IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 02 JULY, 2024

WRIT PETITION No. 5604 of 2024

Narendra Tripathi

vs.

State of Madhya Pradesh and others

Shri L.C. Patne and Shri Abhay Pandey, Advocates for the petitioner.

Shri Prashant Singh, Advocate General with Shri Amit Seth, Deputy Advocate General for the respondent No.1-State.

Shri R.G. Mahajan, Advocate for respondent Nos.2 and 3.

Shri Ved Prakash Tiwari, Advocate for respondent No.4.

Order reserved on : 29/05/2024

Order pronounced on : 02/07/2024

O R D E R

Pleadings are complete. Since, there was an interim order granted in favour of the petitioner, the respondents moved an application for vacating the said interim order and in the opinion of this Court instead of deciding the said application, looking to the nature of the case, it is advised that the matter be finally heard. Learned counsel for the parties have given their consent to argue it finally, accordingly, it is finally heard.

2. This petition is under Article 226 of the Constitution of India assailing the validity of the order dated 21.02.2024 (Annexure P/7) passed by respondent No.2 terminating the services of petitioner with immediate effect and was also relieved from the said assignment. Petitioner challenged the same mainly on the ground that he was appointed in the year 1998 by a competent authority and his appointment was against the sanctioned vacant post and as such after almost 25 years of service, termination of his services is not proper that too without conducting any regular departmental enquiry and without providing him any proper opportunity of hearing.

3. Respondents have opposed the submissions made by learned counsel for the petitioner and submitted that in the existing facts and circumstances of the case, the appointment of the petitioner was illegal from very inception and as such no regular departmental enquiry was required. According to the respondents, whatever procedure followed by them to ascertain whether petitioner's services can be terminated or not, is proper and sufficient to take the decision as has been taken by the respondent No.2 issuing order impugned terminating services of the petitioner. According to the respondents, in the present case there was no requirement to follow the principle of natural justice and to conduct any regular enquiry.

4. Considering the rival submissions made by the parties and on perusal of the record, this Court is of the opinion that to resolve the controversy involved in the case, it is necessary to consider the facts adumbrated in a nutshell, which are as under –

By an order 23.06.1986 (Annexure P/1), the State Government sanctioned certain posts in the respondent/University including two posts of Project Officer.

The Executive Council of the University in its meeting dated 26.10.1998 has resolved vide Agenda No.7 that since in the pay scale of Class III employees, one post of Project Officer is proposed for appointment and since no post of Project Officer is lying vacant and considering the excessive work in the office against the vacant post of Lecturer, an application submitted by the petitioner for the post of Project Officer was considered and on a pay scale of Rs.1,640-2,900 and corresponding scale of the same i.e. Rs.5,500-175-9000, the petitioner was appointed temporarily till the next date. An order of appointment was issued on 16.12.1998 specifying that the appointment was made against the vacant post of Lecturer w.e.f. 01.12.1998. The petitioner was thereafter confirmed vide order dated 30.5.2012 (Annexure P/4) as per by-laws of the University, especially statute 31 and his confirmation was initially on probation for a period of two years. The name of the petitioner was shown at Item No.23 in the said order which also contained names of other employees of the University who got confirmed. The petitioner was also granted sanction by the University for prosecuting PhD degree and also recommended his name for grant of 6th CPC and 7th CPC w.e.f. 01.01.2016.

One Bhagwan Singh Rajput filed a petition in the High Court asking relief therein that the petitioner be removed from service as he does not have the requisite qualification for the said post and

therefore, writ of quo warranto was claimed. In the said petition, after issuing notice to the concerning respondents, the University came before the Court and took a stand that appointment of respondent No.5 (present petitioner) was illegal. The Court, thereafter, granted liberty to the University for taking appropriate action if University itself is of the opinion that the appointment of present petitioner was illegal. With the aforesaid, the petition was dismissed saying that the University can examine and pass an appropriate order about appointment of the present petitioner. The University, thereafter, on 21.02.2024 passed the impugned order terminating the services of the present petitioner.

Learned counsel for the petitioner has also pointed out that on earlier occasion pursuant to a complaint made against the petitioner's appointment, an enquiry was conducted by Dr. Anil Pare, who submitted his report on 08.08.2022 (Annexure P/9). In the said enquiry report dated 08.08.2022, it is opined by the enquiry officer giving his final opinion that the appointment of petitioner was made against the post of Project Officer which was a sanctioned post and lying vacant in the Adult Education Department of University on a pay scale of Rs.5500-175-9000 and thereafter he was given permanent status and pay scale was also granted in accordance with law and as such appointment of the petitioner was approved by the enquiry officer and a report in that regard was submitted by him but the same enquiry officer conducted another enquiry and submitted his report on 02.08.2023 wherein the validity of appointment of petitioner was enquired about and it was opined

by the enquiry officer that the appointment of petitioner was illegal as no procedure which was required to have been followed had been followed and his appointment on the post of Project Officer was found illegal and it was advised that that such appointment has to be cancelled.

