THE STATE OF BIHAR & ORS. A

v.

BIHAR RAJYA BHUMI VIKAS BANK SAMITI

(Civil Appeal No. 7314 of 2018)

JULY 30, 2018 B

[R. F. NARIMAN AND INDU MALHOTRA, JJ.]

Arbitration and Conciliation Act, 1996:

s. 34(5) – Whether mandatory or directory – Held: When a provision results in general inconvenience or injustice, without promoting the real aim and object of the enactment, the provision must be declared to be directory – s. 34(5) is a procedural provision, infraction of which leads to no consequence – To construe such a provision as mandatory would defeat the advancement of justice as it would provide the consequence of scuttling the process of justice by burying the element of fairness – Interpretation of Statutes. C D

Judgments/Orders:

An earlier judgment cannot be overruled sub silentio *without upsetting the reasons on which it is based.*

Allowing the appeal, the Court E

HELD: 1.1 Section 34(5) of Arbitration and Conciliation Act, 1996 is a procedural provision, the infraction of which leads to no consequence. The object behind the provision is to dispose of applications under Section 34 expeditiously. All rules of procedure are the handmaids of justice and if, in advancing the cause of justice, it is made clear that such provision should be construed as directory, then so be it. To construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness. [Paras 20 and 22] [1163-F-G; 1165-A-B] F G

1.2 Considerations of convenience and justice are uppermost, and if general inconvenience or injustice results, H

without promoting the real aim and object of the enactment, the provision must be declared to be directory. [Para 19] [1163-E]

1.3 The only requirement in Section 34(1) is that an application for setting aside an award be in accordance with sub-sections (2) and (3). This, again, is an important pointer to the fact that even legislatively, sub-section (5) of s. 34 is not a condition precedent, but a procedural provision which seeks to reduce the delay in deciding applications under Section 34. [Para 23] [1165-D-E]

1.4 It is evident from s. 29A that unlike Section 34(5) and (6), if an Award is made beyond the stipulated or extended period contained in the Section, the consequence of the mandate of the Arbitrator being terminated is expressly provided. This provision is in stark contrast to Section 34(5) and (6) where, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences. [Para 24] [1166-D-E]

1.5 Therefore, it is not correct that Section 34(5) is independent of Section 34(6) and is a mandatory requirement of law by itself. Sub-section (6) of s. 34 refers to the date on which the notice referred to in sub-section (5) is served upon the other party. This is for the reason that an anterior date to that of filing the application is to be the starting point of the period of one year referred to in Section 34(6). Even if sub-section (5) be construed to be a provision independent of sub-section (6), the same consequence in law is the result – namely, that there is no consequence provided if such prior notice is not issued. [Para 25] [1166-F-G]

1.6 It shall be the endeavour of every Court in which a Section 34 application is filed, to stick to the time limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every Court shall endeavour to dispose of the Section 34 application within a period of one year from the date

of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act. [Para 27] [1168-B-C]

1.7 In cases covered by Section 10 read with Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within six months, as stipulated. Appeals which are not so covered will also be disposed of as expeditiously as possible, preferably within one year from the date on which the appeal is filed. [Para 28] [1168-D, E]

Kailash v. Nanhku and Ors. **(2005) 4 SCC 480: [2005] 3 SCR 289 ;** *Topline Shoes v. Corporation Bank* **(2002) 6 SCC 33 : [2002] 3 SCR 1167 ;** *Salem Advocate Bar Association v. Union of India* **(2005) 6 SCC 344 : [2005] 1 Suppl. SCR 929 ;** *New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage Pvt. Ltd.* **(2015) 16 SCC 20 ;** *J. J. Merchant (Dr.) v. Shrinath Chaturvedi* **(2002) 6 SCC 635 : [2002] 1 Suppl. SCR 469 ;** *State v. N.S. Gnaneswaran* **(2013) 3 SCC 594 ;** *Bikhraj Jaipuria v.Union of India* **[1962] 2 SCR 880 – relied on.**

Bihari Chowdhary and Anr. v. State of Bihar and Ors, **(1984) 2 SCC 627 : [1984] 3 SCR 309 – referred to.**

2. An earlier judgment cannot be overruled sub silentio without upsetting the reasons on which it is based. [Para 17] [1161-H; 1162-A]

Maxwell on Interpretation of Statutes **10th Edn. p. 376 – referred to.**

Case Law Reference

[2005] 3 SCR 289	**relied on**	**Para 4**
[2002] 3 SCR 1167	**relied on**	**Para 11**
[2005] 1 Suppl. SCR 929	**relied on**	**Para 13**

A	**(2015) 16 SCC 20**	**relied on**	**Para 14**
	[2002] 1 Suppl. SCR 469	**relied on**	**Para 14**
	(2013) 3 SCC 594	**relied on**	**Para 18**
	[1962[2 SCR 880	**relied on**	**Para 19**
B	**[1984] 3 SCR 309**	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7314 of 2018.

