

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 28.10.2020

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MRS.JUSTICE R.HEMALATHA

WP.NO.15079 OF 2020

G.Sundarrajan

.. Petitioner

Versus

1. Union of India represented by
The Secretary,
Ministry of Finance
Department of Revenue
New Delhi 110 001.

2. State of Tamil Nadu
represented by the Chief Secretary
Secretariat, Chennai 600 009.

.. Respondents

Prayer:-

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of mandamus directing the respondent No.1-Union of India to implement the provisions of Section 7 of the Goods and Services Tax [Compensation to States] Act, 2017, in letter and spirit and release a sum of Rs.12,250.50 Crores to respondent No.2-State of Tamil Nadu towards compensation for the shortfall in GST collections accrued during the period from 1st April 2020 to 31st August 2020 immediately.

For Petitioner : Mr.M.Radhakrishnan

For R2 : Mr.M.Elumalai
Additional Government Pleader

ORDER

(1)By consent, the writ petition is taken up for final disposal and is disposed of by this order.

- (2) Mr. M. Elumalai, learned Additional Government Pleader accepts notice on behalf of the 2nd respondent.
- (3) The petitioner, who is a Graduate in Engineering [Electronics and Instrumentation] from Annamalai University and also claims to be the Managing Trustee of ''Poovulagin Nanbargal'' [Friend of Earth/Globe], which is a registered Public Trust, which aims at creating an environment law awareness among the people of Tamil Nadu by promoting sustainable development and campaigning for organic and safe food and the Trust also publishes a couple of monthly journals on environment and related issues.
- (4) Mr. M. Radhakrishnan, learned counsel for the petitioner has invited the attention of this Court to the materials placed and would submit that in terms of Section 7 of the Goods and Services Tax [Compensation to States] Act, 2017 [Central Act 15 of 2017], an obligation is cast upon the 1st respondent to provide for timely and speedy disbursement of compensation in pursuance of provisions of Section 18 of the Constitution [101st Amendment] Act, 2016. The learned counsel for the petitioner also drawn the attention of this Court to the Press Release in PR.No.635 dated 31.08.2020 issued by the Director of Information and Public Relations, Government of Tamil Nadu, Chennai and would submit that the Press Release contains a D.O. Letter dated 31.08.2020 of the Hon'ble Chief Minister of Tamil Nadu addressed to the Hon'ble Prime Minister of India, wherein the difficulties being faced by the State of Tamil Nadu, in the light of COVID-19 pandemic virus have been stated and a request has also been made for provision of a mechanism in and by which the Government of India raises required funds as loan and lends it to the Goods and Services Tax [in short ''GST''] Compensation Fund against future cess receipts, so that GST compensation can be paid in full to the States in 2020-21 and also made a request that the Government of India shall ensure that the States shall get their full dues of the compensation in the current year itself and reduce neither the compensation payable nor the already announced and committed additional borrowing permissible to States of 2% of GSDP under the Atma Nirbhar Bharat Stimulus Package in any circumstances and despite the said request made by one of the important Constitutional Functionaries, viz., the Hon'ble Chief Minister of Tamil Nadu, nothing is moving forward and the petitioner, being a citizen of India and a native of the State of Tamil Nadu, is entitled to approach this Court with the prayer for appropriate direction to direct the 1st respondent to implement the provisions of Section 7 of the Goods and Services [Compensation to States] Act, 2017, in letter and spirit and pass appropriate orders.

(5) The learned counsel for the petitioner would submit that in the light of the mandatory nature of the particular provision, viz., Section of the Goods and Services [Compensation to States] Act, 2017, the 1st respondent is under obligation to compensate the State of Tamil Nadu and the urgency in this matter can also be gauged from the fact that the Hon'ble Chief Minister of Tamil Nadu has sent a D.O. Letter dated 31.08.2020 to the Hon'ble Prime Minister of India, which also appears in the form of Press Release dated 31.08.2020 issued by the Director of Information and Public Relations, Chennai and prays for appropriate orders.

