

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15806 of 2014

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Mahendra Prasad S/o Late Jageshwar Paswan resident of village - Dumri,
P.O. - Dumri, P.S. - Govindpur, District - Nawada.

... .. Petitioner/s

Versus

1. The State of Bihar , Principal Secretary General Administration Department,
Govt. of Bihar, 1st Floor, Old Secretariat, Patna.
2. The District Magistrate Nawada at P.O. + P.S. - Nawada, Dist - Nawada. null
null
3. The Additional Collector, Nawada, District - Nawada at P.O. + P.S. + Town -
Nawada.
4. The Deputy Collector Posted at Nawada District, Nazarat Sakha Nawada,
Nawada District at P.O. + P.S. + Town - Nawada.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Dr. Anshuman, Advocate
For the Respondent/s : Mr. Gp23- Anil Kumar

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CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT

Date : 28-08-2018

Petitioner is aggrieved by the office order contained
in Memo No. 461 dated 17.04.2013 whereby the service of the
petitioner was terminated with effect from issuance of letter of
appointment.

2. Learned counsel for the petitioner Dr. Anshuman
has made three fold submissions. Firstly, that the order was
passed without opportunity of hearing to the petitioner and as
such the order terminating the petitioner from the service is
violative of principle of natural justice. The second limb of
argument of Dr. Anshuman is that once the respondents have
taken decision in favour of the petitioner they have no power of



review and in the absence of specific power of review, they cannot review the previous order appointing the petitioner.

3. The third submission is the validity of the order passed from the date of issuance of the letter of appointment. The petitioner was appointed out of panel of 2004.

4. The Division Bench of this Court in the case reported in **2016 (3) PLJR 554** has held out that panel cannot be used reservoir, in fact, similar view was taken by the Apex Court in the case of **Rakhi Ray & Ors. vs. High Court of Delhi & Ors. (2010) 2 SCC 637** and in view of the judgment of the apex court and the Division Bench of this Court that the panel cannot be used as reservoir for making appointment.

5. The action of the respondents appointing the petitioner is in teeth of law laid down by the Apex Court in the case of **Rakhi Ray** (Supra) and the judgment of Division Bench of this Court. Adverting to the question of non-compliance of the principle of natural justice in this case is concerned it is well settled that compliance of natural justice depends on peculiar facts of the case and it is not a strait jacket formula as held out by the Apex Court in various cases. In the case of **Canara Bank vs. V.K. Awasthi reported in 2005 (6) SCC 321** the Apex Court has held out that compliance of



principle of natural justice is not necessary if it is only useless formality.

The relevant part of the judgment of the Apex Court is quoted below:-

17. What is known as “useless formality theory” has received consideration of this Court in M.C. Mehta v. Union of India, [1999] 6 SCC 237. It was observed as under:

"22. Before we go into the final aspect of this contention, we would like to state that case relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed (See Malloch v. Aberdeen Corpn., [1971] 2 All ER 1278, (per Lord Reid and Lord Wilberforce), Glynn v. Keele University, [1971] 2 All ER 89; Cinnamond v. British Airports Authority, [1980] 2 All ER 368 (CA) and other cases where such a view has been held. The latest addition to this view is R. v. Ealing Magistrates. Court, ex p. Fannaran (1996) 8 Admn. LR 351, (See de Smith, Suppl. P.89 (1998) where Straughton, L.J. held that there must be „demonstrable beyond doubt“ that the result would have been different. Lord Woolf in Lloyd v. McMohan, [1987] 1 All ER 1118, has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in McCarthy v. Grant, (1959



NZLR 1014) however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is „real likelihood-not certainty- of prejudice.“ On the other hand, Garner Administrative Law (8th Edn. 1996. pp.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge v. Baldwin, (1964) AC 40: [1963] 2 All ER 66, Megarry, J. in John v. Rees, [1969] 2 All ER 274 stating that there are always „open and shut cases“ and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J has said that the 'useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that „convenience and justice are often not on speaking terms“. More recently, Lord Bingham has deprecated the „useless formality theory“ in R. v. Chief Constable of the Thames Valley Police Forces, ex p. Cotton (1990 IRLR 344) by giving six reasons (see also his article 'Should Public Law Remedies be Discretionary?' 1991 PL. p.64). A detailed and emphatic criticism of the 'useless formality theory' has been made much earlier in 'Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL.pp.27-63) contending that Malloch (supra) and Glynn (supra) were wrongly decided. Foulkes (Administrative Law, 8th Edn. 1996, p.323), Craig (Administrative Law, 3rd Edn. P.596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. De Smith (5th Edn. 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the



court. Wade (Administrative Law, 5th Edn. 1994, pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in *State Bank of Patiala v. S.K. Sharma*, [1996] 3 SCC 364 and *Rajendra Singh v. State of M.P.*, [1996] 5 SCC 460 that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.

23. We do not propose to express any opinion on the correctness or otherwise of the 'useless formality theory' and leave the matter for decision in an appropriate case, inasmuch as the case before us, 'admitted and indisputable' facts show that grant of a writ will be in vain as pointed by Chinnappa Reddy, J." (emphasis in original)



18. As was observed by this Court we need not to go into “useless formality theory” in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellant unless failure of justice is occasioned or that it would not be in public interest to do so in particular case, this Court may refuse to grant relief to the concerned employee. (see Gadde Venkateswara Rao v. Govt. of A.P. and Ors., AIR (1966) SC 828). It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. (See Charan Lal Sahu v. Union of India etc., AIR (1990) SC 1480.”

6. In view of the above, the Court does not accept the contention of the petitioner that the order contained in Annexure-3 is bad for non-compliance of the principle of natural justice. The third limb of argument that the order was passed on 17.04.2013 but it was made effective from the date of issuance of appointment letter dated 27.8.2010. The court finds substance in the submission that the order of termination cannot be made effective from retrospective date and as such to that extent that the order is unsustainable.

7. Dr. Anshuman has also advanced argument that the persons appointed out of same panel have been retained in



Education Department but in the case of the petitioner the respondents have adopted pick and choose in the matter of termination. If it is true then the respondents have to examine the case of the petitioner vis-a-vis those retained in the Education Department and they have to take decision either to retain this petitioner or to terminate the service of similarly circumstanced all such Peon who have been appointed out of panel of 2004 as there cannot be two different stands in terminating one set of employees and retaining other set of employees is contrary to the litigation policy of 2011 and the judgment of the full bench reported in **2018 (2) PLJR 929**.

8. In view of the above, the order contained in Annexure-3 is quashed. The respondents are hereby directed to examine the case of the petitioner in the light of litigation policy 2011 and the judgment of the full bench of this court reported in **2018(2) PLJR 929** as the respondents are required to extend similar benefit to similarly circumstanced and adopt corrective measures after giving opportunity to the persons likely to be adversely affected as treating the equal as unequal and unequal as equal is violation of Article 14 of the Constitution of India. However, quashing the Annexure-3 will not automatically confer the consequential benefit to the petitioner it would



depend upon the further decision taken by the respondents in accordance with law. The respondent are accordingly, directed to take fresh decision in accordance with law within a maximum period of four months from the receipt/production of a copy of this order.

9. With the aforesaid, the writ petition stands disposed of.

(Anil Kumar Upadhyay, J)

Ravi/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	10.09.2018
Transmission Date	