From the Judgment and Order dated 28.10.2016 of the High Court
C of Judicature at Patna in Letters Patent Appeal No. 1841 of 2016.

Nagendra Rai, Parag P. Tripathi, Sr. Advs., Gopal Singh, Manish Kumar, Ms. Aprajita Sud, Jayant Kumar Mehta, Rajesh K. Singh, Rajesh Prasad Chaudhary, Suveni Bhagat, Ms. Mishika Bajpai, Advs. for the appearing parties.

D The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. Leave granted.

2. The question raised in this appeal pertains to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by Amending Act 3 of 2016 (w.e.f. 23rd October, 2015), is mandatory or directory.

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3. The present appeal arises out of an arbitration proceeding which commenced on 24.05.2015. An arbitral award was made on 06.01.2016. A Section 34 petition challenging the said award was filed on 05.04.2016 before the Patna High Court, in which notice was issued to the opposite party by the Court on 18.07.2016. Despite the coming into force of Section
F 34(5), the common ground between the parties is that no prior notice was issued to the other party in terms of the said Section, nor was the application under Section 34 accompanied by an affidavit that was required by the said sub-section.

4. A learned Single Judge of the Patna High Court, by a judgment
G dated 06.09.2016, held that the provision contained in Section 34(5) was only directory, following our judgment in **Kailash v. Nanhku and Ors.**, (2005) 4 SCC 480. A Letters Patent Appeal to a Division Bench yielded the impugned order dated 28.10.2016, by which it was held, adverting to the Law Commission Report which led to the 2015 amendment, that the

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mandatory language of Section 34(5), together with its object, made it clear that the sub-section was a condition precedent to the filing of a proper application under Section 34, and, on the analogy of a notice issued under Section 80 of the Code of Civil Procedure, 1908, being a condition precedent to the filing of a suit against the Government, the Division Bench held that since this mandatory requirement had not been complied with, and as the period of 120 days had run out, the Section 34 application itself would have to be dismissed. In the end, it allowed the appeal and set aside the judgment of the learned Single Judge.

5. Shri Nagendra Rai, learned Senior Advocate appearing on behalf of the Appellants, has argued that the Letters Patent Appeal itself was not maintainable. He further went on to argue that in any event, Section 34(5) and (6) form part of a composite scheme, the object of which is that an application under Section 34 be disposed of expeditiously within one year. He points out that as no consequence is provided if such application is not disposed of within the said period of one year, the aforesaid provisions are only directory, despite the mandatory nature of the language used therein. He also added that procedural provisions ought not to be construed in such a manner that justice itself gets trampled upon. For this purpose, he referred to and relied upon various judgments of this Court.

6. Shri Parag P. Tripathi, learned Senior Advocate appearing on behalf of the Respondent, defended the High Court judgment, both on maintainability as well as on Section 34(5) being a mandatory provision. According to the learned Senior Advocate, despite the fact that no consequence has been provided if the time period of Section 34(6) goes, yet, an application that is filed under Section 34 without complying with the condition precedent as set out in Section 34(5), is an application that is *non est* in law. He further argued that the consequence that follows, therefore, follows not from sub-section (6) of Section 34 but from sub-section (3) thereof, under which, such application cannot be considered if it is beyond the stipulated period and/or extended period mentioned in Section 34(3). He relied upon the Law Commission Report which led to the 2015 amendment, as well as the mandatory nature of the language of Section 34(5). Also, according to the learned Senior Advocate, the vast majority of High Courts have decided in favour of the provision being construed as mandatory, the only discordant note being struck by the Bombay High Court.

7. Section 34(5) and (6) are set out hereunder as follows:

"**34. Application for setting aside arbitral award.—**

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(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

8. There is no doubt whatsoever that the language of Section 34 does lend itself in support of the argument of Shri Tripathi, as the expressions used are "shall", "only after" and "prior notice" coupled with such application which again "shall" be accompanied by an affidavit endorsing compliance.

