
(2021) 09 TEL CK 0060
In the Telangana High Court
Case No : Writ Petition No. 19872 Of 2021

J J Hospital

APPELLANT

Vs

State Of Telangana

RESPONDENT

Date of Decision : 28-09-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 226
Pre-Conception And Pre-Natal Diagnostic Techniques (Prohibition Of Sex Selection) Rules, 1996 — Rule 6, 8, 8(c), 8(2), 8(3), 9, 10, 18, 18A, 18A(4), 18A(4)(ii), 19
Pre-Conception And Pre-Natal Diagnostic Techniques (Prohibition Of Sex Selection) Act, 1994 — Section 3B, 18, 19, 19(3), 28, 32
Code of Criminal Procedure, 1973 — Section 200, 482

Citation : (2021) 09 TEL CK 0060

Hon'ble Judges : P.Naveen Rao, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Heard learned counsel for petitioner Sri. T. Bala Mohan Reddy and learned Government Pleader for Medical and Health for respondents 1 to 3.

2. This writ petition is filed seeking following directions:

".....to grant an order direction or writ more so in the nature of Writ of Mandamus declaring the action of the 2nd respondent in rejecting the Petitioners application for renewal dated 16.06.2021 vide Application No.0050505 vide proceedings bearing Rc.No.19/PC and PNDT/DMHO/ HYD/2021 dated 16.08.2021 on the ground of pending criminal case in C C No 1542/2018 on the file of the Learned III Additional Chief Metropolitan Magistrate at Hyderabad as illegal arbitrary highhanded violative of principles of natural justice apart from being violative of Articles 14 and 19 of the Constitution of India and in violation of Rule 8 (3) of PC and PNDT Prohibition of Sex Selection Rules 1996 and with a consequent prayer to set aside the proceedings of rejection issued by the 3rd Respondent on behalf of 2nd respondent vide proceedings bearing Rc.No.19/PC and PNDT/DMIIO/HYD/2021 dated 16.08.2021 and pass....."

3. Petitioner is a Multi Speciality Hospital, registered under the Pre-Conception and pre-Natal Diagnostic and Techniques Act, 1994 and Rules made thereunder on 25.8.2006 valid for a period of five years.

The registration was renewed on 25.8.2011 and on 25.8.2016. The last renewal was valid up to 24.8.2021. Petitioner applied for renewal of registration well in advance. His application for renewal was rejected by orders dated 3.7.2021. Aggrieved thereby, petitioner filed W.P. No. 17634 of 2021. This Court by order dated 29.7.2021 sets aside the order of rejection on the ground that incompetent authority has taken the decision and remanded the matter to the second respondent to take a decision afresh on the application submitted by the petitioner for renewal of registration. Pursuant to the directions of this Court, by order dated 16.8.2021 second respondent rejected the application of the petitioner. The renewal application is rejected on the ground that C.C.No. 1542 of 2018 on the file of the III ACMM Court, Hyderabad is pending. The said rejection order is under challenge in this writ petition.

4.1 According to learned counsel for petitioner, the order is ex-facie illegal, the decision is arbitrarily made, contrary to settled principle of law. Rule 8 of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short the Rules, 1996) envisages 'Renewal of registration'. Sub Rule 3 of Rule 8 mandates opportunity of hearing before the application for renewal is rejected. That being so, no opportunity of hearing was afforded to the petitioner offending the statutory mandate and on that ground alone, the order is liable to be set aside.

4.2. Learned counsel for petitioner further contended that even though petitioner has remedy of appeal, since the decision is in violation of Rule 8 (3) of the Rules, 1996, petitioner need not be compelled to avail the remedy of appeal. The decision is ex-facie illegal and not exhausting the remedy of appeal is not fatal to maintainability of the writ petition. He further submits that not availing the remedy of appeal is not a bar for this Court to entertain the writ petition and test the validity of impugned order in the teeth of Rule 8 (3) of the Rules, 1996. He further submits that on account of the rejection of the renewal, grave injustice is caused to the petitioner and entire functioning of the hospital is paralyzed. The scanning machine is essential to assess the health and growth of the foetus in the womb of a mother and it is causing great hardship to the hospital in treating the in-patients.

5. Learned Assistant Government Pleader submitted that since petitioner is facing trial in a criminal case, the registration cannot be renewed.

