

JAMMU AND KASHMIR HIGH COURT

State of J&K

Vs.

Abdul Ghani

Letters Patent Appeal No. 15 of 1976

(Adarsh Sein Anand, I.K. Kotwal and G.M. Mir, JJ.)

20.09.1978

JUDGEMENT

KOTWAL, J.

1. This appeal was initially heard by two of us, namely, Anand J. and myself, and we being of the view, that the controversy involved in the appeal was of some importance, which needed an authoritative pronouncement by a larger Bench, we recommended constitution of a larger Bench to hear the appeal. That is how it has been placed before a Full Bench.

2. The facts leading to the appeal, briefly put, are as follows : The respondent, a Govt. servant was tried by the Anti Corruption Commission (non- gazetted), under the Jammu and Kashmir Govt. Servants Prevention of Corruption (Commission) Act, 1962, hereinafter referred to as 'the Act', and was found guilty. The Commission accordingly transmitted its report to the Governor, recommending therein certain punishments, short of dismissal from service, to be imposed on him. The Governor issued a notice to the respondent to show cause as to why he be not dismissed from service and even after considering the reply of the respondent, imposed on him the punishment of dismissal from service. The respondent not only challenged this order in a writ petition, but also challenged the entire proceedings before the Commission on a number of grounds including the one - and with which alone we are concerned, that as he was not supplied copy of the proceedings along with the show cause notice issued by the Governor which was a mandatory requirement of Sub-Section (5) of Section 17 of the Act, not only the order under which he was dismissed from service, but also the entire proceedings before the Commission stood vitiated. No other ground excepting the one of non-compliance with Sub-Section (5) of Section 17 found favor with the learned single Judge (Mian Jalal-ud-Din J., now Hon'ble the Chief Justice), who accordingly issued a writ, but only to the limited extent of quashing the proceedings taken onwards from the stage of Sub-Section (5). The learned Judge was of the view, that provisions of Sub- Section (5) were mandatory, as such, their non-compliance vitiated the final order passed by the Governor. The State has felt aggrieved of this order, hence the appeal.

3. We have heard not only the learned counsel for the parties, but also Mr. P.L. Handao, who was permitted to argue as an intervener, but only on the points involved in the appeal.

4. In support of the appeal, Mr. Malik has urged three grounds. His first ground is, that the provisions of Sub-Section (5) of Section 17 of the Act are not mandatory, but only directory, and their non-compliance in the absence of any prejudice to an accused, shall be of no consequence. Since no prejudice had been pleaded by the respondent, no writ could be issued in his favor. The other ground relied upon by the learned counsel is, that even if these provisions are deemed to be mandatory still their non-compliance would not be material, where an accused knew or could have otherwise means of knowing the contents of the proceedings. As the respondent in the instant case had the knowledge or at least the means of acquiring the knowledge of the proceedings, the order under appeal was bad in law. His last ground is that the expression 'copy of the proceedings' occurring in Sub-Section (5) is too vague and general which could not reasonably admit of strict compliance.

5. For a better appreciation of the controversy involved, it would be necessary to go through the legislative history of Sub-Section (5) of Section 17. The Act was enforced in the year 1962. In Sub-Section (5) as it originally stood there was no provision for supplying any material to an accused. The Sub-Section as it stood then read like this :

"(5) Before accepting the recommendation of the Commission the accused shall be called upon to show cause against the particular punishment to be imposed upon him."

The first amendment was made in it vide Act No. IV of 1967, and a provision included in it, that an accused shall be entitled to a copy of the report, provided the punishment recommended was either dismissal or removal from services or even reduction in rank. The Sub-Section, accordingly, came to be read as below :

"If the penalty recommended by the Commission is that of dismissal, removal from service or reduction in rank, the accused shall be supplied with a copy of the report of enquiry and before accepting that recommendation the accused shall be given further opportunity to show cause why the penalty recommended be not imposed on him." The last amendment, and with which we are mainly concerned in this appeal, was made in Sub-Section (5) vide Act No. XVIII of 1969, and this Sub-Section, after the said amendment, acquired the following form :

"(5) After the Commission submits its recommendation and after the Governor arrives at a provisional conclusion in regard to the penalty to be imposed, the accused shall be supplied with a copy of the proceedings of the inquiry and called upon to show cause by a particular date why the proposed penalty should not be imposed upon him."