Learned counsel for the petitioner has also submitted that the complaint was made against appointment of 156 employees of the University but enquiry was conducted only against the appointment of petitioner. It shows malafides of the respondents against the petitioner.

According to the petitioner herein, the said order of termination issued by the University without conducting any departmental enquiry was a stigmatic order, therefore, he filed this petition challenging the same mainly on the ground that his appointment was made against the sanctioned vacant post by the competent authority and therefore, it cannot be said to be illegal in any manner and after completing more than 25 years of service, his services cannot be terminated in the manner in which it has been done.

5. Shri L.C. Patne, learned counsel for the petitioner has placed reliance on a judgment of Supreme Court in the case of **State of Karnataka and others vs. M.L. Kesari and others (2010) 9 SCC 247** and the order of this Court in the case of **Rajesh Ahirwar vs. Principal Secretary, Health Department, Bhopal and others** reported in **2009 (4) M.P.L.J. 387**.

6. Respondents have taken stand in their reply that the appointment of petitioner was made without following any procedure under which appointment could be made. No advertisement was issued in any of the newspaper inviting applications from open market for filling the said post. Shri Prashant Singh, learned Advocate General appearing for respondent No.1/State vehemently opposed the submissions advanced by learned counsel for the petitioner and submits that the appointment of petitioner is nothing but back door entry. In absence of any advertisement inviting applications from the open market, the appointment of petitioner must be cancelled. It is also alleged that the procedure followed is unknown to law and it is not in consonance with the scheme of Articles 14 and 16 of the Constitution of India. It is also the stand of the respondents that in the existing circumstance of the case, no regular enquiry was required for the reason that the enquiry is nothing but an empty formality. Had the enquiry been conducted, the result would have been the same as stand taken by the authority. As per the respondents, on each and every occasion, applying principles of natural justice is not proper. The respondents have placed reliance upon several judgments in which it is laid down that denial of opportunity of hearing is not fatal when no prejudice is caused to the petitioner. The judgments relied upon by the respondents are as follows :-

State of Uttar Pradesh. vs. Sudhir Kumar Singh (2021) 19 SCC 706; Managing Director, ECIL, Hyderabad vs. B. Karunakar and others (1993) 4 SCC 727; Canara Bank and others vs. Debasis Das and others (2003) 4 SCC 557; Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Gauhati and others (2015) 8 SCC 519; Renu and others vs. District & Sessions Judge, Tis Hazari

Courts, Delhi and another (2014) 14 SCC 50; State of Bihar and others vs. Chandreshwar Pathak (2014) 13 SCC 232; State of Orissa and another vs. Mamata Mohanty (2011) 3 SCC 436; State of M.P. and others vs. Lalit Kumar Verma (2007) 1 SCC 575 and **Mansukh Lal Saraf vs. Arun Kumar Tiwari and others 2016 (2) M.P.L.J. 283.**

7. I have heard the rival submissions of learned counsel for the parties and also perused the record.

8. Considering the submissions made by the parties, the core question emerges to be adjudicated is whether the appointment of petitioner on the post of Project Officer was legal and if not, whether the same can be cancelled without conducting any regular departmental enquiry and without affording proper opportunity of hearing ?

9. As per the record, the petitioner was appointed pursuant to the resolution passed by Executive Council in its meeting dated 26.10.1998 at Agenda No.7, which reads as under :-

> ''पद क्रमांक 7
>
> विश्वविद्यालय के प्रौढ. शिक्षा विभाग में निर्देशक डॉ. नीरज शर्मा द्वारा प्रौढ. शिक्षा के विकास हेतु विभिन्न योजनाये तैयार की गयी है। विभाग में शैक्षणिक पाठ्यक्रम भी चलाये जा रहे है। प्रौढ. शिक्षा के कार्य संपादन हेतु सहा. निर्देशक का एक पद जो निर्देशक के पद में उनयन हो चुका है एवं परियोजना अधिकारी के दो पद है। श्रीमति एदलावादी के निधन के उपरांत परियोजना अधिकारी का एक पद रिक्त है जिसके विरूद्द डॉ. शशांक ठाकुर निर्धारित वेतन पर कार्यरत है, बढे. हुये कार्य को देखते हुये एक परियोजना अधिकारी की और आवश्यकता है किंतु पदाभाव में वहां कोई व्यवस्था संभव नहीं है अतः ऐसी स्थिति में विश्वविद्यालय में व्याख्याता के रिक्त पद के विरूद्ध वहां व्याख्याता से कम के वेतनमान में अर्थात तृतीय श्रेणी के वेतनमान में एक परियोजना अधिकारी की नियुक्ति प्रस्तावित है इस हेतु श्री नरेन्द्र त्रिपाठी ने अपना आवेदन पत्र प्रस्तुत किया है । प्रस्ताव है कि वेतनमान 1640–2900 में जिसका परिवर्तित वेतनमान 5500–175–9000 है में श्री नरेन्द्र त्रिपाठी का परियोजना अधिकारी के रूप में नियुक्त किया जाये यह नियुक्ति अस्थाई रूप से अग्रिम आदेश तक की जाना है। प्रकरण कार्यपरिषद के आदेशार्थ एवं विचारार्थ प्रस्तुत।''

