HIGH COURT OF MADHYA PRADESH PRINCIPAL SEAT AT JABALPUR

W.A. No.108/2009

Smt. Meera Bai Raikwar

Vs.

State of M.P. & others

Present: **Hon'ble Shri Ravi Shanker Jha, Acting Chief Justice &**
Hon'ble Shri Vijay Kumar Shukla, J.

Shri R.K.Verma, learned senior counsel with Shri Ashish Datta, counsel for the appellant.

Shri H.S.Chhabra, learned Panel Lawyer for the respondent/State.

Whether approved for reporting: **Yes/No**

Law laid down:

Significant para nos. :

J U D G M E N T
(04.07.2019)

Per: Shri R. S. Jha, Acting Chief Justice.

This writ appeal has been filed by the appellant under Madhyaya Pradesh Uchcha Nayayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, being aggrieved by order dated 07.11.2008 passed in W.P. No.13384/2003, whereby the petition filed by the appellant/petitioner challenging the order dated

05.02.1999 by which her services were dispensed with, has been dismissed.

2. It is submitted by the learned counsel for the appellant that the appellant was initially engaged on ad-hoc basis for a period of 89 days by order dated 08.09.1995 and on the basis of the said order, the Collector subsequently recommended the appellant's case for payment of salary, etc. It is submitted that subsequently, on a complaint being filed by one Shri Maan Singh, Son of Munne Chamar, Village- Turwa, Post Office- Wartha, Tehsil-Bina, an inquiry was conducted behind the back of the appellant. It is submitted that on the basis of this inquiry that was conducted behind the back of the appellant, the respondent authorities recorded a finding that the appellant's appointment was dehors the provisions of law and was illegal and consequently, issued directions to the Principal to dispense with her services.

3. It is stated that on the basis of the directions by the higher authorities, the Principal of the college issued the impugned order Annexure-A/4 dated 05.02.1999 dispensing with her services.

4. The learned counsel for the appellant submits that the appellant has assailed the aforesaid order before the State Administrative Tribunal by filing O.A. No.306/1999 which was subsequently transferred to this Court and was registered as W.P. No.13384/2003. It is submitted that the learned Single Judge by the impugned order dated 07.11.2008 has dismissed the petition without adverting to the issue raised by the appellant regarding denial of opportunity of hearing and conducting an inquiry before passing the impugned order.

5. It is stated that the appellant, who had been appointed on 03.09.1995 and had worked upto 05.02.1999, was entitled to an opportunity of hearing before passing the impugned order as the same has directly affected the appellant's right to continue in service. The learned counsel for the appellant has relied upon the decision of the Supreme Court rendered in the case of **Basudeo Tiwary v. Sido Kanhu University and Ors. AIR 1998 SC 3261**.

6. The learned Government Advocate appearing for the respondent/State submits that the appellant was engaged by the In-charge Principal on the post of Peon without following the procedure prescribed by law. It is stated that, on receiving complaints, an inquiry was

conducted and it was found that the engagement of the appellant was totally dehors the provisions of law. It is brought on record that by a notice dated 27.08.1998 issued by the Inquiring Authority to the Principal of the Government Higher Secondary School, Bina, the details of the procedure followed while making appointment of the appellant, were called for. A copy of the notice has been annexed along with the appeal as Annexure-R/2.

7. It is submitted that pursuant to the aforesaid inquiry conducted by the authorities, it was found that the engagement of the appellant was totally illegal and contrary to the procedure prescribed by law and therefore, appropriate and necessary directions were issued to dispense with her services on 02.12.1998, vide Annexure-R/3. It is submitted that pursuant to the inquiry conducted by the authorities and the directions issued as above, the Principal of the College passed the impugned order dated 05.02.1999 dispensing with the appellant’s services. It is submitted that in such circumstances, as the appointment of the appellant was apparently illegal, no notice was required to be issued to the appellant and, therefore, there is no infirmity or illegality in the order passed by the learned Single Judge.

8. We have heard the learned counsel for the parties at length.

9. From a perusal of the impugned order passed by the learned Single Judge dated 07.11.2008, it is evident that the learned Single Judge, during hearing of the petition, had made a specific query to the learned counsel for the appellant regarding the manner and mode of appointment of the petitioner/appellant. Even in this appeal a similar query has been raised by this Court.

10. The learned Senior Counsel appearing for the appellant fairly states that there is nothing on record to indicate that the appellant had applied for appointment on the post pursuant to some advertisement issued by the authorities or whether she has applied at all for appointment on the said post. It is also admitted that no document has been filed to indicate that any procedure was followed. The order dated 02.12.1998 passed by the respondents indicates that the appointment of the appellant was made by the In-charge Principal without following any procedure and in ignorance of the roster. In the absence of anything on record and in view of the statement made by the learned Senior Counsel for the appellant as well, it is evident and clearly undisputed that

no procedure whatsoever was adopted while appointing the appellant.