(6) This Court paid its anxious consideration and best attention to the arguments advanced by the learned counsel for the petitioner and also perused the materials placed before it.

(7) It is relevant to extract the following provisions of the Goods and Services [Compensation to States] Act, 2017:-

'Section 2[1]:- In this Act, unless the context otherwise requires -

.....[d] 'compensation' means an amount, in the form of goods and services tax compensation, as determined under Section 7.

Section 7:-[1] The compensation under this Act shall be payable to any State during the transition period.

[2] The compensation payable to a State shall be provisionally calculated and released at the end of every two months period, and shall be finally calculated for every financial year after the receipt of final revenue figures as audited by the Comptroller and Auditor General of India.

Provided that in case any excess amount has been released as compensation to a State in any financial year during the transition period, as per the audited figures of revenue collected, the excess amount so released shall be adjusted against the compensation amount payable to such State in the subsequent financial year.

(3) The total compensation payable for any financial year during the transition period to any State shall be calculated in the following manner, namely:--

(a) the projected revenue for any financial year during the transition period, which could have accrued to a State in the absence of the goods and services tax, shall be calculated as per section 6;

(b) the actual revenue collected by a State in any financial year during the transition period shall be—

(i) the actual revenue from State tax collected by the State, net of refunds given by the said State under Chapters XI and XX of the State Goods and Services Tax Act;

(ii) the integrated goods and services tax apportioned to that State; and

(iii) any collection of taxes on account of the taxes levied by the respective State under the Acts specified in sub-section (4) of section 5, net of refund of such taxes, as certified by the Comptroller and Auditor-General of India;

(c) the total compensation payable in any financial year shall be the difference between the projected revenue for any financial year and the actual revenue collected by a State referred to in clause (b).

(4) The loss of revenue at the end of every two months period in any year for a State during the transition period shall be calculated, at the end of the said period, in the following manner, namely:-- (a) the projected revenue that could have been earned by the State in absence of the goods and services tax till the end of the relevant two months period of the respective financial year shall be calculated on a pro-rata basis as a percentage of the total projected revenue for any financial year during the transition period, calculated in accordance with section 6.

Illustration.—If the projected revenue for any year calculated in accordance with section 6 is one hundred rupees, for calculating the projected revenue that could be earned till the end of the period of ten months for the purpose of this sub-section shall be $100 \times (5/6) = \text{Rs.} 83.33$;

(b) the actual revenue collected by a State till the end of relevant two months period in any financial year during the transition period shall be— (i) the actual revenue from State tax collected by the State, net of refunds given by the State under Chapters XI and XX of the State Goods and Services Tax Act;

(ii) the integrated goods and services tax apportioned to that State, as certified by the Principal Chief Controller of Accounts of the Central Board of Excise and Customs; and

(iii) any collection of taxes levied by the said State, under the Acts specified in sub-section (4) of section 5, net of refund of such taxes;

(c) the provisional compensation payable to any State at the end of the relevant two months period in any financial year shall be the difference between the projected revenue till the end of the relevant period in accordance with clause (a) and the actual revenue collected by a State in the said period as referred to in clause (b), reduced by the provisional compensation paid to a State till the end of the previous two months period in the said financial year during the transition period.

(5) In case of any difference between the final compensation amount payable to a State calculated in accordance with the provisions of sub-section (3) upon receipt of the audited revenue figures from the Comptroller and Auditor-General of India, and the total provisional compensation amount released to a State in the said financial year in accordance with the provisions of sub-section (4), the same shall be adjusted against release of compensation to the State in the subsequent financial year.

(6) Where no compensation is due to be released in any financial year, and in case any excess amount has been released to a State in the previous year, this amount shall be refunded by the State to the Central Government and such amount shall be credited to the Fund in such manner as may be prescribed."

(8) The primordial submission made by the learned counsel for the petitioner is that in the light of Sub-section [1] of Section 7, the compensation payable under the Act to any State during the transition period, is mandatory and as such, the 1st respondent is under obligation to pay the compensation to the State of Tamil Nadu without any loss of time, especially, in the light of the onset and thick spread of COVID-19 pandemic virus.