10. On perusal of the aforesaid Agenda, it is crystal clear that there was no post of Project Officer lying vacant. On the contrary, it reveals that there was no arrangement under which the said post could have been created and as such, against the vacant post of Lecturer, sanction was sought for. Considering the purpose of sanction in a pay scale of 1640-2900, corresponding pay scale of 5500-175-9000, which is a lesser pay than that of the pay scale of Lecturer, the application of the petitioner for the post of Project Officer was considered. The appointment was purely temporary till the date of further order and was made effective w.e.f. 01.12.1998 and pay and allowances of the said post had to be adjusted against the vacant post of Lecturer. An order in this regard was issued on 16.12.1998 by respondent No.3. It clearly indicates that there was no sanctioned and vacant post of Project Officer at the time of giving appointment to the petitioner but he was adjusted on the post of Project Officer against the vacant post of Lecturer. Moreover, without considering this aspect that the appointment of petitioner was temporary in nature, the petitioner was confirmed along with other employees giving reference to statute 31 and he was also granted benefit of pay scale and benefit of time scale from time to time. From the documents made available by the parties, this Court can see that there was no advertisement issued inviting applications for the post of Project Officer but on the single application made by petitioner, temporary appointment was given to him but later on it was treated to be as regular appointment and all benefits of regular employee was extended to him. The petitioner has claimed that since he was appointed by the competent authority i.e. Executive Council vide resolution passed unanimously in its meeting dated 26.10.1998, therefore,

his appointment can be considered to be irregular appointment but not illegal and driving support from the law laid down by the Supreme Court in the case of **M.L. Kesari (supra)** submits that such irregular appointment can be regularized in terms of the law laid down by the Supreme Court in the case of **Secretary, State of Karnataka and others vs. Uma Devi (3) and others (2006) 4 SCC 1** and further as per the view taken by the High Court in the case of **Rajesh Ahirwar (supra)** his appointment can be considered to be irregular appointment and he can be regularized and as such nothing illegal has been done by the respondent/University in respect of the appointment giving him permanent status and confirmed in the employment granting benefits which were available to regular employee. He has also submitted that since he has rendered services for as long as 25 years, in view of the decision of High Court in the case of **Rajesh Ahirwar (supra)** termination of his services is not proper.

11. On perusal of the record, it is seen that certain complaints made against the appointment of the petitioner are on record and to ascertain the allegations made in the complaints, two enquiry reports are also on record. The first enquiry report has given seal of approval to the appointment of the petitioner saying that there is no illegality in the same but in the second enquiry report, though, it was submitted by the same enquiry officer who has submitted his report conducting enquiry against the appointment of petitioner but the same is totally contrary to the first one. In the second report, the enquiry officer has given his final opinion that the appointment of petitioner was illegal from very inception.

12. Indisputably, the appointment of the petitioner was made against the non-sanctioned post of Project Officer and against the vacant post of Lecturer and no advertisement was ever issued inviting applications from open market to fill up the post of Project Officer, however, a singular application of petitioner which was placed before the Executive Council which considered and resolved in its meeting dated 26.10.1998 that looking to the excessive work, services of Project Officer was required and as such temporary appointment of the petitioner was made on the said post. In view of the decision of Supreme Court in the case of **Mamata Mohanty (supra)** wherein it has been observed that the procedure for calling names from employment exchange and making appointment is not proper. It is also observed that the post which is to be filled up, an advertisement should be published so that applications from open market can be called so as to fulfill the requirement of Article 16 of the Constitution of India. The observation of the Supreme Court which has been taken in the said case, is as under :-

