Supreme Court of India
Ganesh Prasad Sah Kesari & Anr vs Lakshmi Narayan Gupta on 18 April, 1985
Equivalent citations: 1985 AIR 964, 1985 SCR (3) 825
Author: D Desai
Bench: Desai, D.A.

PETITIONER:
GANESH PRASAD SAH KESARI & ANR.

Vs.

RESPONDENT:
LAKSHMI NARAYAN GUPTA

DATE OF JUDGMENT18/04/1985

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
MISRA RANGNATH

CITATION:
1985 AIR 964 1985 SCR (3) 825
1985 SCC (3) 53 1985 SCALE (1)806
CITATOR INFO :
R 1987 SC1010 (14)
APL 1989 SC 291 (5)
R 1989 SC2073 (22)
R 1989 SC2206 (21)

ACT:
The Bihar Buildings (Lease, Rent and Eviction) Control Act 1947, Section 11A
Suit for eviction of tenant for default in payment of rent-Failure of tenant to comply with court's order to deposit rent-Striking off defence against eviction-Whether legal.
Interpretation of Statutes:
State-Words 'may' and 'shall used fn different parts of a provision-Whether mandatory or directory-Ascertainment of by the Court.
Words & Phrases:
'Shall order the defence against ejectment be struck off-Meaning of-Bihar Building (Lease, Rent and Eviction) Control Act 1947, Section 11A.

HEADNOTE:
The respondent-plaintiff filed a suit for eviction against the appellant defendant on the ground that the

tenant committed default in payment of rent. The defendant contested the suit contending that he was not in default. An application was filed by the respondent-landlord for a direction under Sec. 11A of the (Bihar Buildings Lease, Rent and Eviction) Control Act, 1947 to the defendant-tenant to deposit the rent in arrears; and a further direction to deposit the future rent from month to month. The trial judge ordered the appellant to deposit the rent in arrears at the rate of Rs. 32 per month and thereafter to continue to deposit the rent at the rate of Rs. 12 20 per month. The defendant preferred a revision petition which was dismissed.

The suit was fixed for hearing. The tenant moved an application for adjournment which was rejected. the plaintiff witnesses were examined and the suit was decreed ex-parte.

On an application moved by the defendant praying for relief under

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Order IX Rule 13 CPC, the trial judge set aside the ex-parte decree and set down the suit for proceeding further from the stage it was decreed ex-parte.

The respondent-landlord moved an application contending that as there was irregularity and delay in depositing the rent, the defence of the appellant be struck off for his failure to strictly comply with the order made under Section 11A, but the trial judge rejected it on the ground that the earlier order was made prior to the date on which the suit was decreed ex-parte; on the setting aside of the ex-parte decree and revival of the suit, the order giving directions for deposit of future rent does not per se revive and therefore even if there was some default on the part of the tenant in depositing the rent, his defence cannot be struck off.

The respondent-landlord moved a revision petition before the High Court.A Division Bench interpreted the expression 'shall' in Sec. 11A of the Act, as mandatory, and finding that there was default in making the deposit for the months mentioned in the landlords' application, it could be shown that there was non-compliance with the order passed under Sec. 11A, and therefore 'the tenant will have to bear the consequence thereto.' It further held that 'once a default is found, the courts are powerless; the statutory consequences are bound to follow,' It made the rule absolute and set aside the order of the trial judge refusing to strike off the defence of the appellant and directed the trial judge to note that the defence of the appellant would be deemed to have been struck off due to non-compliance of the order Passed under Section 11A.

Allowing the Appeal to this Court,

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HELD: 1. (i) Failure to comply with an earlier direction should not necessarily visit the tenant with the consequence of his defence being struck off because there

might be myriad situations in which default may be committed. The Court should adopt such a construction as would not render the court powerless in a situation in which ends of justice demand relief being granted. [835 F-F]

In the instant case, the High Court had adopted a construction of Section 11A of the Act which would defeat the beneficient nature of the pro vision. The decision of the High Court is set aside because it proceeds on the basis that once there is default, the tenant must suffer the consequences of it. The trial judge held that once a suit ended in an ex-parte decree the earlier direction for making necessary deposit given under Sec. 11A would remain ineffective even if the ex-parte degree is set aside and would not revive, was rightly disapproved by the High Court. The trial judge did grant relief to the tenant by refusing to strike off the defence, but on an erroneous view of the law. The High Court reversed it on yet another erroneous view of law holding that the court was powerless to grant any relief once a default is established. [835 F-H; 836 A-B].