9. The 246th Law Commission Report, which introduced the aforesaid provision, also makes interesting reading, which is set out hereinbelow:

"3. The Arbitration and Conciliation Act, 1996 (hereinafter "the Act") is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act has now been in force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts.

After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.

4. There is, therefore, an urgent need to revise certain provisions of the Act to deal with these problems that frequently arise in the arbitral process. The purpose of this Chapter is to lay down the foundation for the changes suggested in the report of the Commission. The suggested amendments address a variety of issues that plague the present regime of arbitration in India and, therefore, before setting out the amendments, it would be useful to identify the problems that the suggested amendments are intended to remedy and the context in which the said problems arise and hence the context in which their solutions must be seen.

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25. Similarly, the Commission has found that challenges to arbitration awards under sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of sections 34(5) and 48(4) which would require that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service of notice. In the case of applications under section 48 of the Act, the Commission has further provided a time limit under section 48(3), which mirrors the time limits set out in section 34(3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthought ……."

10. There is no doubt that the object of Section 34(5) and (6) is, as has been stated by the Law Commission, the requirement that an application under Section 34 be disposed of expeditiously within a period of one year from the date of service of notice. We have to examine as to whether this, by itself, is sufficient to construe Section 34(5) as mandatory, keeping in view the fact that if the time limit of one year is not adhered to under Section 34(6), no consequence thereof is provided.

A 11. Some of the judgments of this Court throw considerable light on similar provisions being construed as being only directory in nature. Thus, in **Topline Shoes v. Corporation Bank**, (2002) 6 SCC 33, Section 13(2)(a) of the Consumer Protection Act, 1986, spoke of a reply being filed by the opposite party "within a period of 30 days or such extended period not exceeding 15 days, as may be granted by the District Forum". This Court referred to the Statement of Objects and Reasons of the Consumer Protection Act, 1986, which is similar to the object sought to be achieved by the amendment made in Section 34(5) and (6) of the Arbitration and Conciliation Act, 1996, as follows:

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C "**8.** The Statement of Objects and Reasons of the Consumer Protection Act, 1986 indicates that it has been enacted to promote and protect the rights and interests of consumers and to provide them speedy and simple redressal of their grievances. Hence, quasi-judicial machinery has been set up for the purpose, at different levels. These quasi-judicial bodies have to observe the principles of natural justice as per clause 4 of the Statement of Objects and Reasons, which reads as under:

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"4. To provide *speedy and simple redressal to* consumer disputes, a quasi-judicial machinery is sought to be set up at the District, State and Central levels. These quasi-judicial bodies will *observe the principles of natural justice* and have been empowered to give reliefs of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided."

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(emphasis in original)

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Thus the intention to provide a time-frame to file reply, is really meant to expedite the hearing of such matters and to avoid unnecessary adjournments to linger on the proceedings on the pretext of filing reply. The provision, however, as framed, does not indicate that it is mandatory in nature. In case the extended time exceeds 15 days, no penal consequences are prescribed therefor. The period of extension of time "not exceeding 15 days", does not prescribe any kind of period of limitation. The provision appears to be directory in nature, which the consumer forums are

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ordinarily supposed to apply in the proceedings before them. We do not find force in the submission made by the appellant-in-person, that in no event, whatsoever, the reply of the respondent could be taken on record beyond the period of 45 days. The provision is more by way of procedure to achieve the object of speedy disposal of such disputes. It is an expression of "desirability" in strong terms. But it falls short of creating any kind of substantive right in favour of the complainant by reason of which the respondent may be debarred from placing his version in defence in any circumstances whatsoever. It is for the Forum or the Commission to consider all facts and circumstances along with the provisions of the Act providing time-frame to file reply, as a guideline, and then to exercise its discretion as best as it may serve the ends of justice and achieve the object of speedy disposal of such cases keeping in mind the principles of natural justice as well. The Forum may refuse to extend time beyond 15 days, in view of Section 13(2)(*a*) of the Act but exceeding the period of 15 days of extension, would not cause any fatal illegality in the order."