6. Advancement in Science and Technology in medical diagnostics is helping in extending better health care and better management of a patient. The Ultra Sound scanning machinery is helping the Doctor to assess the health of foetus at various stages of growth and to advise the mother how to take care of herself during pregnancy. Modern technology is also helping the couple to overcome

problem in conception and to take treatment. The technology is also helping to detect genetic abnormalities, metabolic disorders, chromosomal abnormalities congenial malformations, etc. Now it is also possible to know the sex of the foetus. The possibility of knowing the sex of the foetus is misused more often than not. Technology is used for sex selection even before conception.

7. It is unfortunate but a stark reality that to many families in India a girl child is unwelcome more so, if it is a second child. The overall sex ratio loaded against women is not accidental. Statistics on the child sex ratio reveal that from 976 to 1000 ratio in the year 1961, it went down to 918 to 1000 ratio in the year 2011. The fall in female sex ratio is wide spread, across the country, with no distinction in rural or urban areas. Whenever a woman conceives, the first thing the husband and family members want to know is whether the foetus in the womb is a girl or a boy. If it is found to be a girl, then pressurize the woman to terminate the pregnancy, even at the cost of life of that woman. These incidents are more if it is a second girl. No resistance by the woman is tolerated. The woman is harassed, humiliated, ill-treated and physically assaulted. There are several instances of forcible termination of pregnancy even at advanced stage or abandoning/killing the girl child after the birth. Availability of Ultra-Sound scanning machines and other modern equipment are used to perpetrate this evil social practice. Many diagnostic centers / hospitals / clinics are aiding and abetting such practices to earn quick money. It appears the volume of business is more than Rs.1000 crores. Though, legal framework is put in place and awareness is created, this social evil is still prevalent.

8. Concerned with such illegal practices and to overcome the growing problem of selective termination of pregnancy after determining the sex of foetus by using pre-natal sex determination, the Indian Parliament enacted Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short the Act, 1994). The object of the Act, 1994 is to provide law prohibiting sex selection before or after conception and regulation of pre-natal diagnostic techniques. The statutory frame work is made with primary objective of discouraging such practices and misuse of the modern machines for sex determination of foetus, leading to female foeticide and to prevent illegal practices in matters relating to conception. The Act is comprehensive and puts in place strict regime covering the field of its application. The Act not only prescribes procedure of registration of the laboratories/diagnostic centers/hospitals etc, it also requires registration of concerned machines, and periodical monitoring of the use of those machines by the centers and by the Medical Practitioners and maintenance of registers etc. The Act takes in its fold all stake holders, i.e., the manufacturers, the suppliers, the centers which use the machinery, the authorities who are required to enforce the law and the end users. The Act also envisages penal provisions against violators.

9. Chapter II of the Act, 1994 prescribes mechanism to regulate Genetic Counseling Centers, Genetic Laboratories and Genetic Clinics. It prohibits these

centers and the medical practitioners from conducting activities relating to pre-natal diagnostic techniques. It prohibits sex selection. Section 3-B prohibits sale of Ultrasound machines and similar kind of machinery to persons, laboratories, clinics etc which are not registered under the Act, 1994. Chapter III provides mode of regulation of pre-natal diagnostic techniques. Chapter VI deals with Genetic Counseling Centers, Genetic Laboratories and Genetic Clinics. Section 18 mandates that a centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection or to render services to any of them must register. Section 19 provides for issuance of certificate of registration. As per Section 19 (3) every certificate of registration shall be renewed in such manner and after such period and on payment of such fees as may be prescribed.

10. Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short the Rules) were notified in exercise of power vested by Section 32 of the Act. The Rules give effect to the objectives of the Act. Rule 6 prescribes Certificate of Registration; Rule 8 prescribes procedure of Renewal of Registration; Rule 9 stipulates maintenance and preservation of records; Rule 10 stipulates conditions for conducting pre-natal diagnostic procedures; Rule 18 stipulates Code of Conduct to be observed by persons working in Genetic Centers/ Laboratories/ Clinics Ultrasound Clinics, Imaging Centers etc; Rule 18-A, prescribes Code of Conduct to be observed by appropriate authorities; Rule 19 provides remedy of Appeal.

