

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

113

CWP-10756-2022

Date of Decision : 18.01.2024

Rakesh Sethi

..... Petitioner

Versus

Union of India and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present : Mr.Johan Kumar, Advocate and
Mr. Pawan Kumar Jangra, Advocate
for the petitioner.

Mr. Bharat Bhushan Sr. Panel Counsel
for respondent No.1-UOI.

Mr. Ashwani Talwar, Advocate
for respondents No.2 to 5.

JAGMOHAN BANSAL, J. (Oral)

1. The petitioner through instant petition under Articles 226/227 of Constitution of India is seeking direction to the respondents to re-calculate and release his retiral benefits.

2. The respondent herein is New India Assurance Company Ltd. which is a public sector undertaking. The petitioner joined respondent-organisation on 31.12.1983 as Development Officer (Marketing) at Divisional Office, Hisar. The petitioner retired on 31.07.2019 on attaining the age of superannuation. The petitioner, on retirement, was entitled to benefits of gratuity, leave encashment, provident fund and pension. The

respondent vide communication dated 06.03.2020 (Annexure P-3) determined dues of the petitioner. As per said communication, the petitioner has been treated absent from duty on 582 days during his service. On account of his absence from duty, the respondent has assessed recovery of Rs.11,08,040/- from the petitioner. The respondent has deducted said amount from gratuity of the petitioner. The respondent has further reduced last drawn salary of the petitioner and accordingly, pension has been reduced.

3. Learned counsel for the petitioner submits that as per impugned communication, the amount of gratuity comes to Rs.15,37,120/- whereas as per gratuity statement, it comes to Rs.18,37,308/-. The respondent during the tenure of the petitioner did not recover aforesaid amount and recovery has been effected from the retiral dues of the petitioner without issuing show cause notice followed by opportunity of hearing. In the absence of show cause notice followed by opportunity of hearing, the respondent has no authority to determine amount of recovery and thereafter recover from the retiral dues.

4. Written statement filed on behalf of respondents No.2 to 5 is taken on record. Registry is directed to tag the same at appropriate place.

5. Learned counsel for respondents No.2 to 5 submits that the petitioner remained absent from duty for 582 days during his tenure and respondent by mistake paid salary for the said period. The petitioner was not entitled to salary, thus, salary of the petitioner was required to be re-determined because aforesaid period of absence was never condoned.

6. On being asked, Mr. Talwar, Advocate expressed his inability to controvert the fact that the petitioner was neither issued show cause

notice nor granted opportunity of hearing before effecting aforesaid recovery.

7. I have heard the arguments of learned counsel for the parties and perused the record.

8. A five Judge Constitution Bench of the Hon'ble Supreme Court in ***Olga Tellis and Others Versus Bombay Municipal Corporation; (1985) 3 SCC 545*** has considered question of opportunity of personal hearing and held that no order can be passed without granting an opportunity of personal hearing. It has been further held that opportunity of personal hearing cannot be denied merely on the ground that there was no prejudice to the aggrieved person. The relevant extracts of the judgment read as:-

“48. Any discussion of this topic would be incomplete without reference to an important decision of this Court in S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379, 395. In that case, the supersession of the New Delhi Municipal Committee was challenged on the ground that it was in violation of the principles of natural justice since, no show cause notice was issued before the order of supersession was passed. Linked with that question was the question whether the failure to observe the principles of natural justice matters at all, if such observance would have made no difference, the admitted or indisputable facts speaking for themselves. After referring to the decision in Ridge v. Baldwin [(1964) AC40,68; John v. Rees [1970] Ch345, 402]; Annamunthodo v. Oilfields Workers' Trade Union [(1961) 3 All ER 621, 625 (HL)]; Margarita Fuentes et al v. Tobert L. Shevin [32 L Ed 2d 556, 574] ; Chintapalli Agency Taluk Arrack Sales Cooperative

Society Ltd. v. Secretary (Food and Agriculture) Government of A.P. [(1977) 4 SCC 337, 341, 343-44 : (1978) 1 SCR 563, 567, 569-70] and to an interesting discussion of the subject in Jackson's Natural Justice (1980 Edn.), the Court, speaking through one of us, Chinnappa Reddy, J. said: (SCC p. 395, para 24) Union [(1961) 3 All ER 621, 625 (HL)] ; Margarita Fuentes.

