by the Act, coupled with a duty to exercise it in a proper case."

(emphasis supplied)

19. In the leading case of Padfield v. Minister of Agriculture, Fisheries & Food 1968 AC 997 : (1968) 1 All ER 694 : (1968) 2 WLR 924 (HL), the relevant Act provided for the reference of a complaint to a committee of investigation 'if the Minister so directs'. The Minister refused to act on a complaint. It was held that the Minister was required to act on a complaint in absence of good and relevant reasons to the contrary.

20. Likewise, it was held that the licensing authorities were bound to renew licences of cab drivers if the prescribed procedural requirements had been complied with [R.v. Metropolitan Police Commissioner (1911) 2 QB 1131]. Similarly, local authorities were held bound to approve building plans if they were in conformity with bye-laws [R.V. Nescastle-upon- Tyne Corporation (1889) 60 LT 963]. Again, the court was required to pass a decree for possession in favour of a landlord, if the relevant grounds existed [Ganpat Ladha v. Shashikant (1978 (2) SCC 573).

21. In Alcock v. Chief Revenue Authority 50 IA 227 : AIR 1923 PC 138, the relevant statute provided that if in the course of any assessment a question arises as to the interpretation of the Act, the Chief Revenue Authority 'may' draw up a statement of the case and refer it to the High Court. Holding the provision to be mandatory and following Julius, Lord Phillimore observed:

> "When a capacity or power is given to a public authority, there may be circumstance which couple with the power of duty to exercise it."

22. In Commissioner of Police v. Gordhandas Bhanji (1952 (1) SCR 135), Rule 250 of the Rules for Licensing and Controlling Theatres and Other Places of Public Amusement in Bombay City, 1884 read as under:

> "The Commissioner shall have power in his absolute discretion at any time to cancel or suspend any licence granted under these Rules."

23. It was contended that there was no specific legal duty compelling the Commissioner to exercise the discretion. Rule 250 merely vested discretion in him but it did not require him to exercise the power. Relying upon the observations of Earl Cairns, L.C., the Court observed:

> "The discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the convenience, safety, morality and the welfare of the public at large. An enabling power of his kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or

shelved nor can it be evaded.... "

(emphasis supplied)

24. In Ratlam Municipality v. Vardichan (1980 (4) SCC 162), some residents of Ratlam Municipality moved the Sub- Divisional Magistrate under Section 133 of the Code of Criminal Procedure, 1973 for abatement of nuisance by directing the municipality to construct drain pipes with flow of water to wash the filth and stop the stench. The Magistrate found the facts proved and issued necessary directions. The Sessions Court, in appeal, reversed the order. The High Court, in revision, restored the judgment of the Magistrate and the matter was carried to the Supreme Court.

25. This Court summarized the principle thus:

> "The key question we have to answer is whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the court's power to force public bodies under public duties to implement specific plans in response to public grievances."

26. Holding the provision obligatory, the Court observed:

> "Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the sub-Divisional Magistrate, Ratlam, has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act.... This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding.
>
> (emphasis supplied)

27. We do not wish to refer to other cases on the point. We are, however, in agreement with the observations of Earl Cairns, L.J. in Julius referred to above wherein His Lordship stated:

> "Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and 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." (See M/s. Dhampur Sugar Mills Ltd. v. State of U.P. 2007(10) SCR 245)

28. The use of the words `shall' in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of

the statute are punctiliously followed, the proceeding or the outcome of the proceeding would be invalid. On the other hand, it is not always correct to say that when the word `may' has been used, the statute is only permissible or directory in the sense that non-compliance with those provisions will not render the proceeding invalid.