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(ii) The tenant has deposited all the arrears. There was some irregularity in making the deposit but it was not of such a nature as to visit the tenant with the consequence of striking off his defence. The judgment of the High Court directing that the defence be deemed to be struck off is set aside and the order of the trial judge is restored. [836 C]

2 (i) Section I IA, can he styled as a check on the tendency of the defendant to protract the litigation by frivolous defences more especially where the duty to pay the rent is unmistakably admitted. [830 F]

(ii) In a suit for eviction, Sec. 11A enables the court to give a direction to pay rent which is claimed to be in arrears as also to compel, the defendant who continues to remain in possession during the pendency of the proceedings to perform his obligation to deposit the rent regularly. It also enables the court to determine the rate of rent at which the deposit shall be made, where in a case there is a dispute as to the rate of rent. [830 G]

(iii) An undeniable feature of the tenancies in this country is that, the tenancy is generally oral and no written record is usually available to furnish evidence as to the terms of lease. Giving a receipt for the rent paid has not still become a part of the culture of a landlord. Therefore, where eviction is sought on the ground of non-payment of rent, it places a tenant at a comparative disadvantage if the landlord chooses to claim rent at the rate which is beyond the capacity of the tenant to pay. In such a situation, the tenant will be exposed to double jeopardy in that on a prima face pleading he will be directed to deposit the rent at the rate claimed by the landlord, if the court has no power to determine rate at an interim stage. Such power is conferred by Section 11A on the

Court. It is whole-some provision which would advance justice. [830 H; 83 1 A-C]

3. Where the legislature uses the two words may and shall in two different parts of the same provision prima facie it would appear that the Legislature manifested its intention to make one part directory and another mandatory. But that by itself is not decisive. The power of the court still to ascertain the real intention of the Legislature by carefully examining the scope of the statute to find out whether the provision is directory or mandatory remains un-impaired even where both the words are used in the same provision,

[833 H; 834 A]

In the instant case, if one ascertains the intendment of the legislature, the purpose for which the provision was enacted, the beneficent nature of the statute-to protect the harassed tenant, it does not require long argument to hold that the expression 'shill' was used not with a view to making the provision mandatory or imperative but it to was be directory. Such a construction would advance the purpose for which the Act was enacted namely the protection of tenants. It will also not render the court powerless in the face of harsh facts where striking off the defence would be nothing short of miscarriage of justice. [833 D-E]

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R.V Inhabitants of Great Bolton, (1828) 8B & 71 at 74 Govindlal Chaganlal Patel v. The Agricultural Produce Market Committee, Godhra and others, [1976]1 SCR 451, referred to.

4. Where the court fixes a time to do thing, the court always retains the power to extend the time for doing so. Sec. 148 of the Code of Civil procedure provides that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. The principle this section must govern in not whittling down the discretion conferred on the court, by Section 11A of the Act. [834 F-G]

Shyamcharan Sharma v Dharamdas, [1980] 2 SCR 334, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1365 of From the Judgment and Order dated 11.8.77 of the Patna High Court in Civil Revision No. 585 of 1976.

B.P. Singh R. Kumar and R. Prakash for the Appellants. Mrs. Gian Sudha Misra for the Respondent.

The Judgment of the Court was delivered by DESAI, J. Where a plaintiff in a suit bitterly complains that the defendant would be getting unfair advantage of his own lapse, if we were to interfere with

the judgment rendered by the High Court, we put ourselves on caution whether such be the outcome of our setting aside the order under appeal. Unwittingly, this Court should not be a party to the conferment of an undeserved advantage on a party to a proceeding guilty of a lapse though remediable and even unintentional. Deeper probing into the facts reveals that the boot is on the other foot in that the respondent-plaintiff is wholly to be blamed for the delay.