“In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.”

These observations sum up the true legal position regarding the purport and implications of the right of hearing.”

9. In **Khem Chand Versus Union of India; 1958 SCR 1080**

while dealing with question of compliance of principles of natural justice, in case of an inquiry against civil servant in terms of Article 311, Hon'ble Supreme Court has concluded:

“18. In our judgment neither of the two views can be accepted as a completely correct exposition of the intendment of the provisions of Section 240(3) of the Government of India Act, 1935, now embodied in Article 311(2) of the Constitution. Indeed the learned Solicitor-General does not contend that this provision is confined to guaranteeing to the government servant an opportunity to be given to him only at the later stage of showing cause against the punishment proposed to be

imposed on him. We think that the learned Solicitor-General is entirely right in not pressing for such a limited construction of the provisions under consideration. It is true that the provision does not, in terms, refer to different stages at which opportunity is to be given to the officer concerned. All that it says is that the government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He must not only be given an opportunity but such opportunity must be a reasonable one. In order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite obviously necessary that the government servant should have the opportunity, to say, if that be his case, that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves. Both these pleas have a direct bearing on the question of punishment and may well be put forward in showing cause against the proposed punishment. If this is the correct meaning of the clause, as we think it is, what consequences follow? If it is open to the government servant under this provision to contend, if that be the fact, that he is not guilty of any misconduct then how can he take that plea unless he is told what misconduct is alleged against him? If the opportunity to show cause is to be a reasonable one it is clear that he should be informed about the charge or charges levelled against him and the evidence by which it is sought to be established, for it is only then that he will be able to put forward his defence. If the purpose of this provision is to give the government servant an opportunity to exonerate himself from the charge and if this opportunity is to be a

reasonable one he should be allowed to show that the evidence against him is not worthy of credence or consideration and that he can only do if he is given a chance to cross-examine the witnesses called against him and to examine himself or any other witness in support of his defence. All this appears to us to be implicit in the language used in the clause, but this does not exhaust his rights. In addition to showing that he has not been guilty of any misconduct so as to merit any punishment, it is reasonable that he should also have an opportunity to contend that the charges proved against him do not necessarily require the particular punishment proposed to be meted out to him. He may say, for instance, that although he has been guilty of some misconduct it is not of such a character as to merit the extreme punishment of dismissal or even of removal or reduction in rank and that any of the lesser punishments ought to be sufficient in his case.

19. To summarise: the reasonable opportunity envisaged by the provision under consideration includes

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(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) An opportunity to defend himself by cross examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise

of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.”

10. A three Judge Bench of the Hon'ble Supreme Court in **Sahara India (Firm) Lucknow Versus Commissioner of Income Tax, Centra-I and Another; (2008) 14 SCC 151**, while dealing with special audit under Income Tax Act, 1961 has held that order of special audit cannot be passed without granting opportunity of hearing. The relevant extracts of the said judgment read as under:-

“15. Rules of “natural justice” are not embodied rules. The phrase “natural justice” is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. As observed by this Court in A.K. Kraipak v. Union of India [(1969) 2 SCC 262] the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. (Also see ITO v. Madnani Engg. Works Ltd. (1979) 2 SCC 455.

16. In Swadeshi Cotton Mills v. Union of India [(1981) 1 SCC 664] R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of “natural justice”. Referring to several decisions, His Lordship observed thus: (SCC p. 666)

“Rules of natural justice are not embodied rules. Being means to an end and not an end in

themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) audi alteram partem and (ii) nemo judex in re sua. The audi alteram partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principles distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the predecisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the predecisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the

maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.”