29. Words are the skin of the language. The language is the medium of expressing the intention and the object that particular provision or the Act seeks to achieve. Therefore, it is necessary to ascertain the intention. The word `shall' is not always decisive. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. No universal principle of law could be laid in that behalf as to whether a particular provision or enactment shall be considered mandatory or directory. It is the duty of the court to try to get at the real intention of the legislature by carefully analysing the whole scope of the statute or section or a phrase under consideration. The word `shall', though prima facie gives impression of being of mandatory character, it requires to be considered in the light of the intention of the legislature by carefully attending to the scope of the statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. In that behalf, the court is required to keep in view the impact on the profession, necessity of its compliance; whether the statute, if it is avoided, provides for any contingency for non-compliance; if the word `shall' is construed as having mandatory character, the mischief that would ensure by such construction; whether the public convenience would be subserved or public inconvenience or the general inconvenience that may ensue if it is held mandatory and all other relevant circumstances are required to be taken into consideration in construing whether the provision would be mandatory or directory.

30. The question, whether a particular provision of a statute, which, on the face of it, appears mandatory inasmuch as it used the word 'shall', or is merely directory, cannot be resolved by laying down any general rule, but depends upon the facts of each case particularly on a consideration of the purpose and object of the enactment in making the provision. To ascertain the intention, the court has to examine carefully the object of the statute, consequence that may follow from insisting on a strict observance of the particular provision and, above all, the general scheme of the other provisions of which it forms a part. The purpose for which the provision has been made, the object to be attained, the intention of the legislature in making the provision, the serious inconvenience or injustice which may result in treating the provision one way or the other, the relation of the provision to other consideration which may arise on the facts of any particular case, have all to be taken into account in arriving at the conclusion whether the provision is mandatory or directory. Two main considerations for regarding a rule as directory are: (i) absence of any provision for the contingency of any particular rule not being complied with or followed, and (ii) serious general inconvenience and prejudice to the general public would result if the act in question is declared invalid for non-compliance with the particular rule.

31. It is well-settled that the use of word `may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word `may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word `may', the court has to consider various factors, namely, the

object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well-settled that where the word `may' involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word `may' should be interpreted to convey a mandatory force. As a general rule, the word `may' is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word 'shall', which ordinarily is imperative as it imposes a duty. Cases however, are not wanting where the words `may' `shall', and `must' are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word `shall' or `may' depends on conferment of power. Depending upon the context, 'may' does not always mean may. 'May' is a must for enabling compliance of provision but there are cases in which, for various reasons, as soon as a person who is within the statute is entrusted with the power, it becomes his duty to exercise that power. Where the language of statute creates a duty, the special remedy is prescribed for non-performance of the duty.

32. If it appears to be the settled intention of the legislature to convey the sense of compulsion, as where an obligation is created, the use of the word 'may' will not prevent the court from giving it the effect of Compulsion or obligation. Where the statute was passed purely in public interest and that rights of private citizens have been considerably modified and curtailed in the interests of the general development of an area or in the interests or removal of slums and unsanitary areas. Though the power is conferred upon the statutory body by the use of the word 'may' that power must be construed as a statutory duty. Conversely, the use of the term 'shall' may indicate the use in optional or permissive sense. Although in general sense 'may' is enabling or discretional and `shall' is obligatory, the connotation is not inelastic and inviolate." Where to interpret the word `may' as directory would render the very object of the Act as nugatory, the word 'may' must mean 'shall'.

33. The ultimate rule in construing auxiliary verbs like `may' and `shall' is to discover the legislative intent; and the use of words `may' and 'shall' is not decisive of its discretion or mandates. The use of the words `may' and `shall' may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect. The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed.

34. Obviously where the legislature uses two words may and shall in two different parts of the same provision prima facie it would appear that the legislature manifested its intent on to make one part directory and another mandatory. But that by itself is not decisive. The power of court to find out whether the provision is directory or mandatory remains unimpaired.

35. One additional factor, which may not have an effect on the appeal is to be noted. The First Appellate Court after judgment of the High Court dated 4.2.2005 disposed of the appeal and

remitted the matter to the trial Court. The stay order of this Court was passed on 7.2.2005.

36. It is to be noted that the High Court in the impugned judgment has noted that if the Appellate Court is of the opinion that if the evidence is insufficient to decide the issue, only then the matter may be remitted to the trial Court.

37. Above being the position, the appeal by the respondents before the Allahabad High Court has been rightly allowed. In any event, the order does not suffer from any infirmity to warrant interference. The appeal is dismissed.