Tribhuwan Prasad vs Uttar Pradesh Sarkar And 3 Others on 18 May, 2018

Author: Ajay Bhanot

Bench: Ajay Bhanot

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 10

Case :- WRIT - C No. - 18006 of 2018

Petitioner :- Tribhuwan Prasad

Respondent :- Uttar Pradesh Sarkar And 3 Others

Counsel for Petitioner :- Arvind Kumar Singh

Counsel for Respondent :- C.S.C.

Hon'ble Ajay Bhanot,J.

1. The petitioner was the fair price shop dealer of village panchayat Baldeeh, District-Azamgarh. The fair price shop licence of the petitioner was cancelled by order dated 19.7.2017. The petitioner carried the order of termination in appeal. The appeal was registered as Appeal No.326 of 2017, Tribhuwan Prasad Vs. District Supply Officer before the court of learned Commissioner Azamgarh Division, Azamgarh. The appeal was instituted on 25.9.2017.

2. The petitioner is aggrieved by the delay in the disposal of the appeal. Even though the appeal was instituted on 25.9.2017, the appeal is still on foot, and has not been decided finally. The relief prayed for in this writ petition is for a direction to the authorities to decide the appeal in a stipulated period of time to be fixed by this Court.

3. The order-sheet reveals that the appeal was posted for admission herein before the learned appellate court for the first time on 25.10.2017. On the first date of hearing notices were issued to the parties and records were summoned. The second date of hearing as per the order-sheet was 30.11.2017. No effective hearing took place on 30.11.2017. The next date for hearing was posted to 11.01.2018. On 11.01.2018 once again the parties are shown to be present but no effective hearing has taken place. No reasons have been assigned as to why the hearing could not take place on 11.01.2018. Finally, the matter was posted on 15.02.2018. On 15.02.2018, there was no hearing due to paucity of time.

4. The learned counsel for the petitioner, Shri Arvind Kumar Singh contends that the hearing is being delayed for no fault of the petitioner. The petitioner has been most diligent in prosecuting his appeal before the appellate authority. The order-sheet of the case discloses that the counsel for the petitioner has been present on all dates of hearing. The learned counsel for the petitioner further submits that the appellate authority is under an obligation of law to decide the appeal within a period of two months from the date of its institution.

5. Per contra, Shri S.Shekhar Singh, learned Additional Chief Standing Counsel contends that the time period provided in the control Order 13(3) of the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 is of a directory nature. The authorities are hard pressed for time with the number of appeals and hence, the appeal could not be decided within the time frame provided by the statute.

6. Heard the learned counsel for the parties.

7. The institution and hearing of the appeal is governed and regulated by the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 (hereinafter Control Order, 2016). Order 13 of the Control Order makes comprehensive provisions for appeals, which is reproduced hereunder for ease of reference:

> "13(1) Appeal in relation to action or subject covered under the National Food Security Act, 2013 and rules framed under it shall lie before the authority mentioned in sub-clause (10) of clause 11 of this order but appeal against appointment, suspension and cancellation of fair price shop by the competent Authority shall lie before the Divisional Commissioner.
>
> (2) Any person aggrieved by an order of the Designated Authority denying the issue or renewal of a ration card or cancellation of the ration card under the National Food Security Act, 2013 may appeal to the Appellate Authority within thirty days of receipt of the order.
>
> (3) Any person aggrieved by an order of the Competent Authority denying the issue or renewal of the agreement to the fair price shop owner, suspension or cancellation of the agreement may appeal to the Appellate Authority namely the Divisional Commissioner or the Joint Commissioner/Deputy Commissioner (Food) authorized

by him in writing to hear and dispose appeal within thirty days of the date of receipt of the order and the Appellate Authority shall, as far as practicable, dispose the appeal within a period of sixty days:

Provided that once an appeal has been disposed of by the Appellate Authority, the time for issue or renewal of the agreement of the fair price shop owner by the Competent Authority referred to in sub-clause (9) of Clause 10 shall begin from the date of decision of the Appellate Authority on the appeal:

Provided further that an appeal pending before an Appellate Authority appointed under the Uttar Pradesh Schedule Commodities Distribution Order, 2004 shall be disposed of by such authority as if this order had not been made.

(4) No appeal shall be disposed of unless the aggrieved person has been given a reasonable opportunity of being heard.

(5) Pending the disposal of an appeal, the Appellate Authority may direct that the order under appeal shall not take effect for such period as the authority may consider necessary for giving a reasonable opportunity to the other party under sub-clause (4) or until the appeal is disposed of, whichever is earlier."