17. *Initially, it was the general view that the rules of natural justice would apply only to judicial or quasijudicial proceedings and not to an administrative action. However, in State of Orissa v. Dr.Binapani Dei [AIR 1967 SC 1269 : (1967) 2 SCR 625] the distinction between quasi-judicial and administrative decisions was perceptively mitigated and it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistent with the rules of natural justice. Since then the concept of natural justice has made great strides and is invariably read into administrative actions involving civil consequences, unless the statute, conferring power, excludes its application by express language.*

18. *Recently, in Canara Bank v. V.K. Awasthy (2005) 6 SCC 321 the concept, scope, history of development and significance of principles of natural justice have been discussed in extenso, with reference to earlier cases on the subject. Inter alia, observing that the principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights, the Court said: (SCC pp. 331-32, para 14)*

“14. Concept of natural justice has undergone a great deal of change in recent years. Rules of

natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and nonpecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

19. *Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.*

20. *We may, however, hasten to add that no general rule of universal application can be laid down as to the applicability of the principle audi alteram partem, in*

addition to the language of the provision. Undoubtedly, there can be exceptions to the said doctrine. Therefore, we refrain from giving an exhaustive catalogue of the cases where the said principle should be applied. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of all these matters that the question of application of the said principle can be properly determined.

(See Union of India v. Col. J.N. Sinha (1970) 2 SCC 458.

21. *In Mohinder Singh Gill v. Chief Election Commr. (1978) 1 SCC 405 explaining as to what is meant by expression “civil consequence”, Krishna Iyer, J., speaking for the majority said: (SCC p. 440, para 66)*

“66. ... ‘Civil consequences’ undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence.”

11. A Division Bench of this Court in **Krishna Engineering Works Limited Versus Union of India; 2001 SCC OnLine P&H 1678**, while dealing with Rule 49 read with Rule 173G of Central Excise Rules, 2002, providing for forfeiture of fortnight facility of payment of central excise duty, has held that order of forfeiture cannot be passed without granting an opportunity of hearing. The relevant extracts of the judgment read as under:-

“10. We have given serious thought to the respective arguments/submissions. A reading of the plain language of Rules 49(1)(e) and 173G(1)(e) does not give an impression that rule of audi alteram partem is not required to be complied with before passing an order of forfeiture, but, in our opinion, the absence of express stipulation to this effect is not sufficient to absolve the competent authority from complying with the rules of natural justice. The two main principles in which the rules of natural justice are manifested, namely, Nemo Judex in Sua Causa and audi alteram partem have been read by the courts as an integral part of the concept of rule of law and fairness in State action. The reason as to why the courts have insisted on compliance of the rule of audi alteram partem in quasi-judicial and even in administrative matters is not far to seek. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against the arbitrary exercise of power by the State and its officers. Duty to act judicially would, therefore, arise from the particular nature of the functions intended to be performed. It need not be shown to. super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice are ignored and an order to the prejudice of a person is made, such order will have to be treated a nullity.”

12. In view of above-cited judgments, it is settled law that no order ensuing civil or criminal consequences can be passed without issuing show cause notice followed by opportunity of hearing. The act of respondents amount to pecuniary punishment which could not be awarded without issuing show cause notice followed by opportunity of hearing. The

respondent was duty bound to issue show cause notice and thereafter grant opportunity of hearing. The respondent has not followed the procedure contemplated by rule of law. It is settled proposition of law that every action which is contrary to rule of law is arbitrary and violative of Article 14 of Constitution of India.

13. In the wake of conceded position that respondent has effected recovery without issuing show cause notice followed by opportunity of hearing, the impugned order to the extent of recovery deserves to be set aside and accordingly set aside. The respondent may issue show cause notice and thereafter pass an appropriate order, if permissible by law. The respondent shall release retiral dues of the petitioner within three months from today.

(JAGMOHAN BANSAL)
JUDGE

18.01.2024
anju

Whether speaking/reasoned	Yes/No
<i>Whether Reportable</i>	<i>Yes/No</i>