The Court further held:

"**11.** We have already noticed that the provision as contained under clause (*a*) of sub-section (2) of Section 13 is procedural in nature. It is also clear that with a view to achieve the object of the enactment, that there may be speedy disposal of such cases, that it has been provided that reply is to be filed within 30 days and the extension of time may not exceed 15 days. This provision envisages that proceedings may not be prolonged for a very long time without the opposite party having filed his reply. No penal consequences have however been provided in case extension of time exceeds 15 days. Therefore, it could not be said that any substantive right accrued in favour of the appellant or there was any kind of bar of limitation in filing of the reply within extended time though beyond 45 days in all. The reply is not necessarily to be rejected. All facts and circumstances of the case must be taken into account. The Statement of Objects and Reasons of the Act also provides that the principles of natural justice have also to be kept in mind."

12. In **Kailash** (supra), this Court was faced with the question whether, after the amendment of Order VIII Rule 1 of the CPC by the Amendment Act of 2002, the said provision must be construed as being mandatory. The provision is set out in paragraph 26 of the judgment as follows:

"**26.** The text of Order 8 Rule 1, as it stands now, reads as under:

"1. *Written statement*.—The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

In an instructive judgment, this Court held:

"**27.** Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

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30. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

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35. Two decisions, having a direct bearing on the issue arising for decision before us, have been brought to our notice, one each by the learned counsel for either party. The learned Senior Counsel for the appellant submitted that in *Topline Shoes Ltd.* v. *Corpn. Bank* [(2002) 6 SCC 33] a *pari materia* provision contained in Section 13 of the Consumer Protection Act, 1986 came up for the consideration of the Court. The provision requires the opposite party to a complaint to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum. The Court took into consideration the Statement of Objects and Reasons and the legislative intent behind providing a time-frame to file reply and held: (*i*) that the provision as framed was not mandatory in nature as no penal consequences are prescribed if the extended time exceeds 15 days, and; (*ii*) that the provision was directory in nature and could not be interpreted to mean that in no event whatsoever the reply of the respondent could be taken on record beyond the period of 45 days.

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46. We sum up and briefly state our conclusions as under:

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(*iv*) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the

A defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.

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C 13. To similar effect are the observations of this Court in **Salem Advocate Bar Association v. Union of India,** (2005) 6 SCC 344 at paragraph 20, which is reproduced hereinbelow:

"**20.** The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

14. However, a discordant note was struck by a Judgment dated 04.12.2015, reported in **New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage Pvt. Ltd.**, (2015) 16 SCC 20. A Bench of three learned Judges resurrected the judgment of **J.J. Merchant (Dr.) v. Shrinath Chaturvedi**, (2002) 6 SCC 635. **J.J. Merchant** (supra) was distinguished in **Kailash** (supra) as follows:

"**38.** The learned counsel for the respondent, on the other hand, invited our attention to a three-Judge Bench decision of this Court in *J.J. Merchant (Dr.)* v. *Shrinath Chaturvedi* [(2002) 6 SCC 635] wherein we find a reference made to Order 8 Rule 1 CPC

vide paras 14 and 15 thereof and the Court having said that the mandate of the law is required to be strictly adhered to. A careful reading of the judgment shows that the provisions of Order 8 Rule 1 CPC did not directly arise for consideration before the Court and to that extent the observations made by the Court are *obiter*. Also, the attention of the Court was not invited to the earlier decision of this Court in *Topline Shoes Ltd. case* [(2002) 6 SCC 33]."

Despite this observation, **New India Assurance Co. Ltd.** (supra) went on to follow the judgment in **J.J. Merchant** (supra), and stated:

"**25.** We are, therefore, of the view that the judgment delivered in *J.J. Merchant* [*J.J. Merchant* v. *Shrinath Chaturvedi*, (2002) 6 SCC 635] holds the field and therefore, we reiterate the view that the District Forum can grant a further period of 15 days to the opposite party for filing his version or reply and not beyond that.

26. There is one more reason to follow the law laid down in *J.J. Merchant* (supra). *J.J. Merchant* (supra) was decided in 2002, whereas *Kailash* [*Kailash* v. *Nanhku*, (2005) 4 SCC 480] was decided in 2005. As per law laid down by this Court, while deciding *Kailash* (supra), this Court ought to have respected the view expressed in *J.J. Merchant* (supra) as the judgment delivered in *J.J. Merchant* (supra) was earlier in point of time. The aforestated legal position cannot be ignored by us and therefore, we are of the opinion that the view expressed in *J.J. Merchant* (supra) should be followed."