11. With an objective to pay special focus on eradicating this social evil, the Government of India launched scheme called "BETI BACHAO, BETI PADHAO". It covers various aspects of girl child. The special focus of the scheme is on 1994 Act. Government of India launched nation-wide awareness and advocating campaign and multi-sectoral action plan. In its endeavour to discipline the authorities tasked with enforcement of the Act, one of its kind step was taken in the year 2014 by amending the 1996 Rules and introducing Rule 18-A which prescribes "CODE OF CONDUCT TO BE OBSERVED BY APPROPRIATE AUTHORITY". On further review of functioning of the Act and the Rules, Rule 18-A (4) was amended vide GSR 60 (E) dated 28.1.2015 substituting clause (ii) of Rule 18-A (4), which is the one in force. The Government of India has also brought out Standard Operating Guidelines on various aspects of the 1994 Act. It is a reformation law to root out evil practice and to bring respect to girl child. Enforcement of stringent provisions of the Act must act as a deterrent. It commends strict enforcement.

12. At the first blush, the contention of the learned counsel for petitioner on vitiating the impugned order on the ground of breach of opportunity of hearing offending the statutory mandate envisaged by Rule 8(3) of the Rules appears formidable but on deeper consideration of the whole scheme of the Act and the Rules and statement of objects and reasons to bring out this Act, the said contention waters down and pales into insignificance.

13. The primary purpose of bringing this enactment is to regulate functioning of centers/institutions/hospitals using ultrasound machines or other modern machines and to prevent sex determination and giving treatment for IUI for infertile patients without obtaining permission and license. Act requires registration and maintenance of record of undertaking pre-natal diagnostic centers and other related services. Not following the mandatory provisions of the Act can also result in penal consequences which include suspension, cancellation and refusal of renewal of the registration. 1996 Rules are made to give effect to the object, scope and purpose of the Act. After reviewing the implementation of Act, 1994 and functioning of the authorities constituted under the Act, Rule 18-A was introduced and has been further amended. While Rule 18 prescribes Code of Conduct to be observed by the registered organizations, Rule 18-A prescribes Code of Conduct to be observed by appropriate authorities. Thus, the registered units and appropriate authorities are equally mandated to follow the statutory prescription. Rule 18-A (4) mandates appropriate authority to observe previous conduct of applicant seeking renewal of registration.

14. Rule 8 of the Rules, 1996 deals with mechanism to grant renewal of registration already made under Rule 6. Rule 8 (2) requires holding of enquiry on the application for renewal and to grant renewal if all the parameters are fulfilled. Rule 8 (3) deals with contingency where appropriate authority decided not to grant renewal. It mandates the appropriate authority to give an opportunity of being heard to the applicant and on considering the submissions and on duly taking note of the advice of the Advisory Committee, it may pass orders rejecting the application for renewal. Rule 8 (3) is rooted into the concept of opportunity of hearing to a person before taking an adverse decision against him.

15. Rule 18-A (4) mandates the appropriate authority to observe two aspects while considering the request for registration/renewal of registration under the Act, i.e., a) to dispose of the renewal/registration application within a period of 70 days from the date of receipt of application and b) not to accept application for renewal of registration, if case is pending in any Court against the applicant for violation of the provisions of the Act and the Rules made therein.

16. Rule 18 -A (4) gives effect to the primary objective of the Act, i.e., to root out the evil practice of terminating the pregnancy, if it is found that foetus is a girl and discourages the centers/hospitals/clinics in aiding and abetting people indulging in such heinous crime. It seeks to dissuade persons involving in imaging services from indulging in activities prohibited by the Act, under the guise of registration. It prohibits from granting renewal if the center is involved in crime registered alleging violations of the Act. Having regard to prevalence of evil practices, no stone be left unturned to prevent abuse of technology and such persons should not be allowed to subvert the law to earn quick money. The Act seeks to enforce strict regime on undertaking determination of sex of foetus, sex selection or to render services on those aspects. The strict enforcement of mandate of the Act commends acceptance.

17. Rule 8 (3) and Rule 18-A (4) (ii) deal with two different contingencies. Both have purpose and object. While Rule 8 (3) embodies the rule of 'audi alteram partem', Rule 18-A (4) seeks to act as a restraint against indulging in illegal activities under the guise of securing registration under the Act. When construing Rule 8 (3), it is necessary to consider the whole scheme of the Act and the 1996 Rules and it can not be seen in isolation. Having regard to the scheme and object of the Act, Rule 8 (3) and Rule 18-A (4) have to co-exist and live in harmony. Though on a plain reading of Rule 8 (3), it appears, opportunity of hearing before rejecting the application for renewal of registration is mandatory, its application is circumscribed by the mandate of Rule 18-A(4). On a conjoint reading, merely on the ground that opportunity was not afforded to petitioner, order per-se cannot be said as vitiated, having regard to the fact that petitioner is an accused and facing trial in a criminal case and pending criminal case is a clear embargo to grant renewal.

