

(2018) 06 MP CK 0128

In the Madhya Pradesh High Court

Case No : Writ Petition Nos.5027, 5028, 5085, 5094, 5120, 5264, 5366 Of 2017

Dr. Pali Rastogi & OrsVs Union Of India & Ors

Date of Decision : 27-06-2018

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2018) 06 MP CK 0128

Hon'ble Judges : S. C. SHARMA, J

Bench : Single Bench

Advocate : Sunil Jain, Amol Shrivastava, Sumer Singh Chouhan, Abhishek Tugnawat, Arjun Pathak

Final Decision : Allowed

Judgement

Regard being had to the similitude in the controversy involved in the present cases, these writ petitions were analogously heard and by a common order, they are being disposed of by this Court. Facts of the Writ Petition No.5027/2018 are narrated hereunder.

The petitioner before this Court has filed the present petition being aggrieved by the order dated 26.07.2017 passed by the Medical Council of India in

exercise of the power conferred under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 inflicting a

punishment upon the petitioner for removal of his name for a period of three months from the Indian Medical Register, meaning thereby, he will not be

a doctor for a period of three months. He cannot practice as a doctor even though he is working on the post of Assistant Professor at Mahatma

Gandhi Memorial Medical College, Indore. A similar order has been passed in respect of seven other doctors and they have also filed writ petitions,

which are linked with this matter.

The facts of the case, as stated in the writ petition and as stated in the reply

reveal that the petitioner is having a Master degree in Psychiatry. He is serving as an Assistant Professor in Government Medical College at Indore and is a doctor of great repute.

Undisputedly, the Director General of Central Drug Standard Control Organization has granted permission under the Drugs and Cosmetic Rules, 1945

to M/s Intas Pharmaceuticals Limited to conduct research/clinical trial with Doxepin on patients at various sites including clinical trial sites

under investigation of Dr. Pali Rastogi (present petitioner) at Indore. Thus, it is nobody's case that there was no permission by the Government to

do any research in respect of Doxepin medicine.

A notice was issued to the petitioner by Director General of Health Services (Annexure-P/3) on 04.01.2012 and it was in respect of the inspection

carried out from 22nd to 25th December at his clinic. A notice was also issued by Government of India (Durg Comptroller General of India) in respect

of certain observations made by the Investigator and the petitioner did submit a detailed reply stating categorically that the drug in question was not

given to any patient in the Government Hospital and the protocol required, as per the instructions issued by the Director General, has been followed

and no lapse was committed by the petitioner at any point of time. In spite of the aforesaid that the petitioner did not commit any lapse on his part, a

warning was issued by the Director General of India only on the ground that the petitioner was required to maintain the study relating documents at

the site also.

Undisputedly, all the documents related to the research/trial were forwarded through the company to the Director General of Health Services.

However, in spite of the aforesaid, vide letter dated 02.05.2012, a warning was issued directing the petitioner to be more careful in the future.

In respect of the same incident of the year 2012, a question was raised in the Parliament on 13.03.2012 and it was answered by the Hon'ble

Minister and no misconduct was alleged against the petitioner. Thereafter, Smt. Bindra Karat Member of Parliament, CPIN submitted a complaint,

though, it was submitted on 10.01.2012. It was forwarded to the petitioner vide letter dated 15.01.2013. The petitioner did submit a detailed and

exhaustive reply to the complaint and categorically stated that his name is not involved in the complaint and at no point of time, he has committed

violation of regulations under the MCI Regulations nor he has committed violation of any direction/order issued by Director General of India.

However, in spite of the aforesaid, a show cause notice (Annexure-P/10) was issued on 18.01.2013 and the Ethics Committee, which was constituted

under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 directed the petitioner to submit as many as

eighteen documents. The petitioner has submitted all the desired documents on 02.02.2013 and without granting any opportunity of personal hearing to

the petitioner based upon some internal inquiry, impugned order has been passed.