11. The law relating to the extent of applicability of the principles of Natural Justice and the requirement of prior notice and opportunity while directly issuing orders of termination in such cases of admitted facts, undisputed facts or in cases where compliance of the principles of Natural Justice would have no impact on the ultimate result, i.e. where issuance of a show cause notice becomes an empty or a useless formality, is now well settled and clearly laid down by the Supreme Court.

12. The principles of law propounded in **Ridge vs. Baldwin,** 1964 AC 40, that breach of principles of Natural Justice per-se vitiated any action taken by the authorities has subsequently been relaxed and watered down in subsequent decisions of the Supreme Court. In the case of **M. C. Mehta vs. Union of India,** (1999) 6 SCC 237, some of the cases in which requirement of complying with the principles of Natural Justice can be dispensed with by invoking the “useless formality” theory were stated. The necessity to establish real prejudice in the facts of each case for quashing action taken in breach of the principles of Natural Justice was also emphasized. The law applicable, apparently, would depend on the

facts of each case. The aforesaid change in law has been summarized by the Supreme Court in the case of **Aligarh Muslim University and others vs. Mansoor Ali Khan,** (2000) 7 SCC 529, in the following terms:-

> "**21.** As pointed recently in ***M.C. Mehta v. Union of India*** [(1999) 6 SCC 237] there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in ***Gadde Venkateswara Rao* v. *Govt. of A.P***. [AIR 1966 SC 828 : (1966) 2 SCR 172] it is not necessary to quash the order merely because of violation of principles of natural justice.
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> **22.** In ***M.C. Mehta*** [(1999) 6 SCC 237] it was pointed out that at one time, it was held in ***Ridge* v. *Baldwin*** [1964 AC 40 : (1963) 2 All ER 66 (HL)] that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In ***S.L. Kapoor* v. *Jagmohan*** [(1980) 4 SCC 379] Chinnappa Reddy, J. followed ***Ridge* v. *Baldwin*** [1964 AC 40 : (1963) 2 All ER 66 (HL)] and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in

that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in ***S.L. Kapoor case*** [(1980) 4 SCC 379] laid down two exceptions (at SCC p. 395) namely, if upon *admitted* or *indisputable* facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In ***K.L. Tripathi* v. *State Bank of India*** [(1984) 1 SCC 43 : 1984 SCC (L&S) 62] Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting *Wade's Administrative Law* (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)

> "[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. … There must also have been *some real prejudice* to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the

> nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in ***State Bank of Patiala* v. *S.K. Sharma*** [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] . In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in ***Rajendra Singh* v. *State of M.P.*** [(1996) 5 SCC 460]

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in ***M.C. Mehta*** [(1999) 6 SCC 237] referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go

deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case."

The law has again been reiterated in the case of **Ashok Kumar Sonkar vs. Union of India and others,** (2007) 4 SCC 54.

13. Recently, the Supreme Court in the case of **Union of India and another Vs. Raghuwar Pal Singh, (2018) 15 SCC 463,** has again summarized the law in this regard in paragraph Nos.23, 24 and 25 which is in following terms:

> "**23**.In ***State of Manipur* v. *Y. Token Singh***, (2007) 5 SCC 65, the appointment letters were cancelled on the ground that the same were issued without the knowledge of the department of the State. The Court after adverting to the reported decisions concluded that the candidates were not entitled to hold the posts and in a case of such nature, principles of natural justice were not required to be complied with, particularly when the same would result in futility. It may be useful to advert to para 22 of the reported decision, which reads thus: (SCC p. 73)
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> > "*22*. The respondents, therefore, in our opinion, were not entitled to hold the posts. *In a case of this nature, where the facts are admitted, the principles of natural justice were not required to be complied with, particularly when the same would result in futility*. It is true that where appointments had been made by a competent authority or at least some steps have been taken in that behalf, the

principles of natural justice are required to be complied with, in view of the decision of this Court in ***Murugayya Udayar* v. *Kothampatti Muniyandavar Temple***, 1991 Supp (1) SCC 331] .”

24. In paragraph 30 of the reported decision, the Court adverted to the exposition in **M.C. Mehta Vs. Union of India & Ors., (1999) 6 SCC 237,** which evolved the “useless formality‟ theory. It is apposite to reproduce paragraphs 30 to 32 of the reported judgment, which read thus:

> “30. In **M.C. Mehta Vs. Union of India** this Court developed the “useless formality” theory stating:
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> “22. ...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 and Glynn 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. 526-30) 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 Vs. S.K. Sharma**, (1996) 3 SCC 364, **Rajendra Singh Vs. 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." (emphasis in original)

31. In **Kendriya Vidyalaya Sangathan vs. Ajay Kumar Das,** (2992) 4 SCC 503, it was held:

"5. ...It is clear that if after the termination of services of the said Dr. K.C. Rakesh, the orders of appointment are issued, such orders are not valid. *If such appointment orders are a nullity, the question of observance of principles of natural justice would not arise*."