> **"35.** At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by

advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386 : AIR 1992 SC 789] , State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403 : AIR 1992 SC 2130] , Excise Supdt. v. K.B.N. Visweshwara Rao [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420] , Arun Tewari v. Zila Mansavi Shikshak Sangh [(1998) 2 SCC 332 : 1998 SCC (L&S) 541 : AIR 1998 SC 331] , Binod Kumar Gupta v. Ram Ashray Mahoto [(2005) 4 SCC 209 : 2005 SCC (L&S) 501 : AIR 2005 SC 2103] , National Fertilizers Ltd. v. Somvir Singh [(2006) 5 SCC 493 : 2006 SCC (L&S) 1152 : AIR 2006 SC 2319] , Telecom District Manager v. Keshab Deb [(2008) 8 SCC 402 : (2008) 2 SCC (L&S) 709] , State of Bihar v. Upendra Narayan Singh [(2009) 5 SCC 65 : (2009) 1 SCC (L&S) 1019] and State of M.P. v. Mohd. Abrahim [(2009) 15 SCC 214 : (2010) 1 SCC (L&S) 508] .)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for

> the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

13. Further, in the case of **Chandreshwar Pathak (supra)**, the Supreme Court has again approved its view taken in the case of **Mamata Mohanty (supra)** and observed as under :-

> **"8.** The only question for consideration is whether the appointment of the respondent made without any advertisement or selection process can be considered to be a valid appointment to a public post protected under Articles 14 or 311 of the Constitution of India?
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> **9.** On due consideration, we are of the view that the impugned judgment [Chandreshwar Pathak v. State of Bihar, LPA No. 945 of 2010, order dated 5-1-2012 (Pat)] cannot be sustained for the reasons that follow.
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> **10.** The order of appointment, in the present case, is as follows:
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> "In the light of the order passed by the Inspector General of Police, Criminal Investigation Department, Bihar, Patna, vide his Letter No. 6/86 F3 Shri Chandeshwar Pathak, s/o Shri Devnarayam Pathak of Village Haraji, PO Haraji, PS Dimbara, District Chhapra was appointed as Constable temporarily from 14-1-1988 afternoon on the condition that his previous character found satisfactory and as and when

necessary, his service shall be terminated without assigning any reason or show cause. His pay scale shall be Rs 425-10,565 EB-10-605 with the basic pay of Rs 425. He has been allotted CT No. 390."

It is clear from the above order that the appointment has been given only on the asking of the Inspector General of Police. There is nothing to show that any advertisement was issued giving opportunity to all eligible candidates to compete or any selection process was undertaken before appointment of the respondent.

11. In State of Orissa v. Mamata Mohanty [(2011) 3 SCC 436 : (2011) 2 SCC (L&S) 83 : 4 SCEC 96] , it was observed as under : (SCC pp. 451-52, paras 35-36)

"Appointment/employment without advertisement

35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386] , State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] , Excise Supt. v. K.B.N. Visweshwara Rao [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420] , Arun Tewari v. Zila Mansavi Shikshak Sangh [(1998) 2 SCC 332 : 1998 SCC (L&S) 541] , Binod Kumar Gupta v. Ram Ashray Mahoto [(2005) 4 SCC 209 : 2005 SCC (L&S) 501] , National Fertilizers Ltd. v. Somvir Singh [(2006) 5 SCC 493 : 2006 SCC (L&S) 1152] , Deptt. of Telecommunications v. Keshab Deb [(2008) 8 SCC 402 : (2008) 2 SCC (L&S) 709] , State of Bihar v. Upendra Narayan Singh [(2009) 5 SCC 65 : (2009) 1 SCC (L&S) 1019] and State of M.P. v.

Mohd. Abrahim [(2009) 15 SCC 214 : (2010) 1 SCC (L&S) 508] .)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

12. No contrary view of this Court has been cited on behalf of the respondent. Moreover, another Division Bench of the same High Court has upheld termination in similar matter as noted earlier against which SLP has been dismissed by this Court as mentioned earlier.

13. Accordingly, it has to be held that in the absence of any advertisement or selection process, the appointment of the respondent is not protected and could be validly terminated. The learned Single Judge was justified in dismissing the writ petition while the Division Bench erred in interfering with the same**."**

14. Further, in the case of **Renu (supra)**, Hon'ble Supreme Court has reiterated its view taken in the case of **Mamata Mohanty (supra)** and held as under :-

> **"6.** Article 14 of the Constitution provides for equality of opportunity. It forms the cornerstone of our Constitution.
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> **7.** In I.R. Coelho v. State of T.N. [(2007) 2 SCC 1 : AIR 2007 SC 861] , the doctrine of basic features has been explained by this Court as under : (SCC p. 108, para 141)
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> "141. The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Articles 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III."
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> **8.** As Article 14 is an integral part of our system, each and every State action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained in view of the judgments rendered by this Court in Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386] , State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] , Prabhat Kumar Sharma v. State of U.P. [(1996) 10 SCC 62 : 1996 SCC (L&S) 1331] , J.A.S. Inter College v. State

of U.P. [(1996) 10 SCC 71 : 1996 SCC (L&S) 1339] , M.P. Housing Board v. Manoj Shrivastava [(2006) 2 SCC 702 : 2006 SCC (L&S) 422] , M.P. State Agro Industries Development Corpn. Ltd. v. S.C. Pandey [(2006) 2 SCC 716 : 2006 SCC (L&S) 434] and State of M.P. v. Sandhya Tomar [(2013) 11 SCC 357].