15. **J.J. Merchant** (supra) arose out of a miscellaneous petition which was filed before the National Consumer Disputes Redressal Commission, praying that the complaint filed for alleged medical negligence be decided by the Civil Court, as complicated questions of law arise. A criminal prosecution against the said doctors was also pending. In paragraph 4 of the judgment, the Court stated that some guidelines need to be laid down with regard to the type of cases which the Consumer Forum will not entertain. After noticing that there was an inordinate delay of almost nine years in disposal of the complaint, this Court felt that such delay would not be a ground for rejecting the complaint and for directing the complainant to approach the Civil Court. In answering the

A contention that complicated questions of fact cannot be decided in summary proceedings, this Court held that speedy trial does not mean that justice cannot be done when questions of fact are to be dealt with and decided. It was in this context of speedy trial that the Court made an observation about the legislative mandate of not granting more than 45 days in submitting the written statement. In fact, the Court was alive to the fact that there was no time frame under the unamended Consumer Protection Act, 1986 for disposing of complaints, appeals and revisions. This Court, therefore, stated:

> "**23.** For reducing the arrears and for seeing that complaints, appeals and revisions are decided speedily and within the stipulated time, we hope that the President of the National Commission would draw the attention of the Government for taking appropriate actions within the stipulated time and see that the object and purpose of the Act is not frustrated.
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> **25.** It can be hoped that the National Commission would ensure its best to see that District Forums, State Commissions and the National Commission can discharge its functions as efficiently and speedily as contemplated by the provisions of the Act. The National Commission has administrative control over all the State Commissions *inter alia* for issuing of instructions regarding adoption of uniform procedure in hearing of the matters etc. It would have also administrative control in overseeing that the functions of the State Commissions or District Forums are discharged in furtherance of the objects and purposes of the Act in the best manner."

The Court then referred to the Consumer Protection (Amendment) Bill, 2002, which envisaged insertion of sub-section (3-A) in Section 13 of the Act, which reads as under:

> "**30.** ……
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> "13. (3-A) Every complaint shall be heard as expeditiously as possible and *endeavour shall be made to decide the complaint within a period of* three months from the date of receipt of notice by opposite party where the complaint does not require analysis or testing of commodities and within five months if it requires analysis or testing of commodities:

Provided that *no adjournment shall be ordinarily granted by the District Forum* unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by the Forum:

Provided further that the District Forum shall make *such orders as to the costs occasioned by the adjournment* as may be provided in the regulations made under this Act."

(emphasis in original)

31. From the wording of the aforesaid section, it is apparent that there is legislative mandate to the District Forum or the Commissions to dispose of the complaints as far as possible within the prescribed time of three months by adhering strictly to the procedure prescribed under the Act. The opposite party has to submit its version within 30 days from the date of the receipt of the complaint by him and the Commission can give at the most further 15 days for some unavoidable reasons to file its version."

The Court was, therefore, alive to the fact that no consequence is prescribed for non-adherence to the time limit of three months. In the result, the case was disposed of with certain directions for avoiding delay in disposal of proceedings under the Consumer Protection Act, 1986.

16. It will thus be seen that there was no focused argument in **J.J. Merchant** (supra) on whether the provisions of Section 13(2)(a) of the Consumer Protection Act, 1986 could be held to be directory in as much as no consequence was provided for a written statement being filed beyond 45 days. In point of fact, this Court's judgment in **Topline Shoes** (supra) was not even cited before the Bench hearing **J.J. Merchant** (supra).

17. In this view of the matter, it is a little difficult to appreciate how the three-Judge Bench in **Kailash** (supra) ought to have respected an *obiter dictum* view of Order VIII Rule 1, CPC in **J.J. Merchant** (supra). Unfortunately, what was missed in **New India Assurance Co. Ltd.** (supra) is paragraph 38 of **Kailash** (supra) which has been extracted hereinabove. The fact that **Topline Shoes** (supra) was not cited before the three-Judge Bench in **J.J. Merchant** (supra), as has been held in paragraph 38 of **Kailash** (supra), would render the aforesaid judgment vulnerable on Section 13(2)(a) of the Consumer Protection Act, 1986 being held to be mandatory. An earlier judgment cannot be