(9) The learned counsel for the petitioner would also plead that this Court can also take judicial notice of the fact that on account of the spread of the COVID-19 pandemic virus, the economic activities of the Country, especially, the State of Tamil Nadu, almost came to a standstill and now only, it is limping back to normalcy and it would also take considerable

time and in the light of the same, prays for passing of a positive order in this writ petition, styled as a Public Interest Litigation.

(10) The interpretation of the words 'may' and 'shall' came up for consideration before the Hon'ble Supreme Court of India in the judgment reported in 2008 [12] SCC 372 [Bachahan Devi and Another V. Nagar Nigam, Gorakhpur and Another], referred to by the learned counsel for the petitioner and it is relevant to extract the following paragraphs:-

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

18. It is well settled that the use of the word "may" in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word "may" as a matter of pure conventional courtesy and yet intend a mandatory force. In

order, therefore, to interpret the legal import of the word "may", the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well settled that where the word "may" involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word "may" should be interpreted to convey a mandatory force. As a general rule, the word "may" is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word "shall", which ordinarily is imperative as it imposes a duty. Cases, however, are not wanting where the words "may", "shall" and "must" are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances.

.....

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

- (11) In Sharif-ud-Din V. Abdul Gani Lone reported in 1980 [1] SCC 403, the issue as to the mandatory requirement of Section 81[3] of the Jammu and Kashmir Representation of the People Act, 1957, came up for consideration and in paragraph No.9 of the said judgment, the Hon'ble Apex Court has dealt with the Mandatory Role and the Directory Role and it is relevant to extract the said paragraph No.9, which reads 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. 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 summarised 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 has to subserve 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."

(12) In the judgment reported in 2003 [2] SCC 111 [Bhavnagar University v. Palitana Sugar Mill [P] Ltd and Others], the purport and object of Section 21 of the Gujarat Town Planning and Urban Development Act, 1976, came up for consideration and it is relevant to extract paragraphs No.43 to 45 of the said judgment, which reads thus:-

"43. In Sutherland's Statutory Construction, 3rd Edn., Vol. 3, at p. 102 the law is stated as follows:

"? unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered a limitation of the power of the officer".

At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. 111 it is stated as follows:

"As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive."

44. In Dattatraya Moreshwar v. State of Bombay [MANU/SC/0014/1952 : AIR 1952 SC 181] it was held as under: (AIR p. 185, para 7)

"Generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done."

45. In Craies on Statute Law, 8th Edn., at p. 262, it is stated thus:

" 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.' ? that in each case you must look to the subject-matter, consider the importance of the provision 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 enactment is what is called imperative or only directory."

(13) In the decision reported in 2016 [1] CTC 308 [Hyundai Motors Vs. Union of India], it has been held as follows:-

"59. Therefore, it is clear that if the condition imposed by the provision of law to do a certain thing within a time frame is upon an authority (such as the Designated Authority in this case) and the consequences of the failure of that authority to comply with the condition, is to fall upon someone else (such as the persons in the domestic market) who have no control over the authority which is to perform the duty, then the provision of law cannot be construed as mandatory, but only directory.

....
63. Another simple test to determine whether a time limit stipulated in a rule is directory or mandatory, is to see whether there is any indication in the Rule itself about the consequences of non compliance with the same. If a statutory provision contains a prescription and also stipulates the consequences of non compliance with the condition, it would normally be taken to be mandatory. If the consequences of non compliance are not indicated, then, the provision has to be seen only as directory."

(14) In sum and substance, it is the submission of the learned counsel for the petitioner that in the light of the employment of the word "'shall'" in Sub-section [1] of Section 7 of the Goods and Services Tax [Compensation to States] Act, 2017, the compensation payable to the State shall be provisionally calculated and released at the end of every two months period and shall be finally calculated for every Financial Year after the receipt of the final revenue figures, as audited by the Comptroller and Auditor General of India, in the light of Sub-section [2] of Section 7 of the said Act and the said time line

has not been adhered to and this Court can issue positive orders.