9. In Excise Supt. v. K.B.N. Visweshwara Rao [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420], a larger Bench of this Court reconsidered its earlier judgment in Union of India v. N. Hargopal [(1987) 3 SCC 308 : 1987 SCC (L&S) 227 : (1987) 4 ATC 51 : AIR 1987 SC 1227] , wherein it had been held that insistence on recruitment through employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution. However, due to the possibility of non-sponsoring of names by the employment exchange, this Court held that any appointment even on temporary or ad hoc basis without inviting application is in violation of the said provisions of the Constitution and even if the names of candidates are requisitioned from employment exchange, in addition thereto, it is mandatory on the part of the employer to invite applications from all eligible candidates from open market as merely calling the names from the employment exchange does not meet the requirement of the said articles of the Constitution. The Court further observed : (K.B.N. Visweshwara Rao case [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420] , SCC p. 218 para 6)

"6. … In addition, the appropriate department … should call for the names by publication in the newspapers having wider circulation and also display on their office notice … and employment news bulletins; and then consider the cases of all candidates

who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

(emphasis supplied)

(See also Arun Tewari v. Zila Mansavi Shikshak Sangh [(1998) 2 SCC 332 : 1998 SCC (L&S) 541 : AIR 1998 SC 331] and Kishore K. Pati v. District Inspector of Schools, Midnapore [(2000) 9 SCC 405 : 2001 SCC (L&S) 87] .)

10. In Suresh Kumar v. State of Haryana [(2003) 10 SCC 276] this Court upheld the judgment of the Punjab and Haryana High Court wherein 1600 appointments made in the Police Department without advertisement stood quashed though the Punjab Police Rules, 1934 did not provide for such a course. The High Court reached the conclusion that process of selection stood vitiated because there was no advertisement and due publicity for inviting applications from the eligible candidates at large.

11. In UPSC v. Girish Jayanti Lal Vaghela [(2006) 2 SCC 482 : 2006 SCC (L&S) 339 : AIR 2006 SC 1165] this Court held : (SCC p. 490, para 12)

"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."

(emphasis supplied)

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 : (2007) 2 SCC (L&S) 883] as under : (SCC pp. 274-75, para 24)

"(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."

13. A similar view has been reiterated by the Constitution Bench of this Court in State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753 : AIR 2006 SC 1806] , observing that any appointment made in violation of the statutory rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. "Adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment." The Court further rejected the prayer that ad hoc appointees working for long be considered for regularisation as such a course only encourages the State to flout its own rules and would confer undue benefits on some at the cost of many waiting to compete.

14. In State of Orissa v. Mamata Mohanty [(2011) 3 SCC 436 : (2011) 2 SCC (L&S) 83] this Court dealt with the constitutional principle of providing equality of opportunity to all which mandatorily requires that vacancy must be notified in advance meaning thereby that information of the recruitment must be disseminated in a reasonable manner in public domain ensuring maximum participation of all eligible

candidates, thereby the right of equal opportunity is effectuated. The Court held as under : (SCC p. 452, para 36)

"36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

15. Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. (Vide University of Mysore v. C.D. Govinda Rao [AIR 1965 SC 491] , Kumar Padma Prasad v. Union of India [(1992) 2 SCC 428 : 1992 SCC (L&S) 561 : (1992) 20 ATC 239 : AIR 1992 SC 1213] , B.R. Kapur v. State of T.N. [(2001) 7 SCC 231 : AIR 2001 SC 3435] , Mor Modern Coop. Transport Society Ltd. v. State of Haryana [(2002) 6 SCC 269] ,

> Arun Singh v. State of Bihar [(2006) 9 SCC 375] , Hari Bansh Lal v. Sahodar Prasad Mahto [(2010) 9 SCC 655 : (2010) 2 SCC (L&S) 771] and Central Electricity Supply Utility of Odisha v. Dhobei Sahoo [(2014) 1 SCC 161 : (2014) 1 SCC (L&S) 1] .)
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> **16.** Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others."