18. To appreciate the issue of opportunity of hearing, it is also appropriate to consider the chronology of events:

18.1. On 6.10.2017 the District Appropriate Authority lodged complaint in the Court of the III Additional Chief Metropolitan Magistrate at Hyderabad under Section 28 of the Act, 1994 read with Section 200 of Cr.P.C alleging that the two accused, the petitioner and the Director of the petitioner violated Section 18 of the Act, 1994 and Rules 9 and 10 of the Rules, 1996. The complainant alleged that on inspection of the petitioner hospital premises, he noticed that accused no.2 was not maintaining proper records as required by Rules 9 and 10 and accused no. 2 was found giving treatment for Intrauterine Insemination (IUI) for infertile patients without obtaining permission and license from the complainant. Complainant also stated that he seized Form F, PC & NPDT Register and Ultrasound scan machine. The criminal Court took cognizance of the crime reported against petitioner and petitioner is facing trial in CC No. 1542 of 2018.

18. Registration of Genetic Counseling Centres, Genetic Laboratories or Genetic Clinics. (1) No person shall open any Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre, laboratory or clinic is duly registered under the Act. 2. Every application for registration under sub-section (1), shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed. 3. Every Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counseling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in section 4, immediately before the commencement of this Act, shall apply for registration within sixty days from the date of such commencement. 4. Subject to the

provisions of section 6, every Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic engaged in counseling or conducting pre-natal diagnostic techniques shall cease to conduct any such counseling or technique on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registration and is so registered separately or jointly or till such application is disposed of, whichever is earlier. 5. No Genetic Counseling Centre, Genetic Laboratory or Genetic Clinic shall be registered under this Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such facilities, maintain such equipment and standards as may be pre scribed.

18.2 According to petitioner, as previous ultrasound scanning machine has become old and was giving technical problems, petitioner purchased a new machine and changed the existing machine. Since the Act requires registration of the new machine, petitioner applied for registration on 18.3.2021. The said application was not considered by the appropriate authority compelling the petitioner to institute W.P. No. 12383 of 2021 praying to declare the inaction of the respondents in considering the application and grant permission for change of old ultrasound scanning machine with a new machine on the ground that C.C. No. 1542 of 2018 is pending. While the said writ petition was pending, on 19.5.2021 petitioners were issued orders rejecting the application on the ground that C.C.No. 1542 of 2018 is pending trial. As the said fact was brought to the notice of the Court, the writ petition was disposed of granting liberty to the petitioner to work out remedies available in law.

18.3. Petitioner filed W.P.No. 12464 of 2021 challenging the rejection of the application as illegal and sought for consequential directions. This Court having noticed that case in C.C. No.1542 of 2018 and Criminal Petition No. 2632 of 2019 is filed and this Court granted blanked stay on continuation of the criminal proceedings, directed consideration of the application for change of ultrasound machine without reference to the rejection letter dated 19.5.2021. In obedience of the orders of this Court, permission to replace ultrasound scanning machine was granted valid till 24.8.2021, the day on which earlier renewal of registration would expire.

18.4. The renewal application was rejected by order dated 3.7.2021. This rejection refers to pending C.C.No. 1542 of 2018 by relying on Rule 18-A(4) (ii) of the Rules. This order was challenged in W.P.No. 17634 of 2021. This Court having found merit in the contention that decision to refuse renewal of registration was made by incompetent authority, sets aside the order and remanded the matter for consideration afresh. On said remand, the impugned order is passed. To complete the narration, it is necessary to notice that challenging the initiation of criminal proceedings and continuation thereof, petitioner filed Criminal Petition No. 2632 of 2019 and by order dated 12.6.2019 this Court granted stay of all further proceedings in C.C.No. 1542 of 2018. The Criminal Petition was dismissed by order dated 24.8.2021.

