

# Supreme Court of India ‘Rules Out’ the Rulebook in Favor of Substantive Rights

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Siddharth Ratho, Tanisha Khanna (Nishith Desai)

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A *mandatory* legal provision is one that a party has no choice but to obey, whereas a *directory* provision is one which the party is encouraged to obey. In other words, a mandatory provision *must* be observed, disobedience of which would lead to a nullification of the legal act, whereas a *directory* provision is *optional*.

In the case of *State of Bihar & Ors. v Bihar Rajya Bhumi Vijas Bank Samiti*<sup>[fn]</sup> Civil Appeal No. 7314 of 2018<sup>[/fn]</sup>, the Supreme Court of India (“**SC**”) has had occasion to decide whether Section 34(5)<sup>[fn]</sup> Section 34 (5) of the Arbitration Act (inserted vide Section 18 of the Arbitration and Conciliation (Amendment) Act, 2015) states as follows: 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.<sup>[/fn]</sup> of the Indian Arbitration and Conciliation Act, 1996 (“**Act**”), is a *mandatory* or *directory* provision of law. In doing so, it had to play referee to two competing considerations – discouraging unscrupulous defendants by upholding strict rules of procedure, versus preventing procedural provisions of law from defeating substantive rights. The SC eventually ruled in favor of the latter.

Consequently, prior notice to an adversary is *not* mandatory for filing an application to set aside an arbitration award. In reaching its conclusion, the SC elucidated important principles governing the distinction between *mandatory* and *directory* provisions of procedural law.

### **Precedential Back Drop**

In this case, the SC was tasked with finally resolving two contrary streams of precedent. One line of rulings, helmed by *New India Assurance Co. Ltd. v Hilli Multipurpose Cold Storage Pvt. Ltd.* (2015) 16 SCC 20, held that procedural provisions of law (in this case the time limit prescribed for filing a written statement under the Consumer Protection Act, 1986 (“**CPA**”)) were mandatory in nature. The SC in *New India Assurance* was guided by observations in *Dr. J.J. Merchant & Ors. v Shrinath Chaturvedi* (2002) 6 SCC 635 to the effect that the prescribed time limit for filing of a written statement under the Code of Civil Procedure, 1908 (“**CPC**”) was ‘*required to be adhered to.*’

Eventually, the SC upheld its previous rulings in *Topline Shoes v Corporation Bank*, (2002) 6 SCC 33 *Salem Advocate Bar Association v Union of India* (2005) 6 SCC 344, *State v N.S. Ganeswaran* (2013) 3 SCC 594 and *Kailash v Nankhu & Ors* (2005) 4 SCC 480, where similar procedural provisions prescribing time-lines were considered *directory* in nature.

## **Facts and Arguments**

The newly introduced Section 34(5) of the Act provides that applications to set aside arbitral awards *“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.”* Section 34(6) further provides that such an application is to be disposed of expeditiously and in any event within one year from the date on which such notice is served upon the other party.

The appellants in this case (“**Appellants**”) had filed an application for setting aside an arbitral award under Section 34 of the Act (“**Application**”) before the High Court of Patna (“**Patna HC**”) without issuing prior notice to the respondents (“**Respondents**”). The Respondents challenged the maintainability of the Application on the ground that no prior notice had been issued to them. The Appellants countered this by stating that the requirement to provide notice under Section 34 (5) of the Act was only directory in nature.

The two arguments came to a head before a single judge of the Patna HC, who relied upon the SC ruling in *Kailash* to hold that the requirement to issue notice under Section 34(5) of the Act was only directory in nature. However, a division bench of the Patna HC struck down the single judge’s order, opining that the obligatory language in which the provision was couched, and the object of the section, indicated that the provision was *mandatory* in nature.

Accordingly, the Appellants appealed the decision of the Patna HC division bench before the SC.