8. The failure to implement the statutory mandate can be determined once the nature of the statutory mandate is understood. Understanding the nature of the statutory mandate is essentially an exercise in interpretation of the statute.

9. The words of a statute are the best guide to legislative intent. The settled canons of interpretation of statutes are the best tools to ascertain the scope of the statutory duties.

10. The intent of the legislature is clearly to ensure an expeditious disposal of the appeal by the appellate authority. The legislature was clearly aware of the realities of governance and the limitations of quasi judicial authorities. In such circumstances, the legislature was conscious that it may not be possible to adhere to the letter of a strict time frame. But it was within the reach of the appellate authority to comply with the spirit of deciding the appeal with dispatch and expedition. The intendment of the legislature is revealed by the words employed in the provisions.

11. The legislature has taken a practical view. The legislature has set pragmatic standards which are achievable and not created idealistic goals which are beyond reach. The realities of administration have been balanced with the ideals of justice.

12.The legislative mandate to the appellate authority is "the Appellate Authority shall, as far as practicable, dispose the appeal within sixty days".

13. The word "shall" is indicative of the mandatory nature of the provision, but it is not conclusive. The Hon'ble Supreme Court considered the import and consequences of the word "shall" used by the

legislature in different statutes.

14. The Hon'ble Supreme Court in the case of State of Haryana Vs. Raghubir Dayal, reported at (1995) 1 SCC 133, undertook this exercise and held thus:

> "5. The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word 'shall' as mandatory or as directory, accordingly/Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory."

15. Clearly the consequences of using the word "shall" can vary and are not uniform. The mandatory effect of the word "shall" can be diluted depending upon the context in which the word "shall" is employed and the statutory scheme in which it is placed. In the context of the order 13(3) of the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016, the word "shall" is also qualified by the words "as far as practicable". The latter words limit the mandatory effect of the word "shall".

16. The phrase "as far as practicable" was interpreted by the Hon'ble Supreme Court in the case of N.K. Chauhan Vs. State of Gujarat and others, reported at (1977) 1 SCC 308, the Hon'ble Supreme Court held thus:

> "26. What does 'as far as practicable' or like expression mean, in simple anglo-saxon ? Practicable, feasible, possi- ble, performable, are more or less interchangeable. A skiagraph of the 1959 Resolution reveals that the revival of the direct recruitment, method was motivated by 'the inter- est of administration'--an overriding object which must cast the benefit of doubt if two meanings with equal persuasive- ness contend. Secondly, going by the text, 50% of the substantive vacancies occurring in the cadre should be filled in by selection in accordance With appended Rules. 'As far as practicable' finds a place in the Resolution and the Rule. In the context what does it qualify ? As far as possible 50% ? That is to say, if 50% is not readily forth- coming, then less ? Within what period should be imprac- ticabilitv to felt ? What is the content of impracticabi- litv' in the given administrative 'setting ? Contrariwise, can

you not contend that impracticability is not a license to deviate, a discretion to disobey or a liberty with the ratio ? Administrative tone is too impor- tant to be neglected but if sufficient numbers to fill the direct recruits' quota are not readily available, substan- tive vacancies may be left intact to be filled up when direct recruits are available. Since the exigencies of administration cannot wait, expediency has a limited role through the use of the words 'as far as practicable'. Thereby Government is authorised to make ad hoc appointments by promotion or by creation of ex cadre posts to be filled up by promotees, to be absorbed in the 50% portion falling to the promotional category in later years. In short 'as far as practicable means, not interfering with the ratio which fulfils the interest of administration, but flexible provision clothing government with powers to meet special situations where the normal process of the government Reso- lution cannot flow smooth. It is a matter of accent and import which affords the final test in the choice between the two parallel interpretations.