18.5. Petitioner filed Criminal Petition No. 2632 of 2019 under Section 482 of Criminal Procedure Code in this Court challenging the interlocutory order of the I Additional Metropolitan Sessions Judge at Hyderabad and also praying to drop proceedings against the petitioners in C.C. No. 1542 of 2018. C.C. No. 1542 of 2018 is registered on the charge of violation of provisions of the Act. This Court was not persuaded to discharge the accused and by judgment dated 24.8.2021 dismissed the Criminal Petition No. 2632 of 2019. From paragraphs 16 and 17 of the judgment, it appears that petitioner was issued notice dated 24.7.2017 calling for explanation on issues leading to filing criminal complaint. Petitioner seems to have admitted his lapses. Be that as it may, this judgment shows that petitioner was aware of alleged violations of the Act.

18.6. From the above chronology of events, litigation before this Court and the decisions made by the authorities, it is evident that consistent stand of the authorities is that petitioner is not entitled to seek renewal in view of provision in Rule 18-A (4) (ii) since criminal case is pending against him and same is also reflected in the orders referred to above. Petitioner is also aware that the renewal is not granted because of the criminal case registered against him. It is thus apparent that petitioner is aware of the reason for rejection of his application for renewal i.e., pending criminal case against him and there was no surprise element when renewal application was rejected by the order impugned herein.

19. Renewal is not a matter of course. Registration is circumscribed by strict compliance of law. There is no extra-terrestrial right to seek renewal even when applicant is facing prosecution on offence flowing out of the Act. Thus, though, ordinarily before rejecting renewal, applicant must be provided opportunity of hearing, if applicant is involved in crime, not affording opportunity of hearing is not fatal. I am dealing with post facto situation after a decision was made to test whether any useful purpose will be served if an opportunity is afforded to petitioner. In other words, is it possible for the petitioner to persuade the competent authority to ignore pending criminal case and take a view different from one that was taken in the impugned decision.

20. Having regard to the statutory mandate and history of litigation, learned counsel for petitioner was asked to satisfy the Court as to how prejudice is caused to him and if opportunity of hearing is afforded to him how he can improve his case and state that in spite of restriction imposed by Rule 18-A(4) (ii) he can still persuade the competent authority to take a different view and to grant renewal. No satisfactory explanation is elicited from the learned counsel for petitioner.

21. From the statutory scheme, it is apparent that as long as petitioner is facing trial, on the renewal application only one result is possible i.e., rejection. Therefore, even assuming that statutory mandate is violated, remitting the matter on the ground that petitioner was not afforded opportunity of hearing, is an exercise in futility.

22. Writ remedy is an equitable and discretionary remedy. In a given circumstances of a case, the writ Court may refuse to grant relief even when a case is made out on violation of procedural safeguards where justice and larger public interest require denial of such relief vis-à-vis grievance of an individual; where no prejudice is caused; where no useful purpose would be served in remanding the matter for fresh consideration; where the course adopted by an authority is in accord with the statutory mandate; where on admitted and indisputable facts, there is only one conclusion. Even if a legal flaw can be electronically detected, this Court would not interfere save manifest injustice or unless a substantial question of public importance is involved [RASHPAL MALHOTRA v. SATYA RAJPUT MRS (1987) 4 SCC 391= AIR 1987 SC 2235 & COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH v. K G S BHATT {AIR 1972 SC 1089'.

23. It is settled principle of law that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the Court need not issue a writ merely because there is some violation of procedural safeguards. The writ Court need not grant a futile writ. The queue of precedential decisions is long and crowded. Suffice to note few watermark decisions.

23.1. In S.L. KAPOOR v. JAGMOHAN {(1980) 4 SCC 379}, principal contention was that the order of supersession of New Delhi Municipal Corporation made by Lt. Governor was in complete violation of principle of natural justice and total disregard of fair play. No notice to show cause was issued and no opportunity was afforded on the allegations made for such supersession. Supersession resulted in premature termination of tenure of members of the Municipal Committee. Having said that not affording opportunity before superseding the Committee was illegal, the Hon'ble Supreme Court held,

"24. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."

23.2 In M.C. MEHTA v. UNION Of INDIA {(1999) 6 SCC 237}, Bharat Petroleum Corporation Limited (BPCL) assailed cancellation of retail petroleum outlet on the ground that prior to such cancellation, no notice or opportunity was afforded to BPCL. Earlier the very same piece of land was allotted to Hindustan Petroleum Corporation Limited (HPCL). This allotment was cancelled, and allotment was in turn made to BPCL. By order dated 10.03.1999, the plot was restored to HPCL withdrawing from BPCL. Both have contended that principles of natural justice violated when allotment was cancelled. To the extent relevant the observations of Hon'ble Supreme Court are as under:

"15. It is true that whenever there is a clear violation of the principles of natural

justice, the courts can be approached for a declaration that the order is void or for setting aside the same.....