A reply has been filed in the matter and the stand of Medical Council of India is that based upon the complaint received in the matter, action was

initiated under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and the petition preferred under Article 226

of the Constitution of India deserves to be dismissed.

Though, the reply is very detailed and exhaustive reply but it is silent on the point of grant of personal hearing and also in respect of conclusion of the

matter within a period of six months, which is mandatory in light of the regulations governing the field. In the reply, it has been stated that in exercise

of the power conferred under Article 226 of the Constitution of India, no interference can be made by this Court and the Ethics Committee after great

discussions and due deliberations, has removed the name of the petitioner as well as all other doctors, as they have violated the Regulations of 2002.

This Court has carefully gone through the reply and in respect of first ground raised by the petitioner that he was never heard by the Ethics Committee

and there is no whisper in the reply in respect of personal hearing except a bald statement that the principles of natural justice and fair play have not

been violated.

Even, this Court by order dated 02.04.2018 has directed the Medical Council of India to produce the deliberations, which took place between the

Executive Committee. In compliance to the order passed by this Court, the minute of meetings dated 11.07.2017 of the Executive Committee have

been brought to the notice of this Court. The minutes also reflect that the petitioner was not present at all before any Committee at any point of time

neither before the Executive Committee nor before the Ethics Committee,

meaning thereby, the opportunity of personal hearing has not been granted to the petitioner. He was also not issued any notice to appear in person or to appear through a pleader.

Not only this, Regulations 8.2 and 8.4 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 reads as under:-

8.2. It is made clear that any complaint with regard to professional misconduct can be brought before the appropriate Medical Council for

Disciplinary action. Upon receipt of any complaint of professional misconduct, the appropriate Medical Council would hold an enquiry and give

opportunity to the registered medical practitioner to be heard in person or by pleader. If the medical practitioner is found to be guilty of committing

professional misconduct, the appropriate Medical Council may award such punishment as deemed necessary or may direct the removal altogether or

for a specified period, from the register of the name of the delinquent registered practitioner. Deletion from the Register shall be widely publicized in

local press as well as in the publications in different Medical Associations/ Societies/ Bodies.

8.4. Decision on complaint against delinquent physician shall be taken within a time limit of 6 months.

Regulation 8.2 makes it very clear that an opportunity of personal hearing has to be granted to the Medical Practitioner and entire exercise based upon

the complaint has to be completed within a period of six months. In the present case, the entire exercise took place for almost five years for

completion and undisputedly, no opportunity of personal hearing was given to the petitioner.

Another important aspect of the case is that the medical research or so called drug trial was under the permission granted by Director General of

Health Services and after seeking reply of the petitioner, as the documents were not kept properly by the petitioner in respect of the prescription of the

drug that too in his private clinic, a warning was issued by the Drug Comptroller General of India in the year 2012 and for a stale incident of 2012, in

the year 2017 the impugned order has been passed on 26.07.2017 for the same misconduct, if any and the petitioner are being vexed twice.

In the present case, this Court is dealing with the cases of Psychiatrist along with the other seven doctors, who are also the Psychiatrist or Senior

Specilists. All are the Government doctors holding senior position. They are being paid salary by the Government and keeping them idle for three

months and paying them salary is not going to serve any fruitful purpose.

There is already an acute shortage of doctors, and therefore, as they have already been warned by Drug Comptroller of India and there is violation of

principles of natural justice and fair play, this Court is of the opinion that the present petition deserves to be allowed, and is, accordingly allowed.

Though, it has been argued at length that principal of natural justice and fair play have not been violated, as proper notice was issued to the petitioner

and they have submitted the reply, however, in the considered opinion of this Court, the impugned order has been passed on the basis of some inquiry

conducted behind the back of the petitioner and they have not given the opportunity of personal hearing.