15. Further, in the case of **Lalit Kumar Verma (supra)** Hon'ble Supreme Court has also observed as to which appointment can be considered to be irregular appointment and which can be considered to be illegal and opined as under :-

> **12.** The question which, thus, arises for consideration, would be: Is there any distinction between "irregular appointment" and "illegal appointment"? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is "State" within the meaning of Article 12 of the Constitution of India, the

recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance with the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to.

13. In National Fertilizers Ltd. v. Somvir Singh [(2006) 5 SCC 493 : 2006 SCC (L&S) 1152] it has been held: (SCC pp. 500-01, paras 23-25)

"23. The contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

24. The Constitution Bench thought of directing regularisation of the services only of those employees whose appointments were irregular as explained in State of Mysore v. S.V. Narayanappa [State of Mysore v. S.V. Narayanappa, (1967) 1 SCR 128 : AIR 1967 SC 1071] , R.N. Nanjundappa v. T. Thimmiah [R.N. Nanjundappa v. T. Thimmiah, (1972) 1 SCC 409] and B.N. Nagarajan v. State of Karnataka [B.N. Nagarajan v. State of Karnataka, (1979) 4 SCC 507 : 1980 SCC (L&S) 4] wherein this Court observed: [Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] , SCC p. 24, para 16]

‘16. In B.N. Nagarajan v. State of Karnataka [B.N. Nagarajan v. State of Karnataka, (1979) 4 SCC 507 : 1980 SCC (L&S) 4] this Court clearly held that the words “regular” or “regularisation” do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments.’

25. Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not, thus, have any legal right to continue in service.”

14. In R.S. Garg v. State of U.P. [(2006) 6 SCC 430 : 2006 SCC (L&S) 1388 : (2006) 7 Scale 405] it has been held by this Court: (SCC p. 448, para 24)

“24. The original appointment of the 3rd respondent being illegal and not irregular, the case would not come within the exception carved out by the Constitution Bench. Furthermore, relaxation, if any, could have been accorded only in terms of Rule 28 of the Rules; Rule 28 would be attracted when undue hardship in any particular case is caused. Such relaxation of Rules shall be permissible only in consultation with the Commission. It is not a case where an undue hardship suffered by the 3rd respondent could legitimately be raised being belonging to a particular class of employee. No such case, in law could have been made out. It, in fact, caused hardship to other employees belonging to the same category, who were senior to him; and thus, there was absolutely no reason why an exception should have been made in his case.”

(See also State of Gujarat v. Karshanbhai K. Rabari [(2006) 6 SCC 21 : 2006 SCC (L&S) 1265] .)

15. Yet, recently in Principal, Mehar Chand Polytechnic v. Anu Lamba [(2006) 7 SCC 161 : 2006 SCC (L&S) 1580] it was held: (SCC p. 171, para 35)

"35. The respondents did not have legal right to be absorbed in service. They were appointed purely on temporary basis. It has not been shown by them that prior to their appointments, the requirements of the provisions of Articles 14 and 16 of the Constitution had been complied with. Admittedly, there did not exist any sanctioned post. The Project undertaken by the Union of India although continued for some time was initially intended to be a time-bound one. It was not meant for generating employment. It was meant for providing technical education to the agriculturalists. In the absence of any legal right in the respondents, the High Court, thus, in our considered view, could not have issued a writ of or in the nature of mandamus."

16. The appointment of the petitioner thus does not fall within the category of 'irregular appointment' but it is under 'illegal appointment' as Hon'ble Supreme Court has also viewed that such an appointment which is considered to be illegal appointment cannot be allowed to continue and regularized. The petitioner, although, placed reliance upon an order passed by High Court of Madhya Pradesh in the case of **Rajesh Ahirwar (supra)** in which the High Court has taken a view that by virtue of irregular appointment that since the petitioner rendered service continuously for long, would create great hardship to the employee and services cannot be terminated only on the ground that the appointment was made contrary to the rules. The petitioner, therefore, is claiming that since the appointment made by the competent authority i.e. Executive Council against the sanctioned vacant post of Project Officer and appointment was temporary in nature, that would fall within the category of irregular appointment and looking to the long service rendered by the petitioner, termination is not proper. But this submission of the petitioner does not impress this Court for the reason that the view taken by the Supreme Court in the cases referred hereinabove is contrary to the submissions made by learned counsel for the petitioner. It is already made clear that the case of the petitioner does not fall within the ambit of irregular appointment but it falls within the purview of illegal appointment, therefore, the case on which the petitioner has placed reliance would not help him because that view of the High Court was in respect of irregular appointment. In the considered view of this Court, although, terminating the services of petitioner after rendering long period for almost 25 years is no doubt a great hardship to the petitioner and this Court has great sympathy but the existing legal

position rule over the sympathy in view of the aforesaid rulings of Supreme Court and the view taken therein and in view of the observations made in **Mamata Mohanty (supra)** which is as under :-