23.3. In *STATE BANK OF PATIALA v. S.K. SHARMA* {(1996) 3 SCC 364}, Supreme Court examined the issue whether merely because a person is not afforded reasonable opportunity it would not automatically result in setting aside the decision of a competent authority unless the person also satisfies the writ court that grave prejudice was caused and if only opportunity was afforded he would have satisfied that authority to take a view in his favour as against him. In this case, Supreme Court introduced the test of prejudice principle to test the validity of a contention on denial of reasonable opportunity. Supreme Court delineated the principles that should govern the issue of denial of reasonable opportunity. To the extent relevant they read as under:

"33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) (1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether

(a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this : procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under- "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing

that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) xxxxx

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing".

(a) In the case of former, the order passed would undoubtedly be invalid (one may call it 'void' or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem).

(b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

23.4. In KALASAGARAM, SECUNDERABAD CULTURAL ASSOCIATION Vs STATE OF ANDHRA PRADESH {1998 (1) ALD 595= 1998 (1) ALT 212}, learned single Judge of this Court, as he then was, considered the very issue and held as under:

"10. There is no controversy whatsoever about the nature of the land granted to the petitioner by the respondent-Corporation on lease. The land itself admittedly, does not belong to the Corporation. The land belongs to Government Employees Co-operative Housing Society and forms part of sanctioned layout. In the layout the land in question is admittedly reserved for the purpose of play ground, park etc. May be, under the provisions of the layout Rules and the Hyderabad Municipal Corporation Act, after the reservation of land for parks and play grounds, the lands stood vested in the Municipal Corporation.

14. Even if it is to be assumed that the impugned order suffers from some infirmities, should the Court grant relief to the petitioner and issue writ as prayed for? Whether the petitioner is entitled for any relief from this Court? It is settled law that this Court does not issue writs in exercise of its jurisdiction under Article 226 of the Constitution of India, as a matter of course. The Court exercising jurisdiction under Article 226 of the Constitution of India is also a Court of equity. The relief to be granted in exercise of such power is an equitable one. Mere infraction of a statutory provision would not automatically give rise to a cause for issuing a writ of Mandamus. The Court of equity, when exercising its equitable jurisdiction under Article 226 of the Constitution must so act as to prevent perpetration of a legal fraud and the Courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from crafty evasions and now subtleties invented to evade law' (See A.P. STATE FINANCIAL CORPORATION v. GAR RE-ROLLING MILLS, (1994) 2 SCC 647 at 662. Writ of Mandamus is highly discretionary remedy as the aggrieved person has to not only establish the infraction of a statutory provision of law but required to further establish that such infraction has resulted in invasion of a judicially enforceable right. The existence of a right is the foundation of the jurisdiction of Court to issue a writ of Mandamus.

16. Be that as it may, the Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot compel the Government or statutory authorities to act in an illegal manner. The respondent-Municipal Corporation ought not to have granted lease of the said land to the petitioner herein as it is reserved as open space and for a specified purpose, namely, play grounds, perks. The land reserved for such purpose cannot be even allowed to be utilised for any other public purpose. Land reserved for a park and play ground can never be allowed to be converting to be utilised even for any other public purpose (See Bangalore Medical Trust v. S. Muddappa, (1991) 4 SCC 54 : AIR 1991 SC 1902. It is not as

if an equal extent of a land was made available in the same layout for the play grounds and parks by allotting the land in question to the petitioner."

23.5. The following principles can be deduced from the treasure trove of precedents, few of which are referred to above:

(A) In exercise of power of judicial review under Article 226 of the Constitution of India, it being discretionary and equitable remedy, Writ Court may decline to grant the relief to a petitioner, in the given facts of a case, even if legal flaw in the decision of competent authority is made out.

(B) Even when there are procedural infirmities in taking a decision by statutory authority affecting the petitioner adversely, Court need not grant the relief prayed for, if setting aside the decision assailed would result in restoring another illegal decision.

(C) Even when there are procedural infirmities vitiating a decision of competent authority, it need not be set aside on that ground and petitioner has to prove prejudice caused to him and that if opportunity was afforded to him he could have persuaded the competent authority to take a different view and such is possible and permissible.

24. For all the aforesaid reasons, the writ petition fails and accordingly dismissed. No costs. Miscellaneous petitions, if any pending, are closed.