32. In **Bar Council of India Vs. High Court of Kerala,** (2004) 6 SCC 311, it was stated : (SCC p.323, para45)

"45. ...*Principles of natural justice, however, cannot be stretched too far*. Their application may be subject to the provisions of a statute or statutory rule." (emphasis supplied)

In the present case, the appointment letter was admittedly issued without the approval of the competent authority.

25. In **Dhirender Singh & Ors. Vs. State of Haryana & Ors**.,(1997) 2 SCC 712, termination of the appellant therein albeit without notice, was not interfered with by the Court as admittedly the same was not approved by the competent authority. The underlying principle will apply proprio vigore to the present case, as the letter of appointment has been issued by an officer who had no authority to do so and also because it was issued without waiting for the approval of the competent authority. Resultantly, there was no necessity to afford opportunity to the respondent before issuing the letter of cancellation of

> such appointment. The mere fact that such letter of appointment had been issued in favour of the respondent does not bestow any right in his favour much less to insist for an opportunity of being heard."

14. The Supreme Court in the case of **State of U.P and others vs. U.P State Law Officers Association and others,** (1994) 2 SCC 204, and **M.P. Co-operative Bank Ltd. Bhopal vs. Nanuram Yadav and others,** (2007) 8 SCC 264, has also held that those who enter service from the back door, cannot raise any grievance if they are made to leave services from the same door.

15. The Supreme Court in the case of **Renu and others vs. District and Sessions Judge, Tis Hazari Courts, Delhi and another,** (2014) 14 SCC 50, has again affirmed and reiterated the law laid down in the case of **State of U.P vs. U.P State Law Officers' Association,** (1994) 2 SCC 204, regarding beneficiary to the spoil system by stating that those who come by the back door have to go by the same door in para-18. While doing so, the Supreme Court has also reiterated the law laid down in the case of **UPSC vs. Girish Jayanti Lal Vaghela,** (2006) 2 SCC 482, regarding necessity of making appointments after issuing proper advertisement and also reiterated the principles to be adopted in the matter of public appointments formulated in the case of

M.P. State Co-operative Bank Ltd. vs. Nanuram Yadav, (2007) 8 SCC 264, in the following terms:-

> "**11**. In ***UPSC* v. *Girish Jayanti Lal Vaghela*** [(2006) 2 SCC 482, this Court held: (SCC p. 490, para 12)
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> > "*12*. ... The appointment to any post under the State can *only be made after a proper advertisement* has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made ... *Any regular appointment* made on a post under the State or Union *without issuing advertisement inviting applications* from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete *would violate the guarantee enshrined under Article 16 of the Constitution*."
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> > (emphasis supplied)
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> **12.** The principles to be adopted in the matter of public appointments have been formulated by this Court in ***M.P. State Coop. Bank Ltd.* v. *Nanuram Yadav*** (2007) 8 SCC 264 as under: (SCC pp. 274-75, para 24)
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> "(*1*) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting

applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.

(*2*) Regularisation cannot be a mode of appointment.

(*3*) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(*4*) Those who come by back door should go through that door.

(*5*) No regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention of the statutory rules.

(*6*) The court should not exercise its jurisdiction on misplaced sympathy.

(*7*) If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(*8*) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

16. Though, the appellant has claimed benefit of the provisions of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960, and has asserted that as she has worked for more than

three months, she has acquired the status of a temporary and quasi permanent employee and was, therefore, required to be served with a notice before dispensing with her services, we are of the considered opinion that the said submission of the learned Senior Counsel for the appellant also deserves to be rejected in view of the Full Bench decision of this Court rendered in the case of **Mamta Shukla Vs. State of M.P., 2011 (3) MPLJ 210,** wherein it has been held that the benefit of the provisions of the aforesaid rules can be claimed only by those who have been employed after following the due procedure prescribed under the aforesaid Rules. As undisputedly, no such procedure was followed in the case of the appellant, the benefit and protection under the Rules as claimed for by the appellant is also not available to her.

17. In the facts and circumstances of this case, we do not find any substance in the appeal. Accordingly, this writ appeal stands dismissed.

(RAVI SHANKER JHA)	**(VIJAY KUMAR SHUKLA)**
ACTING CHIEF JUSTICE	**JUDGE**

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