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**(2002) 09 GAU CK 0009**

**In the Gauhati High Court**

**Case No :** Writ Appeal No's. 429, 430, 431, 432 and 436 of 2001

Khargeswar Bora Ors.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision :** 16-09-2002

**Acts Referred:**

Assam Rules of Executive Business, 1968 — Rule 17, 2  
Constitution of India, 1950 — Article 14, 16, 226, 311

**Citation :** (2003) 1 GLT 57

**Hon'ble Judges :** N.S. Singh, J; Amitava Roy, J

**Bench :** Division Bench

**Advocate :** P.K. Goswami, B.K. Sharma, M. Bhuyan, H.K. Das and D.K. Sharma, for the Appellant; A.K. Phukan and M.R. Barbhuiya, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

N.S. Singh, J.—These 5 writ appeals arise out of a common judgment and order involve common questions of facts and law, and accordingly, they are taken up for hearing today.

2. Upon hearing Mr. B.K. Sharma, learned senior counsel, led by Mr. P.K. Goswami, learned senior counsel, appearing for Appellants in Writ Appeal Nos. 429/2001, 430/2001, 431/2001 and 432/2001, Mr. M. Bhuyan, learned Counsel appearing for the Appellants in Writ Appeal No. 436/2001, and Mr. A.K. Phukan, learned Advocate General, Assam, assisted by Mr. M.R. Barbhuiya, appearing for the State Respondents, and also on perusal of the available materials on record, we hereby dispose of these 5 writ appeals with the following common judgment and order:

3. Writ Appellants herein as writ Petitioners approached this Court with writ petitions under Article 226 of the Constitution of India questioning the validity of the impugned orders dated 19.5.2001 by which their appointments to the posts of Lower Division Assistant and one Loka Kanya (Junior) made under the related order dated 30.3.2001 have been cancelled. In the writ petitions these

Appellants as writ Petitioners contended that the impugned order of cancellation dated 19th May, 2001, is violative of the principles of natural justice as well as violative of Articles 14, 16 and 311 of the Constitution of India inasmuch as though the appointment orders were subject to discharge without notice, and without assigning any reason thereof, the Chief Secretary to the Government of Assam issued the impugned orders by asserting and assigning reason that all the appointments were made in gross violation of the provisions of the Assam Secretariat Subordinate Service Rules, 1963, as under the Rules, the Chief Secretary is the Appointing Authority in respect of Lower Division Assistant whereas the appointment orders were made by the Commissioner and Secretary to the Government of Assam, Secretariat Administration (Estt.) Department without the knowledge of the Chief Secretary, and so far the relaxation of Rules for such appointment was concerned, the same is also illegal. However, the learned Single Judge of this Court dismissed all the writ petitions, being Writ Petition (Civil) Nos. 4324/2001, 4299/2001, 3677/2001, 4324/ 2001, 4303/2001 by holding that non-issuance of notice before passing the impugned cancellation orders to the Petitioners/Appellants is not material.

4. Being dissatisfied with the impugned common judgment and order dated 28.9.2001, the present Appellants have approached this Court by filing these writ appeals.

5. Mr. B.K. Sharma, learned senior Counsel, and Mr. M. Bhuyan, learned Counsel, appearing for their respective Appellants in the connected writ appeals, contended that under the specific Government policy these writ Appellants, (writ Petitioners in the related writ petitions) had been given appointment under the related appointment orders dated 30.3.2001 to the posts of Lower Division Assistant and one Loka Kanya (Junior) SO as to enable them to come back to normal life and to eliminate violence. However, the Respondent-authorities, particularly, the Chief Secretary to the Government of Assam, cancelled those appointment orders under the impugned orders dated 19.5.2001 without any justification which according to the learned counsel appearing for the Appellants was violative of the principle of natural justice on the ground that the writ Appellants were entitled to notice before of the impugned cancellation orders, and apart from that it was a case of relaxation of the related Rules as a special case/circumstances. It is also argued by the learned Counsel appearing for the Appellants that the Chief Secretary to the Government of Assam is the Chairman of State Level Empowered Committee (hereinafter referred to as "the SLEC") which is not disputed, or, cannot be controverted by the State-Respondents and thus the appointment orders were issued after clearance from the SLEC and there was no hide and seek policy while appointing the writ Appellants to the said posts. According to the learned counsel for the Appellants, the Commissioner and Secretary to the Government of Assam, Secretariat Administration (Estt.) Department, (Respondent No. 2 herein) had ample power and jurisdiction to issue appointment orders in terms of the Assam Rules of Executive Business, 1968 (for short, "the Rules of Business") in as much as "Secretary" means a