6. The question, whether a particular provision is mandatory or directory, is seldom free from difficulty. The use of the word 'shall' in a statute, though generally taken in a mandatory sense, is yet not conclusive of its nature. A provision, which is mandatory in form, may nevertheless be directory in substance, and vice versa, and the language employed in it may not provide a sure index. One of the tests, for determining the nature of a provision, is the object, sought to be achieved by the Statute. The legislative intent plays an important role in determining, whether a provision is mandatory or directory. In Re : Presidential Poll Special Reference No. 1 of 1974 :

((1974) 2 SCC 33) : (AIR 1974 SC 1682) Ray C.J. stated the law on the point in the following words : (at p. 1686 of AIR).

"In determining the question whether a provision is mandatory or directory, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the Courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. The key to the opening of every law is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole."

7. Another guide, for determining the nature of a provision is, whether it entails any penal consequences, for, a penal statute has to be strictly construed in favour of the accused. Let us, therefore, examine the provisions of Sub-Section (5) in the light of these fundamental principles.

8. The two amendments, which Sub-Section (5) has undergone in the years 1967 and 1969, clearly reflect the intention of the legislature to widen the scope of the information sought to be conveyed to an accused, to know his case fully, in order to enable him to make an effective representation to the Governor, before any penal consequences may be visited upon him. Whereas, a necessity was felt to supply information to an accused, as to what was the final outcome of the enquiry against him, a provision was made in the year 1967 to provide him a copy of the report of the Commission, but only, where certain kinds of punishments were recommended. This was not considered enough, and Sub-Section was again amended in the year 1969, with a view to widening the scope of information to be supplied to an accused. Consequently, the words 'copy of the report' were replaced by the words 'copy of the proceedings' and the condition of the nature of the punishment was also removed. An accused, therefore, became entitled to copy of proceedings in all cases where he was found guilty by the Commission, regardless of the nature of the punishment to be imposed on him.

9. An adverse report of the Commission undoubtedly entailed penal consequences. Besides recommending any one or more of the punishments provided in Sub-Section (1) of Section 17, the Commission could also recommend criminal prosecution of the accused in a court of law. Another important feature of the Act was, that neither the report of the Commission, nor the final order passed by the Governor, was open to scrutiny by any court. Once the Governor accepted the findings of the Commission, his order became final. It was perhaps for these reasons, that the legislature intended to provide fullest information to an accused, to enable him to make out his defence, as effectively as possible. This legislative intent must, therefore, play an important role, in determining whether the provisions of Sub-Section (5) are mandatory or merely directory. The penal nature of the Act, coupled with the aforesaid legislative intent, and the use of the word 'shall' in it, can lead to one and only one conclusion, that the provisions of Sub-Section (5) are mandatory, and not merely directory. I am not impressed with the argument of Mr. Malik, that the expressions 'copy of the report' and 'copy of the proceedings' used in Sub-Section (5) in the years 1967 and 1969 respectively, were only interchangeable. As held by their Lordships of the Supreme Court in *Dhoom Singh v. P.C. Sethi*¹, "a statute must be construed ut res magis valeat quam pereat, so that the intention of the legislature may not be treated as vain or left to operate in the air."

10. Mr. Malik then attempted to draw an analogy between the provisions of Sub-Section (5) of Section 17 of the Act and Sub-Section (4) of Section 173 of the Code of Criminal Procedure, and argued, that as Sub-Section (4) of Section 173, which too provides for supplying copies to an accused, has been held to be merely directory by the Supreme Court in *Noor Khan v. State of Rajasthan*², Sub-Section (5) of Section 17 must on parity of the reasoning, be held to be only directory, and its non-compliance inconsequential, in the absence of any prejudice to the accused. This argument of the learned counsel is also untenable. Sub-Section (4) of Section 173 has been held to be directory, in the light of other provisions, more particularly, Section 537, contained in the Code of Criminal Procedure. The Code has itself defined, as to which of its provisions are mandatory, a non-compliance whereof would vitiate a trial or other proceedings, Section 530 of the Code speaks of such provisions. Section 173(4) is not included in this Section. Sections 529, 531, 532, 533, 535, 536 and 537 deal with those provisions, a non-compliance whereof alone would not be sufficient to vitiate any trial or proceeding. By the simple process of elimination, Section 173 would fall under Section 537 and its non-compliance would not be material in the absence of any resultant prejudice to an accused. It was in these circumstances, that the Supreme Court in *Noor Khan's* case (*supra*) held, that the provisions of Sub-Section (4) of Section 173 were only directory. There are no such provisions in the Act, and consequently no such analogy is either permissible or even desirable. It is now well settled, that no prejudice may be shown by an accused, where a mandatory provision of law has not been complied with, as in such a case, prejudice shall have to be presumed. The first ground taken by Mr. Malik therefore fails.