A overruled *sub silentio* without upsetting the reasons on which it is based. **J.J. Merchant** (supra) does not deal with **Topline Shoes'** (supra) *ratio* – namely, that no penal consequence was provided in case the extended time of 15 days was exceeded; that therefore, no substantive right accrued in favour of the claimant; and that the Statement of Objects and Reasons of the Act also provided that the principles of natural justice be kept in
B mind. The judgment in **New India Assurance Co. Ltd.** (supra) did not refer to paragraph 38 of **Kailash** (supra) or appreciate that **J.J. Merchant** (supra) was distinguished correctly on the ground that Order VIII Rule 1, CPC did not directly arise for consideration in **J.J. Merchant** (supra). The observations on Order VIII Rule 1, CPC in paragraphs 14
C and 15 of **J.J. Merchant** (supra) were correctly held to be in the nature of *obiter dicta*, and therefore, not binding on the three-Judge Bench of **Kailash** (supra). Insofar as **Kailash** (supra) is concerned, it is a binding judgment on the effect of Order VIII Rule 1, CPC, whose reasoning has been confirmed by a three-Judge Bench in **Salem Bar Association**
D (supra).

18. In **State v. N.S. Gnaneswaran**, (2013) 3 SCC 594, this Court was concerned with whether Section 154(2) of the Code of Criminal Procedure, 1973 was mandatory or directory. The said Section reads as follows:

E "**154. Information in cognizable cases**.—

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(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant."

F Despite the mandatory nature of the language used in the provision, no consequence was provided if the Section was breached. This Court referred to a number of judgments which laid down tests for determining whether a provision is mandatory or directory, and then held that Section 154(2) was directory.

G 19. However, Shri Tripathi has relied strongly upon the judgment of **Bikhraj Jaipuria v. Union of India**, (1962) 2 SCR 880. In that case, this Court held that the provision contained in Section 175(3) of the Government of India Act, 1935, which requires that contracts on behalf of the Government of India shall be executed in the form prescribed, was mandatory in nature, despite the fact that the Section did not set out
H any consequence for non-compliance. This Court referred to an instructive

passage in *Maxwell on Interpretation of Statutes*, 10th Edn, p. 376, as follows:

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve 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, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded."[1]

It then went on to hold that the provision was in the interest of the general public because the question whether a binding contract has been made between the State and the private individual should not be left open to dispute and litigation. We must not forget that, as has been laid down in *Maxwell* (supra), considerations of convenience and justice are uppermost, and if general inconvenience or injustice results, without promoting the real aim and object of the enactment, the provision must be declared to be directory.

20. It will thus be seen that Section 34(5) does not deal with the power of the Court to condone the non-compliance thereof. It is imperative to note that the provision is procedural, the object behind which is to dispose of applications under Section 34 expeditiously. One must remember the wise observation contained in **Kailash** (supra), where the object of such a provision is only to expedite the hearing and not to scuttle the same. All rules of procedure are the handmaids of justice and if, in advancing the cause of justice, it is made clear that such provision should be construed as directory, then so be it.

21. Take the case of Section 80 of the CPC. Under the said provision, the Privy Council and then our Court have consistently taken the view that a suit against the Government cannot be validly instituted

[1] *Bikhraj Jaipuria* v. *Union of India*, (1962) 2 SCR 880, para 16.

A until after the expiration of two months after the notice in writing has been delivered to the parties concerned in the manner prescribed by the said Section. If such suit is filed either without such notice or before the said two months' period is over, such suit has to be dismissed as not maintainable. The reason for this is felicitously set out in **Bihari Chowdhary and Anr. v. State of Bihar and Ors.**, (1984) 2 SCC 627, as follows:

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> "**3.** …… When we examine the scheme of the section it becomes obvious that the section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. The object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation."

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G 22. Section 80, though a procedural provision, has been held to be mandatory as it is conceived in public interest, the public purpose underlying it being the advancement of justice by giving the Government the opportunity to scrutinize and take immediate action to settle a just claim without driving the person who has issued a notice having to institute a suit involving considerable expenditure and delay. This is to be

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contrasted with Section 34(5), also a procedural provision, the infraction of which leads to no consequence. To construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness.

23. However, according to Shri Tripathi, an application filed under Section 34 is a condition precedent, and if no prior notice is issued to the other party, without being accompanied by an affidavit by the applicant endorsing compliance with the said requirement, such application, being a non-starter, would have to be dismissed at the end of the 120 days' period mentioned in Section 34(3). Apart from what has been stated by us hereinabove, even otherwise, on a plain reading of Section 34, this does not follow. Section 34(1) reads as under:

> "**34. Application for setting aside arbitral award.—**(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)."