27. We have given close thought to the competing contentions and are inclined to the view that the former is the better. Certainly, Shri Garg is right that the primary purpose of the quota system is to improve administrative efficiency. After all, the Indian administration is run for the service of the people and not for opportunities for promotion to a few persons. But theories of public administration and experiments in achieving efficiency are matters of governmental policy and business management. Apparently, the State, having given due consideration to these factors, thought that a blended brew would serve best. Even so, it could not have been the intention of government to create artificial situations, import legal fictions and complicate the composition of the cadre by deviating from the natural course. The State probably intended to bring in fresh talent to the extent reasonably available but not at the sacrifice of sufficiency of hands at a given time nor at the cost of creating a vacuum by keeping substantive vacancies unfilled for long. The straightforward answer seems to us to be that the State, in tune with the mandate of the rule, must make serious effort to secure hands to fill half the number of vacancies from the open market. If it does not succeed, despite honest and serious effort, it qualifies for departure from the rule. If it has become non-feasible impracticable and procrastinatory to get the requisite quota of direct recruits, having done all that it could, it was free to fill the posts by promotion of suitable hands if the filling up of the vacancies was administratively necessary and could not wait. 'Impracticable' cannot be equated with 'impossible'--nor with 'unpalatable'--and we cannot agree with the learned judges of the High Court in construing it as colossally incapable of compliance. The short test, therefore, is to find out whether the government, in the present case, has made effective efforts, doing all that it reasonably can, to recruit from the open market necessary numbers of qualified hands. We do not agree that the compulsion of the rule goes to the extreme extent of making government keep the vacancies in the quota of the direct recruits open and to meet the urgent needs of administration by creating ex cadre posts or making ad hoc appointments or resorting to other out-of-the-way expedients. The sense of the rule is that as far as

> possible the quota system must be kept up and if not 'practicable', promotees in the place of direct recruits or direct recruits in the place of promotees may be inducted applying the regular procedures, without suffering the seats to lie indefinitely vacant."

17. In the case of P.T. Rajan Vs. T.P.M. Sahir and others, reported at (2003) 8 SCC 498 while considering the same issue and similar provision, the Hon'ble Supreme Court held thus:

> "48. Furthermore even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is well-settled pinciple of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory."

18. A mandatory provision is required to be complied with strictly on pain of invalidation. But merely because a provision is held to be directory, it does not provide an option of non-compliance to the authorities. The law has to be complied with in all circumstances. This is the essence of the rule of law. However, the rigors of compliance may vary depending upon the statutory provision. In case of a directory provision, a substantial compliance of the same would suffice to meet the ends of law. The Hon'ble Supreme Court has often dealt with the distinction between a mandatory provision and a directory provision, and the issue of compliance of directory provisions. The Hon'ble Supreme Court in the case of Sharif-Ud-Din Vs. Abdul Gani Lone, reported (1980) 1 SCC 403 held thus:

> "9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter, substantial compliance may be sufficient to achieve the object regarding which the rule is enacted (emphasize added). Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarized thus: The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be

carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

19. A Full Bench of this Court in the case of Vikas Trivedi Vs. State of U.P. and others, reported at (2013) 2 UPLBEC 1193 held as under:

"15. Maxwell On the Interpretation of Statutes (Twelfth Edition) in Chapter 13,while discussing "Imperative And Directory Enactments" said following:

'The first such question is: when a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases the conditions or forms prescribed by the Statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.' It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule', said Lord Campbell, L.C., 'can be laid down for the construction of statutes, 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 construed.' And Lord Penzance said: 'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

"76. At this juncture a note of caution is required to be given. All provisions of the statute are required to be complied with. It is useful to quote paragraph 5-052 of De-Smith Judicial Review 6th Edition in which while dealing with mandatory and directory statutes, following was observed:-

"5-052. A second reason for the tangle in this area is the use of the terms "mandatory" and "directory"; the latter term is especially misleading. All statutory requirements are prima facie mandatory. However, in some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of

> the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however, render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole. Furthermore, logically, a provision cannot be mandatory if a court has discretion not to enforce it."

20. In the case of Karnal Improvement Trust, Karnal Vs. Smt. Parkash Wanti (Dead) and another, reported at (1995) 5 SCC 159, the Hon'ble Apex Court laid down the law in the following terms:

> "11. There is distinction between ministerial acts and statutory or quasi-judicial functions under the statute. When the statute requires that something should be done or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arise: What intention is to be attributed by inference to the legislature? It has been repeatedly said that no particular rule can be laid down in determining whether the command is to be considered as a mere direction or mandatory involving invalidating consequences in its disregard. It is fundamental that it depends on the scope and object of the enactment. Nullification is the natural and usual consequence of disobedience, if the intention is of an imperative character. The question in the main is governed by considerations of the object and purpose of the Act; convenience and justice and the result that would ensure. General inconvenience or injustice to innocent persons or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment would be kept at the back of the mind. The scope and purpose of the statute under consideration must be regarded as an integral scheme. The general rule is that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially. When a public duty, as held before, is imposed and statute requires that is shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements are not essential and imperative."