> "**37.** It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (Vide Upen Chandra Gogoi v. State of Assam [(1998) 3 SCC 381 : 1998 SCC (L&S) 872 : AIR 1998 SC 1289] , Mangal Prasad Tamoli v. Narvadeshwar Mishra [(2005) 3 SCC 422 : AIR 2005 SC 1964] and Ritesh Tewari v. State of U.P. [(2010) 10 SCC 677 : (2010) 4 SCC (Civ) 315 : AIR 2010 SC 3823]).
>
> **38.** The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. [Vide M.S. Patil (Dr.) v. Gulbarga University [(2010) 10 SCC 63 : (2010) 2 SCC (L&S) 785 : AIR 2010 SC 3783] ."

17. The Division Bench of the High Court in the case of **Mansukh Lal Saraf (supra)** dealing with the similar issue when appointment was made contrary to law and an employee was rendering services for long, it was

held that the petitioner therein was not entitled to get any advantage of the said appointment because the Court has found the said appointment as fraud with the Constitution and was illegal appointment from very inception and opined as under :-

"**48.** Now reverting to the appointment of respondent No. 1, since we have held that the same is capricious, arbitrary and illegal, having been made against the statutory rules and also intended to defeat the judgment of this Court, in our opinion, not only the appointment order deserves to be quashed and set aside but it is necessary to also clarify that the respondent No. 1 shall not be extended any other service benefits as given to regular appointees-as a consequence of quashment of his appointment order, in any manner. In that, the initial appointment will have to be treated as non-est in law from its very inception, being the product of fraud played on the statute to which the respondent No. 1 was equally responsible. The period for which the respondent No. 1 has worked on the post be treated only as a contractual appointment without accrual of any other rights, until this order of quashing his appointment is passed today. The fact that the respondent No. 1 has been in service for quite some time can be no reason to take a lenient view, as from the inception his appointment was fraudulent, illegal and non-est in law. It is well established position that no person can be permitted to take advantage of his own wrong-NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA. Further, it is well established position that delay and laches do not constitute any impediment to deal with the lis on merits, as expounded in Kashinath G. Jalmi v. Speaker, (1993) 2 SCC 703. This has been restated in paragraph 31 of Rajesh Awasthi's case (supra). In the case of V.C. Banaras Hindu University v. Shrikant, (2006) 11 SCC 42, the Supreme Court held that if

> initial order is nullity, its purported approval by the Competent Authority would not cure the defect.
>
> **49.** In the present case, we have held that the appointment of respondent No. 1 must be treated as non-est in the eye of law from its very inception, for more than one reason. The illegality committed in appointment of respondent No. 1 was not only to show undue favour to him but also entailed in denial of Constitutional rights of the deserving candidates who could have been appointed after following proper selection process as per the rules and more so denial of opportunity of being considered to several eligible aspirants waiting to be appointed on the post on which respondent No. 1 came to be appointed by a back door method."

Thus, there is no confusion in the mind of this Court that considering the manner in which the petitioner was given appointment and the view taken by Supreme Court and High Court on the same, the petitioner's appointment was held illegal and has rightly been terminated.

18. Now, under such a circumstance, the contention made by the learned counsel for the petitioner and grounds raised by him challenging the impugned order on the ground that it is in violation of principles of natural justice, so this Court has to see whether order impugned suffered by principles of natural justice and what is the consequence of that. Relying upon several judgments, learned counsel for the respondents submit that under the existing circumstance when the appointment of the petitioner was illegal from very inception, it was not obligatory for the respondents to follow the principle of natural justice or to conduct any regular departmental enquiry. The respondents have placed reliance upon a

decision dealing with the issue about applicability of principle of natural justice and in a case of **B. Karunakar (supra)**, Hon'ble Supreme Court has observed as under :-

> "30[v]. The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

19. Further in the case of **Debasis Das (supra)**, Supreme Court has observed as under :-

> "**22.** 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 : (SCC pp. 245-47, paras 22-23)

"22. Before we go into the final aspects of this contention, we would like to state that cases 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 : (1971) 1 WLR 1578 (HL)] (per Lord Reid and Lord Wilberforce), Glynn v. Keele University [(1971) 2 All ER 89 : (1971) 1 WLR 487] , Cinnamond v. British Airports Authority [(1980) 2 All ER 368 : (1980) 1 WLR 582 (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] (Admn LR at p. 358) [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. McMahon [(1987) 1 All ER 1118 : 1987 AC 625 : (1987) 2 WLR 821 (CA)] 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's 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 : (1963) 2 WLR 935 (HL)] , Megarry, J. in John v. Rees [(1969) 2 All ER 274 : 1970 Ch 345 : (1969) 2 WLR 1294] 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 [(1971) 2 All ER 1278 : (1971) 1 WLR 1578 (HL)] and Glynn [(1971) 2 All ER 89 : (1971) 1 WLR 487] 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 v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , 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 in the case before us, 'admitted and indisputable' facts show that grant of a writ will be in vain as pointed out by Chinnappa Reddy, J."