11. Explaining his second ground, Mr. Malik drew our attention to the procedure laid down in the Act, and urged, that when a proceeding is commenced against an accused before the Commission, he is given a copy of the charge sheet, and called upon to submit his preliminary statement. Thereafter, the prosecution evidence starts and he is allowed to cross-examine the prosecution witnesses. After the prosecution evidence is over, he is given an opportunity to file a detailed written statement, explaining all the circumstances, that have appeared against him in prosecution evidence. He may then lead his own evidence. When the evidence of the parties is closed, the Commission is to hear both sides, and then record its own finding. All this, according to the learned counsel, provides the accused an opportunity to know the whole case against him. And, on top of it, if he also gets a copy of the Commission's report which contains the broad features of the whole case, there would be, as such no need left, to make

¹(1975) 1 SCC 597 : (AIR 1975 SC 1012)

² AIR 1964 SC 286

available any copy of the proceedings to him. This may in a given case, according to Mr. Malik, amount to substantial compliance with Sub-Section (5). This is what, according to the learned counsel, has also happened in this case. Without going into the factual aspect of this argument, I may say, that there is intrinsic fallacy in the argument of Mr. Malik, Cases may be conceivable, where an accused person is totally illiterate, or a victim of chill penury, who can neither read nor write, nor has the means to obtain copies of the statements of witnesses etc. Take yet another case, where an accused has remained *ex parte* from the start of the proceedings before the Commission. How would this argument of Mr. Malik cover such cases ? Does it not then mean, that the provisions of Sub-Section (5), may have to be applied to different persons, in different ways, in accordance with the facts of each individual case ? The answer to this question must be in the affirmative. Such an interpretation is hardly possible, much less when the Sub-

Section too does not say that it shall be applied to different persons in accordance with particular facts of each individual case. On its plain terms, provisions of Sub-Section (5) must be complied with in each case irrespective of its peculiar facts and circumstances, however inconvenient the prosecution might feel in doing so. That a provision of law, which is otherwise unqualifying, cannot be applied, according to the facts of each individual case, has been held by the Supreme Court in the famous case *Smt. Indira Nehru Gandhi v. Raj Narain*³ wherein Khanna J. observed as follows :- (at p. 2352)

"It has been argued on behalf of the appellant that the grounds on account of which the election of the appellant had been held to be void by the High Court were of a technical nature. I need not express any opinion about this aspect of the matter at this stage but assuming it to be so, I find that clause (4) of Article 329-A is so worded that however serious may be the malpractices vitiating the election of the Speaker or the Prime Minister, the effect of clause (4) is that the said election would have to be treated as valid. I cannot accede to the submission that in construing clause (4) we should take into account the facts of the appellant's case. This is contrary to all accepted norms of construction. If a clause of a Constitution or statutory provision is widely worded, the width of its ambit cannot be circumscribed by taking into account the facts of an individual case to which it applies."

12. The Legislature in enacting Sub-Section (5) has made a solemn commitment to the accused, that he would be supplied a copy of the proceedings before he shall be asked to submit his defence. This assurance has to be honoured, whether or not such a copy is really needed by the accused. May be that in some cases an accused entirely depends upon this assurance. Looking at the problem from another angle, the term 'copy' in the Sub-Section must mean the true copy, which is not a translation of the original, but is written in the same language in which its original is written. Copy also does not mean a mere gist or substance of its original. Copy of the Commission's report may seldom satisfy these fundamental requirements. In *re Rangaswami Goundan*, AIR 1957 Madras 508 an English Translation of the statement of the witness was held not to be a sufficient compliance with Sub-Section (4) of Section 173 Cr. P.C. which also requires copies to be supplied to the accused. *Somasundaram*

³(AIR 1975 SC 2299)

J., who spoke for the court, said : (at p. 512)

"There is no guarantee that the English translation of the statements recorded in Tamil are true and correct.

