

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1582 of 2017

IN

Civil Writ Jurisdiction Case No. 9250 of 2015

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Muni Lal Mochi, Son of Late Ram Awatar Ram, Resident of Village- Bamak, P.O.- Basuhar, P.S.- Punpun, District- Patna, at present resident of Village- Dariyapur (Shiv Nagar), P.O.- Mittanchak, P.s.- Parsa, District- Patna. Appellant/s

Versus

1. The State of Bihar through Chief Secretary, Old Secretariat, Patna, Bihar.
2. The Secretary, Personnel and Administrative Department, Old Secretariat, Patna.
3. The under Secretary, Personnel and Administrative Department, Old Secretariat, Patna.
4. The Secretary, Finance Department, Old Secretariat, Patna.
5. The Treasury Officer, Patna. Respondent/s

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Appearance :

For the Appellant/s : Mr. Akhilesh Kumar Sinha, Advocate

For the Respondent/s : Mr. S. K. Sharma, AC to AAG-3

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date: 23-02-2018

The present letters patent appeal has been preferred by the appellant against the judgment dated 09.10.2017 passed by the Writ Court in C.W.J.C. no. 9250 of 2015, under Clause 10 of the Letters Patent of Patna High Courts. The Writ Court on consideration of entire facts and circumstances of the case dismissed the writ application and upheld the decision of the respondent contained in memo no. 30177 dated 10.06.2014.

2. The brief fact for deciding the present letters patent appeal lies in a narrow compass:



The petitioner was made accused in Vigilance P.S. case no. 18 of 1983 for offence under Sections 420, 467, 468, 471 and 120B of the Indian Penal Code and Section 5 (2) read with Section 5 (1) (c) (d) of the Prevention of Corruption Act. During the pendency of the trial, petitioner superannuated on 30.09.2013. In the trial, the vigilance court convicted the petitioner, vide order dated 19.07. 2004 and he was sentenced to undergo R.I. for two and a half years and a fine of Rs. 15,000/- was also imposed. He was also sentenced to undergo various descriptions of imprisonment and fine.

3. After superannuation on 30.09.2003, the appellant was paid provisional pension and other retiral dues including Group Insurance and gratuity, but after the conviction the appellant was inflicted punishment of forfeiture of pension vide order dated 28.10.2009 under the Bihar Pension Rules. By filing C.W.J.C. No. 13804 of 2012, the petitioner challenged the order forfeiting the full pension on the ground that he was not given any opportunity of hearing before passing the order of forfeiture of pension and the Writ Court vide order dated 11.07.2013 set aside the order inflicting punishment and the matter was remanded back to the competent authority to provide hearing before passing the order of punishment.

4. After the order of remand on 11.07.2013 passed in C.W.J.C. No. 13804 of 2012 opportunity of hearing was provided to



the petitioner, his representation dated 29.01.2014 was also examined by the respondent in the light of the order of the Writ Court and thereafter order was passed on 10.06.2014. The petitioner filed review application, which was also examined by the disciplinary authority. The review petition was also dismissed vide order dated 09.09.2014. The petitioner thereafter filed C.W.J.C. No. 9250 of 2015 challenging the order passed by the disciplinary authority dated 10.06.2014 inter alia contending that the action of the respondent is not permissible under Rule 139 (c) of the Bihar Pension Rules, 1950.

5. Before the Writ Court on behalf of the petitioner submission was advanced that after expiry of three years from the date of order of sanction, no action under Rule 139 of the Bihar Pension Rules is permissible. It was also contended that the petitioner has been visited with this consequence only because of the fact that he was convicted by the trial court.

6. The Writ Court not only considered the fact that the petitioner was convicted, but the conviction was also approved with certain modification in sentence in appeal. The Writ Court also considered the submission advanced on behalf of the respondents-State that the action of the respondent is justified under the Bihar Pension Rules. Referring to Rule 43 (a) of the Bihar Pension Rules and the provisions of Rules 43 (b) and 139 of the Bihar Pension Rules



the State was justified in forfeiting the pension of the writ petitioner.