The facts first. The respondent-plaintiff field a suit for eviction against the appellant-defendent on the only ground that the tenant committed default in payment of rent for the period May, 1969 to December, 1971. The defendant contested the suit inter-

alia contending that he was not in default. There followed an application by the respondent-landlord for a direction under Sec. 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 ('Act' for short). Section 11A reads as under:

> "11A. Deposit of rent by tenants in suits for ejectment- If in a suit for recovery of possession of any building the tenant contests the suit, as regards claim for ejectment the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any and the Court, after giving an opportunity to the par- ties to be heard, may make an order for deposit of rent at such rate as may be determined month by month and the arrears of rent, if any and on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of the next following month, the Court shall order the defence against ejectment to be struck out and the tenent to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the Court may permit him to do so. The Court may further order recovery of cost of suit and such other compensation as may be determined by it from the tenant."
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> The prayer in the application was that the defendant-

tenant be directed to deposit the rent in arrears upto and inclusive of June 1973 within a period of fifteen days from the date of the order and a further direction be given that he should continue to deposit the rent from month to month. The learned Judge made an order directing the appellant to deposit rent for the period upon and inclusive of June 1973 at the rate of Rs. 32 per month and there after to continue to deposit the rent from month to month at the rate of Rs. 12.20 per month. The tenant preferred a revision petition which was dismissed on March 26, 1974. The such was fixed fore haring on January 28, 1975. The tenant moved an application for adjournment which was rejected. Plaintiff's witnesses were examined and the suit was decreed ex-parte on January 30, 1975. On an application moved by the defendant praying for relief under Order IX Rule 13, Code of Civil Procedure the learned Judge set aside the ex-parte decree and set down the suit for proceeding further from the stage where it was decreed ex- parte. On January 5, 1976, the respondent-landlord moved an application praying that as there was irregularity in depositing the rent for the month of

August to October, 1975, defence of the appellant be struck off, the his failure to strictly comply with the order made under Section 1 IA. After the appellant filed his rejoinder, the learned Judge heard the application and rejected the same on the ground that as the earlier order was made prior to the date on which the suit was decreed exparate, on the setting aside of the exparte decree and revival of the suit, the order giving directions for deposit of future rent does not per se revive and therefore even if there was some default on the part of the tenant in depositing the rent for the months from February to April, 1979, his defence cannot be struck off. Promptly, the respondent-landlord moved a revision petition before the High Court being Civil Revision No. 585 of 1976.A Division Bench of the High Court heard and disposed of the revision petition on August 11, 1977. The learned Judges of the High Court made the rule absolute and set aside the order of the learned trial Judge refusing to strike off the defence of the appellant and directed the learned Judge to note that the defence of the appellant will be deemed to have been struck off due to non-compliance of the order dated April 26, 1973. Hence this appeal by special leave which is being heard after seven years.

Section 11A, to some extent, can be styled as a check on the tendency of the defendent to protract the litigation by frivolous defences more especially where the duty to pay the rent is unmistakably admitted. In a suit for eviction, Sec. 11A enables the court to give a direction to pay rent which is claimed to be in arrears as also to compell the defendent who continues to remain in possession during the pendency of the proceedings to perform his obligation to deposit the rent regularly. It also enables the court to deter mine the rate of rent at which the deposit shall be made, wherein a case there is a dispute as to the rate of rent. It is an undeniable feature of the tenancies in this country that more or less excluding the metropolitan areas, the tenancy is generally oral and no written record is usually available to furnish evidence as to the terms of lease. Giving a receipt for the rent paid has not still become a part of the culture of a landlord. Therefore where eviction is sought on the ground of non-payment of rent, it places a tenant at a comparative disadvantage if the landlord chooses to claim rent at the rate which is beyond the capacity of the tenant to pay. In such a situation, the tenant will be exposed to double jeopardy in that on a prima facie pleading he will be directed to deposit the rent at the rate claimed by the landlord, if the court has no power to determine rate of rent at an interim stage. Such power is conferred by Sec. 11A on the court. The court can also determine as to from what date the tenant appears to be in arrears so that an appropriate direction can be given that the rent in arrears may be deposited within the time stipulated by the court as also future rent may be deposited regularly in the court. It is a whole some provision which would advance justice.