What is conspicuous by its absence is any reference to sub-section (5). The only requirement in Section 34(1) is that an application for setting aside an award be in accordance with sub-sections (2) and (3). This, again, is an important pointer to the fact that even legislatively, sub-section (5) is not a condition precedent, but a procedural provision which seeks to reduce the delay in deciding applications under Section 34. One other interesting thing needs to the noted – the same Amendment Act brought in a new Section 29A. This provision states as follows:

> "**29A. Time limit for arbitral award**.— (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
>
> *Explanation*.— For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.
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> (2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

A (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay."

24. It will be seen from this provision that, unlike Section 34(5) and (6), if an Award is made beyond the stipulated or extended period contained in the Section, the consequence of the mandate of the Arbitrator being terminated is expressly provided. This provision is in stark contrast to Section 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences.

25. Shri Tripathi then argued that Section 34(5) is independent of Section 34(6) and is a mandatory requirement of law by itself. There are two answers to this. The first is that sub-section (6) refers to the date on which the notice referred to in sub-section (5) is served upon the other party. This is for the reason that an anterior date to that of filing the application is to be the starting point of the period of one year referred to in Section 34(6). The express language of Section 34(6), therefore, militates against this submission of Shri Tripathi. Secondly, even if sub-section (5) be construed to be a provision independent of sub-section (6), the same consequence in law is the result – namely, that there is no consequence provided if such prior notice is not issued. This submission must therefore fail.

26. We come now to some of the High Court judgments. The High Courts of Patna,[2] Kerala,[3] Himachal Pradesh,[4] Delhi,[5] and Gauhati[6] have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80, CPC have been drawn to reach the same result. On the other hand, in **Global Aviation Services Private Limited v. Airport Authorities of India**,[7] the Bombay High Court, in answering question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because no consequence has been provided for breach of the time limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under:

> "**133.** Insofar as the submission of the learned counsel for the respondent that if section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights of a party to challenge an award under section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of the arbitration petition."

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[2] *Bihar Rajya Bhumi Vikas Bank Samiti* v. *State of Bihar and Ors*., L.P.A. No. 1841 of 2016 in C.W.J.C. No. 746 of 2016 [decided on 28.10.2016].

[3] *Shamsudeen* v. *Shreeram Transport Finance Co. Ltd.,* Arb. A. No. 49 of 2016 [decided on 16.02.2017].

[4] *Madhava Hytech Engineers Pvt. Ltd.* v. *The Executive Engineers and Ors.*, O.M.P. (M) No. 48 of 2016 [decided on 24.08.2017].

[5] *Machine Tool (India) Ltd.* v. *Splendor Buildwell Pvt. Ltd. and Ors.,* O.M.P. (COMM.) 199-200 of 2018 [decided on 29.05.2018].

[6] *Union of India and Ors.* v. *Durga Krishna Store Pvt. Ltd*., Arb. A. 1 of 2018 [decided on 31.05.2018].

[7] Commercial Arbitration Petition No. 434 of 2017 [decided on 21.02.2018].

A The aforesaid judgment has been followed by recent judgments of the High Courts of Bombay[8] and Calcutta.[9]

27. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every Court in B which a Section 34 application is filed, to stick to the time limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every Court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar C to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.

28. We may also add that in cases covered by Section 10 read D with Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within six months, as stipulated. Appeals which are not so covered will also be disposed of as expeditiously as possible, preferably within one E year from the date on which the appeal is filed. As the present appeal has succeeded on Section 34(5) being held to be directory, we have not found it necessary to decide Shri Rai's alternative plea of maintainability of the Letters Patent Appeal before the Division Bench.

29. As a result, the appeal is allowed and the judgment of the F Patna High Court is set aside. The Section 34 petition that has been filed in the present case will now be disposed of on its merits.

Kalpana K. Tripathy Appeal allowed.

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[8] *Maharashtra State Road Development Corporation Ltd.* v. *Simplex Gayatri Consortium and Ors.*, Commercial Arbitration Petition No. 453 of 2017 [decided on 19.04.2018].

[9] *Srei Infrastructure Finance Limited* v. *Candor Gurgaon Two Developers and Projects Pvt. Ltd.*, A.P. No. 346 of 2018 [decided on 12.07.2018].