21. Statutes fixing time-lines to accomplish an action, as discussed above, were held to be directory in nature. The legislative intent was sought to be defeated by a highly delayed compliance on the pretext of the provision being directory in nature. The action of the authorities was invalidated and such interpretation was negatived by the Hon'ble Supreme Court. Inordinate delay does not satisfy the requirement of substantial compliance of a directory provision. The Hon'ble Supreme Court in the case of State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and another, reported at (1987) 2 SCC 602, while laying down the law, dispelled all such doubts. The relevant parts of the judgement are being extracted for ease of reference:

> "14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performance, conduct or character, as the case may. The adverse remarks should not be understood in terms

> of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the provisions of Rules 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 6, 6A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty seven months, simply because these Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent."

22. The statutes which do not provide for specific time frame to do an act, do not provide a clear guidance to the authorities regarding the time period in which the act has to be done. The Hon'ble Supreme Court while ironing out such creases in law in the case of Regional Provident Fund Commissioner Vs. K.T. Rolling Mills Pvt. Ltd." reported at (1995) 1 SCC 181 held:

> "4. There can be no dispute in law that when a power is conferred by statute without mentioning the period within which it could be invoked, the same has to be done within reasonable period, as all powers must be exercised reasonably, and exercise of the same within reasonable period would be a facet of reasonableness. When this appeal was heard by us on 7-9-1994 and when this aspect of the matter came to our notice, we desired an affidavit from the Commissioner to put on record regarding the point of time when he came to know about the default and to explain the cause of delay. Pursuant to that order, the Commissioner filed his affidavit on 10-11-1994, according to which the power of levying damages came to be delegated to the Commissioner by an order dated 17-10-1973. As, however, large number of establishments were in existence in the State of Maharashtra -- the number of which in 1985 was 22,189 -- and there was only one Regional Provident Fund Commissioner having power to levy damages, delay was caused in detection of the cases of belated payment. According to the affidavit, the default at hand was located on 19-4-1985 and the damages came to be levied by order dated 5-11-1986."

23. In case the appeal is decided within two months, the letter and spirit of the statute is implemented. However, mere failure to decide the appeal within two months does not violate the statutory mandate. In the latter case, the statutory obligation will be defined by the quality of the

efforts made to decide the appeal with promptitude and dispatch. The obligation will be met if the appeal is decided within a reasonable time, after the expiry of two months from its institution.

24. Statutes of limitation are statutes of repose. Statutes with time lines for decision making are statutes of endeavour. Statutory duty is discharged not only when the act is done but also when effort is made. However, the leeway to the authority is not unlimited and the time to accomplish the act is not indefinite. The statutory duty of the appellate authority, in the event the appeal is not decided within two months is to be seen.

25. The appellate authority shall have discharged its statutory duties initially, if it makes efforts commensurate to decide the appeal expeditiously, and finally when it enters a judgement, in a reasonable time after the expiry of two months. In such circumstances, the appellate authority can implement the law, by making honest endeavours and serious efforts to decide the appeal with dispatch and expedition. This is the statutory duty of the appellate authority. While the statutory duty of the appellate authority is to make earnest efforts to decide expeditiously, the proof of its performance is in the order-sheet of the court. The order-sheet of the appellate court is the most reliable evidence of the sincerity or earnestness of the efforts made by the appellate authority. The order-sheet of the appellate court is true testimony to the accomplishment of the statutory duty or the failure of the authority to perform its statutory duty. In the latter case the authority is liable to be mandamused.

26. In the light of the legal position stated above, the facts of the case will be analyzed. A perusal of the order of Appeal No.326 of 2017, Tribhuvan Prasad Vs. District Supply Officer before the court of learned Commissioner Azamgarh Division, Azamgarh shows that dates of hearing have been fixed at intervals of more than one month. The presence of counsels has been recorded but no reasons for failing to hear the matter have been disclosed on 11.1.2018. The long intervals between the dates of hearing is sufficient to defeat the mandate of the statute in the facts of this case. Serious efforts to decide the appeal with dispatch and expedition are lacking in this case.

27. Efforts made by the appellate authority are not commensurate with the duty to decide the appeal within a reasonable time frame even after the expiry of two months. There is no substantial compliance of the provisions of Order 13(3) of the U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016.

28. The authority has failed to perform its statutory duty. In view of the aforesaid facts, this Court has to issue a mandamus commanding the appellate authority to discharge its statutory duty.

29. A writ of mandamus is issued to the respondent No.2 or any other authority, before whom the aforesaid appeal is pending, commanding it to decide the appeal within a period of two months from the date of production of a certified copy of this order. The appellate authority shall give shorter dates and not grant any adjournment to the parties.

The writ petition is allowed.

Order Date :- 18.5.2018/Ashish Tripathi