Now where power is conferred on the court to give such directions, a sanction had to be created to guard against the failure to comply with the court's directions. This sanction is to be found in the conferment of power on the court to strike off the defence of the tenant if the tenant fails to comply with the order of the court giving directions for deposit. Such a sanction would again advance justice. So far there is no dispute.

The contention of the landlord which has found favour with the High Court is that the moment the failure of the tenant to comply with the earlier order is brought to the notice of the court, without anything more the defence has to be struck off. This view of the court is founded on the use of the expression 'shall' in that part of section by which power in conferred on the court to strike off the

defence. The relevant part of the expression reads thus: F ".... on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of next following month, the court shall order the defence against ejectment to be struck off and the tenant be placed in the same position as if he had not defended the claim to ejectment."

Interpreting this expression 'shall' as mandatory in the afore-mentioned clause, the High Court was of the opinion that as there was default in making the deposit for the month herein before mentioned which would show non-compliance with the order dated July 26, 1973 passed under Sec. 11A and therefore 'the tenant will have to bear consequences thereto ' The High Court further observed that 'once a default is found, the courts are powerless; the statutory consequences are bound to follow.' In the back-drop of the rival contentions, the neat question that arises is: whether the use of the word 'shall' in the expression herein before extracted makes the provision imperative or mandatory or the court still retains the discretion to relieve against the default ?

Ordinarily the use of the word 'shall' prima facie indicates that the provision is imperative in character. However, by a catena of decisions, it is well-established that the court while considering whether the mere use of the word 'shall' would make the provision imperative, it would ascertain the intenedment of the legislature and the consequences flowing from its own construction of the word 'shall'. If the use of the word 'shall' makes the provision imperative, the inevitable consequence that flows from it is that the court would be powerless to grant any relief even where the justice of the case so demands. If the word 'shall' is treated as mandatory the net effect would be that even where the default in complying with the direction given by the court is technical, fortuitous, unintended or on account of circumstances beyond the control of the defaulter, yet the court would not be able to grant any relief or assistance to such a person. Once a default is found to be of a very technical nature in complying with the earlier order, the court must have power to relieve against a drastic consequence all the more so if it is satisfied that there was a formal or technical default in complying with its order. To illustrate, if the tenant while he has on the way to the court on the 15th day to deposit the rent for the just preceeding month as directed by an order under Sec. 11A, met with an accident on the road and could not reach the court before the court hours were over, should he be penalised by his defence being struck off. Even if the court is satisfied that he was on the way to the court to make the necessary deposit, that he had the requisite amount with him, and that he started in time to reach the court within the prescribed court hours and yet by circumstances beyond his control, he met with an accident would the court be powerless to grant him relief? This illustration would suffice to the intendment of the legislature that it never used the word 'shall' to make it so imperative as to render the court powerless.

The statute in which the expression is used is The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. It is a statute enacted with a view to providing a fetter on the right of a landlord to evict tenant at his whim or fancy. The long title of the Act shows that it was enacted to regulate the letting of buildings 13 and the rent for such buildings and to prevent unreason able eviction of tenants therefrom in the Province of Bihar.A provision in such a statute primarily enacted for the protection of tenants against unreasonable eviction that the court is required to find out whether the word 'shall' was used as to make the provision mandatory or imperative. Obviously if one ascertains

the intendment of the legislature, the purpose for which the provision was enacted, the beneficient nature of the statute and to protect the harassed tenant obviously it does not require long argument to hold that the expression 'shall' was used not with a view to making the provision mandatory or imperative but it was to be directory. Such a construction would advance the purpose for which the Act was enacted namely the protection of tenants. It will also not render the court powerless in the face of harsh facts where striking off the defence would be nothing short of miscarriage of justice.