23. As was observed by this Court we need not 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 appellants, unless failure of justice is occasioned or that it would not be in public interest to dismiss a petition on the fact situation of a case, this Court may refuse to exercise the said jurisdiction (see Gadde Venkateswara Rao v. Govt. of A.P. [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 [(1990) 1 SCC 613 : AIR 1990 SC 1480] .)

24. Additionally, there was no material placed by the employee to show as to how he has been prejudiced. Though in all cases the post-decisional hearing cannot be a substitute for pre-decisional hearing, in the case at hand the position is different. The position was illuminatingly stated by this Court in Managing Director, ECIL v. B. Karunakar [Managing Director, ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] (SCC at p. 758, para 31) which reads as follows:

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the court/tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the state of furnishing him with the report. The question

> whether the employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."

20. In the case of **Dharampal Satyapal (supra)**, Hon'ble Supreme Court again considered the scope of principle of *audi alteram partem* and observed that the same cannot be applied in any straight jacket formula and observed as under :-

> "**38.** But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have

held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason—perhaps because the evidence against the individual is thought to be utterly compelling—it is felt that a fair hearing "would make no difference"—meaning that a hearing would not

change the ultimate conclusion reached by the decision-maker—then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corpn. [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , who said that : (WLR p. 1595 : All ER p. 1294)

"… A breach of procedure … cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.J. opined in Cinnamond v. British Airports Authority [(1980) 1 WLR 582 : (1980) 2 All ER 368 (CA)] that : (WLR p. 593 : All ER p. 377)

"… no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be

> decided on the touchstone of "prejudice". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing."

21. Hon'ble Supreme Court in the case of **Sudhir Kumar Singh (supra)** has dealt with the applicability of principle of natural justice and observed as under :-

> **"42.3.** No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.
>
> **42.4**. In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

22. Thus, in view of the aforesaid enunciation of law on the point of principle of natural justice, I am of the opinion that this is a case in which the basic question involved is as to whether the appointment of petitioner was illegal or not ?

23. Complete material was placed before the Court to demonstrate in what manner appointment of the petitioner on the post of Project Officer has been made. Learned counsel for the petitioner during the course of arguments has not disputed the procedure followed by the respondent for appointment of petitioner but on the contrary, he relied upon the same and asserted that the said procedure was proper. Although, his submission and assertion has not attracted this Court because the same was contrary to the legal position and view expressed by Hon'ble Supreme Court and High Court in that regard. Thus, it is clear, had the enquiry been conducted, the same would have not changed the factual position and would not change the outcome of the enquiry, as such, no prejudice is caused to the petitioner as there was no sanctioned post of Project Officer as per the resolution passed by the Executive Council in Agenda No.7,. No advertisement was issued by the respondent/University inviting applications from other eligible candidates from open market to make appointment on the said post on which the petitioner was appointed. The appointment was temporary in nature and was made against the post of Lecturer but it was later-on confirmed on the post of Project Officer, as such, it was nothing but a back door entry, contrary to the scheme of Constitution and as such in view of the aforesaid discussion, taking note of the view expressed by Hon'ble Supreme Court from time to time, the said appointment of the petitioner falls within the purview of illegal appointment and therefore, the petitioner is not entitled to be continued on the said post and termination of the petitioner is the proper course adopted by the respondents. Merely because enquiry is conducted so as to ascertain the allegations made in the complaints with regard to appointment of the petitioner and different views

expressed by the enquiry officer, there are certain documents on record which are part of the internal correspondence of the officers of the respondents but the same do not validate the nature of appointment of the petitioner. However, this Court is of the opinion that though the appointment of petitioner was illegal and not entitled to continue in service and was also not entitled to get benefit of the services which he rendered for 25 years but he cannot be granted any other benefit of his long services under the garb of illegal appointment.

24. Ex-consequentia, the order impugned does not call for any interference and petition is accordingly dismissed. However, it is made clear that whatever wages paid to the petitioner so far due to services rendered by him, cannot be recovered from him and no order for any recovery should be issued by the respondents.

25. With the aforesaid observation, this petition is **dismissed.**

(SANJAY DWIVEDI)
JUDGE

PK