### **Game, Set, Match: SC upholds appeal, ruling that prior notice is not mandatory**

On appeal, the SC initially observed that the language of Section 34(5), namely the words ‘*shall*’, ‘*only after*’ and ‘*prior notice*’ supported the Respondents’ argument that the provision was *mandatory* in nature. The SC also took note of the 246<sup>th</sup> Indian Law Commission Report (“**Law Commission Report**”) which documented that the object of Section 34(5) and 34(6) was that an application under Section 34 be disposed of expeditiously *within a period of one year from the date of service of the notice.*

However, the SC ultimately served three decisive strikes against the Respondents’ arguments.

- *Strike 1: No consequence under the Act for non-service of notice*

Relying upon a plethora of judgments, the SC held that the Section 34(5) of the Act was directory in nature because no consequences was provided for its contravention. The SC also drew a parallel with Section 29A of the Act which prescribes the time limit within which an arbitration award is required to be made and also provides that if the same is not met, the mandate of the arbitrator stands terminated. This stands in stark contrast to Sections 34(5) and 34(6) which did not prescribe a consequence if an application under Section 34 was not decided within the prescribed time limit.

- *Strike 2: Object of Section 34 was to advance justice, not defeat it*

The SC held that procedural provisions of law, such as Sections 34(5) and 34(6), ought not be construed in a manner that justice itself was trampled upon. The Law Commission Report indicated that the object behind them was to dispose of applications under Section 34 expeditiously. However, as had been observed in *Kailash*, the intent behind such provisions was to *‘expedite the hearing and not scuttle the same.’* The SC emphasized the time-honored principle that *‘all rules of procedure were the handmaids of justice’*. It noted that *‘if, in advancing the cause of justice, it is made clear that such provisions should be construed as directory, then so be it.’*

Apart from alluding to the *ratio* in *Kailash* to this effect, the SC also noted similar observations in *Topline Shoes* wherein it was held that a similar provision under the CPA did not create any substantive rights in favor of the complainant that bars a respondent from advancing his defense.

Relying upon the principles propounded in these previous judgments, the SC held that to construe the requirement of 'prior notice' in Section 34 as mandatory in nature would defeat the advancement of justice.

- *Strike 3: New India Assurance judgment liable to be set aside*

The SC was conscious of the contrary finding of the SC in *New India Assurance* wherein it was held that the time period for filing a written statement under the CPA was mandatory. In doing so, the SC in *New India Assurance* relied upon observations in *JJ Merchant* wherein it was observed that a speedy trial in summary proceedings did not necessarily indicate that justice had not been administered.

In *New India Assurance*, the SC had reasoned that the remarks in *JJ Merchant* would prevail, as *JJ Merchant* was decided prior to *Kailash*.

The SC in the present case, however, noted that the judgement in *New India Assurance* had completely overlooked a crucial paragraph in *Kailash* which underscored both that (i) the observations in *JJ Merchant* were *obiter*; and (ii) *Topline Shoes* had not been cited before the court in *JJ Merchant*, and that therefore the critical *ratio* on the consequence of no penalty being provided had not been considered in *JJ Merchant*.

Additionally, the reasoning in *Kailash* had been successively upheld by a three-judge bench in *Salem Bar Association*. In light of this, the SC reasoned that the reliance on the observations in *JJ Merchant* in *New India Assurance* was misplaced, and that it was principles propounded in *Kailash* that held the field.

### **What this means for procedural provisions of Indian law**

This judgment clarifies that before construing a particular provision to be mandatory or merely directory in nature, one has to assess whether there are any penal consequences provided for the same, and whether or not adhering to such a procedural requirement would in any manner take away a vested right of a party and in effect scuttle the administration of justice. This would certainly affect the applicability of the various new provisions introduced across various statutes in India, such as provisions imposing strict time lines for the resolution of disputes, whether through arbitration, litigation, or corporate insolvency.

Some of these statutory time-lines are arguably unreasonable given the judicial backlog, pendency of cases and lack of judges in India. What this judgment re-affirms is that while adhering to procedure is important, administration of justice remains paramount.