Mrs. Gyan Sudha Misra, learned counsel however contended that where the expression 'may' and 'shall' both are used in the same provision the legislative intendment is unmistakable that the provision where the word 'shall' is used must be held to be mandatory because the previous use of the expression 'may' shows that the legislature was conscious, which part of the provision is to be directly and which other part to be mandatory. She relied upon a statement in Maxwell on the Interpretation of Satutes 12th Edn. Page 282 where in it is stated relying upon the decision is R. v. Inhabitants of Great Bolton(1) that "where the Legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas." 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 intention to make one part directory and another (1) [1828] 8 B & C 71 at 74 mandatory. But that by itself is not decisive. The power of the court still to ascertain the real intention of the Legislature by care fully examining the scope of the statute to find out whether the provision is directory or mandatory remains unimpaired even where both the words are used in the same provision. In Govindlal Chagganlal Patel v. The Agricultural Produce Market Committee Godhra and others(1) Chandrachud, J. speaking for the Court approved the following passage in Crawford on 'Statutory Construction' (Ed. 1940 Art. 261, p. 516):

> "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 phrasacology of the provision, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other."

Applying this well-recognised canon of construction the conclusion is in escapable that the word 'shall' used in the provision is directory and not mandatory and must be read as 'may'. .

This construction also commends to us for the additional reason that where the court fixes a time to do a thing, the court always retains the power to extend the time for doing so. Sec. 148 of the Code of Civil Procedure provides that where any period is filed or granted by the court for the doing of any act prescribed or allowed by the Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. The principle of this section must govern in not whittling down the discretion conferred on the court.

The view which we are taking is in accord with the construction put by this court on a provision imparimateria in a similar statute. In Shyamcharan Sharma v. Dharamdas(2) a question that arose (1) [1976] 1 S.C.R. 451.

(2) [1980] 2 S.C.R. 334.

before this Court was whether the construction put by the High Court on Sec. 13 (1) read with Sec. 13 (6) of the Madhya Pradesh Accommodation Control Act, 1961 accords with the intendment of the Legislature. The relevant provision provides that on an application, a tenant can be directed by the Court to pay to the landlord an amount calculated at the rate of the rent at which it was paid for the period for which a tenant may have made a default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay month by month by the of tenth of each succeeding month, the sum equivalent to the rent. It was contended that the provision i i mandatory so that the court has to power to extend the time initially liked by it for making the deposit.A submission before the court was that the expression used in sub-sec. (1) discloses the legislative intent and the use of the word 'may' in sub- sec. (6) would not make the provision directory. The Court, speaking through O. Chinnappa Reddy, J. after ascertaining the intendment of the Legislature held that the court has the jurisdiction to extend time once fixed for deposit or payment of monthly rent falling due after the filing of the suit.

Failure to comply with an earlier direction should not necessarily visit the tenant with the consequence of his defence being struck off because there might be myriad situations in which default may be committed. The Court should adopt such a construction as would not render the court powerless in a situation in which ends of justice demand relief being granted. The High Court has adopted such a construction which would defeat the beneficent nature of provision. The decision of the High Court will have to be set l, aside because it proceeds on the basis that once there is default, the tenant must suffer the consequences of it.

The learned trial Judge had held that once a suit ended in exparte decree the earlier direction for making necessary deposit given under Sec. it would remain ineffective even if the exparte is, decree is set aside and would not revive was rightly disapproved by the High Court. To that extent the view of the learned trial Judge was unsustainable.

The learned trial Judge did grant relief to the tenant by refusing to strike off the defence, of course, on an erroneous view of law that the direction did not revive after the setting aside of the ex-parte decree. And the High Court reversed it on another crroneous view of law that the court was powerless to grant any relief once a default is established ? The question then is what relief we should grant ?

The tenant has deposited all the arrears. There was some irregularity in making the deposit but it was not of such a nature as to visit the tenant with the consequence of striking off his defence. Therefore the Judgment of the High Court directing that the defence be deemed to be struck off is set aside and the order of the learned trial Judge is restored for the reasons herein stated.

This appeal is allowed accordingly and the matter is remitted to the trial court to proceed further with the suit from the stage where the defence of the present appellant was struck off. The defence will be treated as part of the proceedings and suit shall be proceeded with accordingly. As the matter

is delayed for long, we direct that the suit shall be accorded priority by the trial court and shall be disposed of within a period of six months from the date of this judgment.

Mrs. Misra on behalf of the respondent submitted that the respondent has filed a second suit for eviction on the ground of personal requirement. If that is pending the same must be heard alongwith the suit from which the present appeal arises.

We leave the parties to bear their respective costs both in the High Court as well as in this Court. Costs in the trial court will abide the outcome of the suit.

N.V.K. Appeal Allowed;