The principal of natural justice and fair play have been dealt by this Court in the case of Kansa Vs. State of Madhya Pradesh & Ors 2015 (3) JLJ 29

and the relevant paragraphs read as under:-

â??6. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into

the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and

human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a

formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

7. The expressions â??natural justiceâ? and â??legal justiceâ? do not present a water-tight classification. It is the substance of justice which is to be

secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves

legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord

Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigantsâ?? defence.

8. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on

determining disputes between the parties, or any administrative action involving

civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play?|..

10. 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. These rules are intended to prevent such authority from doing injustice.

12. Lord Wright referred to the leading cases on the subject. The most important of them is the Board of Education v. Rice (1911 AC 179:80 LJKB 796), where Lord Loreburn, L.C. observed as follows:

â??Comparatively recent statutes have extended, if they have originated, the practice of imposing upon departments or offices of State the duty of deciding or determining questions of various kinds. It will, I suppose usually be of an administrative kind, but sometimes, it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. I need not and that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial....The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorariâ??.

13. Lord Wright also emphasized from the same decision the observation of the

Lord Chancellor that the Board can obtain information in any way

they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement

prejudicial to their view. To the same effect are the observations of Earl of Selbourne, LO in *Spackman v. Plumstead District Board of Works*

(1985 (10) AC 229:54 LJMC 81), where the learned and noble Lord Chancellor observed as follows: "No doubt, in the absence of special

provisions as to how the person who is to decide is to proceed, law will imply no more than that the substantial requirements of justice shall not be

violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case

and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some

other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the

meaning of the statute if there were anything of that sort done contrary to the essence of justice".

14. Lord Selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person

by whose decision they are to be bound, such considerations as in their judgment ought to be brought before him. All these cases lay down the very

important rule of natural justice contained in the oft-quoted phrase "justice should not only be done, but should be seen to be done".

15. 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 frame- work 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. Expression "civil

consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non- pecuniary

damages. In its wide umbrella comes everything that affects a citizen in his civil life.

16. Natural justice has been variously defined by different Judges. A few instances will suffice. In *Drew v. Drew and Lebura* (1855(2) Macg. 1.8,

Lord Cranworth defined it as "universal justice". In *James Dunbar Smith v. Her Majesty the Queen* (1877-78(3) App. Case 614, 623 JC) Sir

Robert P. Collier, speaking for the judicial committee of Privy council, used the phrase "the requirements of substantial justice", while in *Arthur*

John Specman v. Plumstead District Board of Works (1884-85(10) App. Case 229, 240), Lord of Selbourne, S.C. preferred the phrase "the

substantial requirement of justice". In *Vionet v. Barrett* (1885(55) LJRD 39, 41), Lord Esher, MR defined natural justice as "the natural sense of

what is right and wrong". While, however, deciding *Hookings v. Smethwick Local Board of Health* (1890 (24) QBD 712), Lord Fisher, M.R.

instead of using the definition given earlier by him in *Vionet's* case (supra) chose to define natural justice as "fundamental justice". In *Ridge*

v. Baldwin (1963(1) WB 569, 578), Harman LJ, in the Court of Appeal countered natural justice with "fair-play in action" a phrase favoured by

Bhagwati, J. in *Maneka Gandhi v. Union of India* (1978 (2) SCR 621). In *re R.N. (An Infant)* (1967 (2) B 617, 530), Lord Parker, CJ, preferred to

describe natural justice as "a duty to act fairly". In *Fairmount Investments Ltd. v. Secretary to State for Environment* (1976 WLR 1255) Lord

Russell of Willowan somewhat picturesquely described natural justice as "a fair crack of the whip" while Geoffrey Lane, LJ. In *Regina v.*

Secretary of State for Home Affairs Ex Parte Hosenball (1977 (1) WLR 766) preferred the homely phrase "common fairness".