Even the best translations in the world cannot take the place of the original. With the knowledge of English that the investigating officers possess, it cannot be said with certainty that the translation must be true or correct. Errors are bound to creep in the English translations and the spirit and force of particular expressions used by the witness in Tamil may not always be brought out accurately in the English Translation. In fact the case *Criminal A. Nos. 577 and 638 of 1965* : (AIR 1957 Madras 505), will be an instance in point..... Copies of statement in Tamil not having been made available to the accused prejudice must be presumed. In our opinion, the provisions relating to the grant of copies

mentioned in Section 173(4), Criminal P.C. are vital provisions and disregard of such a vital provision, according to their Lordships of the Supreme Court in AIR 1956 Supreme Court 116, is fatal to the trial and at once invalidates the conviction. We, therefore, set aside the conviction and sentence of the accused and order re-trial."

The second ground urged by Mr. Malik must, therefore, fail.

13. Turning now to his last ground, it may be pointed out, that the term 'Proceeding' has not been defined in the Act. Mr. Malik is indubitably right in arguing, that in case a liberal construction is placed upon this term, then an accused may be entitled, not only to the copies of the charge sheet, the statements of the witnesses and the Commission's report, but also to all the interim orders passed by the Commission, right from the day the complaint is produced before it. This, argues the learned counsel, and rightly so, may to a large extent be a mere exercise in futility; what then should be the real import of 'the term 'Proceeding' ? 'Proceeding' has been defined in Webster's New International Dictionary as :

- i. Progress or movement from one thing to another;
- ii. the course of procedure in an action at law; and
- iii. any step or action taken in conducting litigation.

If the aid of Dictionary is taken in interpreting the term 'Proceeding', then the apprehensions of Mr. Malik may certainly come true. Obviously, therefore, Dictionary cannot be always a sure guide for interpreting a legal term which is not defined in an Act. Guidance in such cases has to be taken from the intention of the Legislature, and the purpose for which the particular provision is made in a Statute. This rule of construction has been clearly enunciated by the Supreme Court in *Bolani Ores Ltd. v. State of Orissa*⁴, wherein it was held (at Pp. 25, 26 of AIR) :

"As usual references have been made to the Dictionaries but quite often it is not possible to hold a dictionary in one hand and the statute to be interpreted in the other for ascertaining the import and intent of the word or expression used by Legislature. The shades of meaning of a word, its different connotations

⁴(1974) 2 SCC 777 : (AIR 1975 SC 17)

and collocations which one finds in a dictionary does not relieve us of the responsibility of having to make the ultimate choice of selecting the right meaning. We choose that meaning which is most apt in the context, colour and diction in which the word is used. The use of a dictionary ad lib without an analysis of the entire Act, its purpose and its intent, for ascertaining the meaning in which the Legislature could have used the word or expression may not lead us to the right conclusion. With this caution before us for avoiding any of the aforesaid methods which might lead to a possible incongruity, we will examine the different facets to which our attention has been drawn."

14. As already observed, the intention of the Legislature "in amending Sub- Section (5) twice i.e. once in 1967 and then again in 1969 was to ensure, that fullest information was given to the

accused, about the case found against him so that, he was not in any way hampered or handicapped in making out his defence, pursuant to the show cause notice, that might be issued by the Governor to him. Keeping in view the legislative intent and purpose of Sub- Section (5), 'copy of the proceeding' should mean and include, not only copies of the statements of witnesses, the charge sheet and the final report of the Commission, but may also include, copies of the written statements of the accused and such interim orders passed by the Commission, which have a bearing on the defence of the accused. A Commission, for instance, might have closed defence evidence without any justification or even refused the prayer of the accused to cross-examine a prosecution witness in recording its reasons in a separate order. Copies of all such interim orders must also be supplied to him. The accused requires copies of all these documents and orders, for twofold purpose, on the one hand, of explaining the circumstances appearing against him in the evidence, and on the other hand, of establishing his innocence. But, copies of other documents or orders, which have neither any bearing on the prosecution case nor on the defence of the accused, need not be supplied to him, though the same may also fall within the wider definition of the term 'proceeding'. Putting in a nut-shell 'copy of the proceeding', should mean and include, copies of all those documents and orders, which disclose, not only the prosecution case, but which have also a direct bearing on the defence of the accused. Interpreted thus, Sub-Section (5) will be no more incapable of a reasonably strict compliance. No fault can, therefore, be found with the view taken by the learned single Judge.

15. In the result, the appeal fails, which is accordingly dismissed, but in the peculiar circumstances of the case without any order as to costs.

Adarsh Sein Anand, J.

16. I agree.

G. M. MIR, J.

17. I agree.

Appeal dismissed