7. The Writ Court after considering the scheme of the pension and noticing the serious offence committed by the petitioner held out that Rule 43 (a) and 43(b) of the Bihar Pension Rules authorizes the State to withhold the entire pension or any part of it since the petitioner was convicted and his conviction was also upheld by the Appellate Court. The action of the respondent forfeiting the pension of the petitioner does not warrant any interference, as he was found guilty of grave misconduct in judicial proceeding. The Writ Court has also noticed the fact that the petitioner was not only convicted under the provisions of panel provision of IPC but also under the Prevention of Corruption Act and as such in the matter of withholding of pension under Rule 43 (a) and 43 (b) of the Bihar Pension Rules no interference was called for and as such the writ court dismissed the writ application.

8. Before us learned counsel appearing on behalf of the appellant submitted that though the appellant was convicted by the trial court and the conviction was upheld in the appeal, the respondents were not justified in forfeiting the pension of the petitioner in purported exercise of power under Rule 139 of the Bihar Pension Rules. He has not disputed the fact that the appellant was convicted and conviction was upheld in appeal. All that he argued



before this court in appeal that opportunity as contemplated under the pension rules before passing the order of forfeiture of pension was not strictly followed.

9. We have considered the submissions of the learned counsel appearing on behalf of the appellant. In view of the undisputed factual position that the appellant was convicted in a criminal case involving not only the offence under the Indian Penal Code but also under provisions of Prevention of Corruption Act, who also noticed that on the date of superannuation of the appellant, criminal proceeding was pending and he was subsequently convicted in criminal trial and the conviction was upheld in appeal also. In view of the aforesaid, we do not find any substance in the submission of the counsel for the appellant that the respondent ought to have granted opportunity of hearing and indulgence in terms of Rule 43 (a) and 43(b) of the Bihar Pension Rules, since the appellant was getting pension provisionally from the date of his superannuation till the date the order impugned was passed forfeiting his entire pension, such action after lapse of eight years from the sanction of pension was impermissible.

10. We have gone through the record and on consideration of the materials available we find that the petitioner on superannuation was granted only provisional pension and under the



scheme of the pension rules his pension was liable to be forfeited. A conjoint reading of Rule 43 (a) and Rule 43(b) and Rule 139 of the Pension Rules, it is apparent that pension is not indefeasible right but it depends on future conduct as well as the past conduct. In the present case, the appellant's conduct was blemished and he was convicted by a competent court for serious misconduct involving Prevention of Corruption Act and as such no indulgence is called for.

11. The contention of the learned counsel for the appellant that the petitioner ought to have been granted opportunity of hearing in terms of Scheme of Bihar Pension Rules, since the respondents have resorted to forfeiture of pension without providing opportunity of hearing and without compliance of natural justice and fair play, the action of the respondent is unsustainable is patently misconceived.

12. We do not find any substance in the submission of the learned counsel for the appellant obviously for the simple reason. Firstly; he was granted opportunity after the order dated 11.07.2013 in C.W.J.C. No. 13804 of 2012 hearing was provided and his representation was considered. His review application was also considered by the disciplinary authority. Secondly; the appellant was convicted by a competent court and the conviction was upheld in appeal also. We are conscious of the useless formality theory if the



case of the petitioner by providing opportunity will not in any manner to be improved than it would be a useless exercise. The law in this regard is well settled and the court is required to see whether compliance of natural Justice is only useless formality or it would serve any purpose.

13. In the totality of the facts situation, we are of the considered view that granting any further indulgence to the appellant will not serve any purpose, as there is no denial of the fact that appellant was convicted for serious offence under the Indian Penal Code as well as Prevention of Corruption Act and his of conviction was a upheld in appeal also. Reference in this regard may be made to the judgment of the Apex Court in the case of **Canara Bank versus V. K. Awasthy, reported in (2005) 6 SCC 321** where the Apex Court has held out with reference to the earlier judgment of the Apex Court that no useful purpose would be served while granting further opportunity of hearing, as it would be a futile exercise and useless formality. The relevant part of the judgment of the Apex Court reads as follows para 17

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, paras 22-23. 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, HL (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 at p.358 (see de Smith, Suppl. P.89 (1998) where Staughton, 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, (WLR at p.862) 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, HL), 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."



14. In view of the discussion above, we do not find any error in the judgment of the Writ Court, accordingly, we uphold the decision of the Writ Court and dismissed the appeal.

(Rajendra Menon, CJ)

Uday/-

(Anil Kumar Upadhyay, J)

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CAV DATE	NA
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