17. How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a

process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-

judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and

justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "nemo judex in causa

sua" or "nemo debet esse judex in propria causa sua" as stated in (1605) 12 Co. Rep. 114 that is, "no man shall be a judge in his own

causeâ?? . Coke used the form â??aliquis non debet esse judex in propria causa quia non potest esse judex at parsâ?? (Co.Litt. 1418), that is, â??no

man ought to be a judge in his own case, because he cannot act as Judge and at the same time be a partyâ?? . The form â??nemo potest esse simul

actor et judexâ??, that is, â??no one can be at once suitor and judgeâ?? is also at times used. The second rule is â??audi alteram partemâ??, that

is, â??hear the other sideâ?? . At times and particularly in continental countries, the form â??audietur at altera parsâ?? is used, meaning very much

the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely â??qui aliquid statuerit

parte inaudita alteram actquam licet dixerit, haud acquum faceritâ?? that is, â??he who shall decide anything without the other side having been

heard, although he may have said what is right, will not have been what is rightâ?? (See Bosewellâ??s case (1605) 6 Co.Rep. 48-b, 52-a) or in

other words, as it is now expressed, â??justice should not only be done but should manifestly be seen to be doneâ?? . What is known as â??useless

formality theoryâ?? has received consideration of this Court in M.C. Mehta v. Union of India (1999(6) SCC 237). It was observed as under:

â??Before we go into the final aspect of this contention, we would like to state that case relating to breach of natural justice do also occur where all

facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief

can be refused even if the court thinks that the case of the applicant is not one of â??real substanceâ?? or that there is no substantial possibility of his

success or that the result will not be different, even if natural justice is followed (See Malloch v. Aberdeen Corpn: (1971)2 All ER 1278, HL) (per

Lord Reid and Lord Wilberforce), Glynn v. Keele University: (1971) 2 All ER 89; Cinnamond v. British Airports Authority: (1980) 2 All ER 368, CA)

and other cases where such a view has been held. The latest addition to this view is R v. Ealing Magistratesâ?? Court, ex p. Fannaran (1996 (8)

Admn. LR 351, 358) (See de Smith, Suppl. P.89 (1998) where Straughton, L.J. held that there must be â??demonstrable beyond doubtâ?? that the

result would have been different. Lord Woolf in Lloyd v. McMohan (1987 (1) All ER 1118, 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 a real likelihood-not certainty- of prejudice. On the other hand, Garner Administrative Law (8th Edn. 1996.pp.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge v. Baldwin (1964 AC 40: (1963) 2 All ER 66, HL), Megarry, J. in John v. Rees (1969 (2) All ER 274) stating that there are always 'open and shut cases' and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J has said that the 'useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that 'convenience and justice are often not on speaking terms'. More recently, Lord Bingham has deprecated the 'useless formality theory' in R. v. Chief Constable of the Thames Valley Police Forces, ex p. Cotton (1990 IRLR 344) by giving six reasons (see also his article 'Should Public Law Remedies be Discretionary?' 1991 PL. p.64). A detailed and emphatic criticism of the 'useless formality theory' has been made much earlier in 'Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL.pp.27-63) contending that Malloch (supra) and Glynn (supra) were wrongly decided. Foulkes (Administrative Law, 8th Edn. 1996, p.323), Craig (Administrative Law, 3rd Edn. P.596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. De Smith (5th Edn. 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (Administrative Law, 5th Edn. 1994, pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet

another line of cases as in *State Bank of Patiala v. S.K. Sharma* (1996 (3) SCC 364), *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.

We do not propose to express any opinion on the correctness or otherwise of the “useless formality theory” and leave the matter for decision in

an appropriate case, inasmuch as the case before us, “admitted and indisputable” facts show that grant of a writ will be in vain as pointed by

Chinnappa Reddy, J.”

In light of the aforesaid, keeping in view the totality of the facts and circumstances of the case, the impugned order dated 26.07.2017 is hereby

quashed. The present writ petition stands allowed and all other connected writ petitions are also allowed.

Certified copy as per rules.