(15) In the considered opinion of the Court, the mere employment of the word ''shall'' cannot be construed as mandatory in the light of the ratio laid down in the above cited decisions and it depends upon the context and the purpose of the legislative intent also.

(16) It is also to be noted at this juncture that the Goods and Services Tax [Compensation to States] Act, 2017, does not deal and speak about the consequences of non-compliance of the time line stipulated under Sub-section [2] of Section 7 of the said Act and therefore, it can be construed only as directory and not mandatory. It is not as if the 1st respondent is not going to compensate the States, in the light of the above cited provisions and whatever difficulties faced by the Government of Tamil Nadu in lieu of the economic melt down due to COVID-19 pandemic virus, may have equal application to the Union of India also.

(17) In the light of the reasons assigned above, this Court is of the considered view that positive direction sought for by the petitioner cannot be granted. This Court also hope and trust that the 1st respondent would take into account the difficulties being faced by the States, especially the State of Tamil Nadu in the light of the contents of the Press Release dated 31.08.2020 issued by the Director of Information and Public Relations, Chennai-9.

(18) In the result, the writ petition stands dismissed subject to the above observations. No costs.

Sd/-
Assistant Registrar (CS III)

//True Copy//

Sub Assistant Registrar

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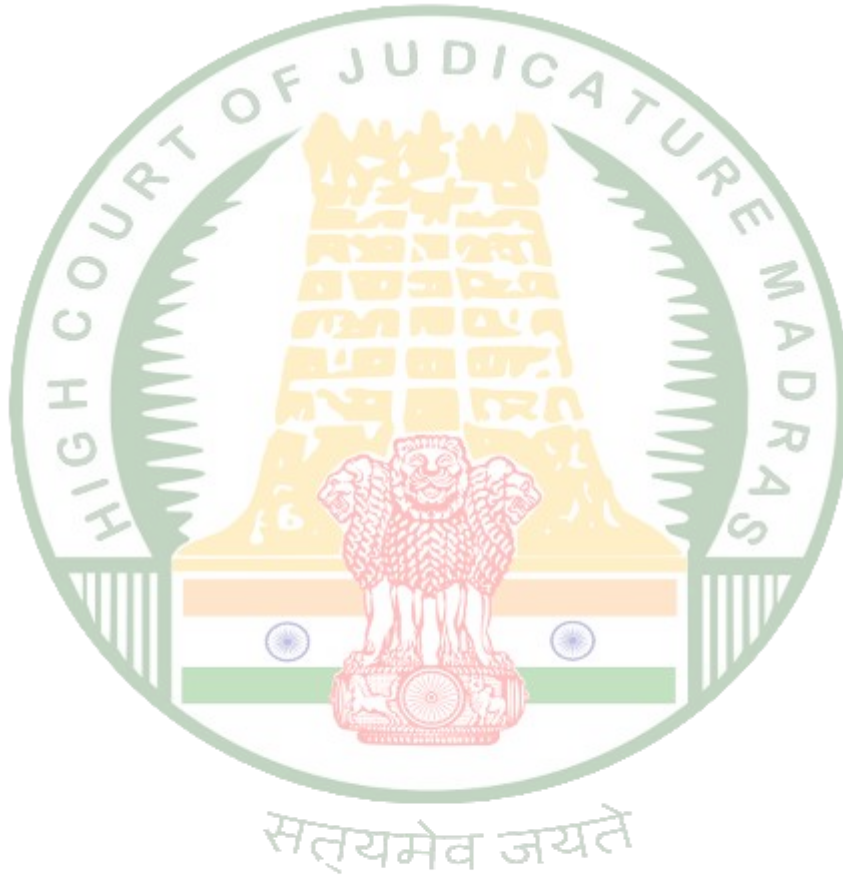
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