Secretary to the Government of Assam and includes Chief Secretary, Additional Chief Secretary (Principal Secretary), (Special Commissioner, Commissioner and Secretary, Special Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary and an Under Secretary. Supporting this submission, learned Counsel for the Appellants have drawn our attention to the related Rule 2(i) of the Rules of Business, and a copy of the Cabinet Memorandum dated 12.4.2001 has also been placed before us. Learned Counsel further submitted that those appointment orders made in favour of the writ Appellants had been approved by the Cabinet on 16.4.2001 inasmuch as the Cabinet held that beneficiaries of those appointments had been selected strictly under the supervision and direction of the Chief Minister under whose direct supervision the campaign against extremism had been organised in the State, and the State Government had been taking various measures for tackling the problem of insurgency and militancy in the State for quite some time, and the said Memorandum related to special recruitment to different Grade-III and Grade-IV posts under the Government. We have perused the same. It is next argued by the learned Counsel for the Appellants that in the matter pertaining to relaxation of Service Rules, concurrence of the Personnel Department is to be obtained by other Departments, but in the instant case such relaxation has been made by the Personnel Department of Government of Assam itself and, as such, there is no infirmity or illegality in the appointment orders. Supporting the case of the Appellants, the learned Counsel for the Appellants have relied upon a catena of decisions of the Apex Court and also of this Court reported in Sandeep Kumar Sharma Vs. State of Punjab and others, S.L. Kapoor Vs. Jagmohan and Others, Basudeo Tiwary Vs. Sido Kanhu University and Others, and also interpreted the meaning of "ratification" by relying upon the Black's Law Dictionary, and submitted that these Appellants have been condemned unheard without any justification and, as such, the impugned cancellation orders deserve to be quashed.

6. At the hearing Mr. A.K. Phukan, learned Advocate General, Assam, contended that no notice was required in the instant case as the appointment orders were issued in complete infraction of the related Recruitment Rules and due process of law as public employment is national wealth to which each and every citizen who is/are eligible for the post or posts is/are equally entitled to the same, and apart from that the appointment orders in the present case were issued before relaxation of related Service Rules, and ex post facto approval of the Cabinet for such appointment was not tenable under the Service jurisprudence. Supporting his submission, learned Advocate General, Mr. Phukan, relying upon a decision of the Apex Court rendered in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., submitted that the State can create civil posts and fill them up according to the related Service Rules only and relaxation of such Rules is not permissible though executive power can be exercised only to fill up the gaps, and such power cannot supplant statutory Rules. Learned Advocate General also relied upon Anr. decision of the Apex Court rendered in

Nazira Begum Lashkar v. State of Assam, reported in (2001) 1 SCC 143: 2001(1) GLT 6 , and contended that appointments made indiscriminately without following the statutory Rules would not confer any right on the appointees nor can any of such appointees claim any equitable relief from any court, and relaxation is to be made only when reserved candidates compete with general candidates. In regard to this submission, Mr. Phukan, referred to a decision of the Apex Court rendered in Haridas Parsedia Vs. Urmila Shakya and Others, It is next contended that the Chief Secretary to the Government of Assam is the Appointing Authority in the instant case whereas the appointment orders were issued by the Commissioner and Secretary to the Government of Assam, Secretariat Administration (Estt.) Department without the knowledge of the Chief Secretary, and the relaxation was also not granted before issuance of such appointment orders and, as such, ex post facto approval of the Cabinet is illegal and not warranted by law rather it is not known under the service jurisprudence.

7. Now this Court is to see and examine as to whether these writ Appellants/writ Petitioners have enforceable legal right in the instant case or not, and as to whether there were materials on record to interfere with the impugned common judgment and order passed by the learned Single Judge in the connected writ petitions or not?

8. In terms of the related appointment orders those appointments were subject to discharge without notice and without assigning any reason. For better appreciation in the matter, one of the related appointment orders is quoted below:

GOVERNMENT OF ASSAM SECRETARIAT ADMINISTRATION: ESTT. DEPARTMENT  
NO. S(E) 70/2001/ Dated Dispur the 30th March/01

#### OFFICE ORDER

Subject to discharge without notice and without assigning any reason thereof Sri/ Smt. Md. Firzul Haque is appointed temporarily as Lower Division Assistant in the Assam Secretariat on ad hoc basis in the scale of pay of Rs. 3490-90-4480-120-4600-EB-120-5200- 175-6600-250-8100/- PM plus other allowances as admissible from time to time with effect from the date of his/her joining the post.

He/she would join within 15 (fifteen) days from the date of receipt of this order failing which his/her appointment will stand cancelled.

His/her inter-se-seniority will be fixed in due course as per rule in force.

This has the clearance of SLEC.

Sd/- P.P. Verma

Commissioner and Secretary to the Government of Assam, Secretariat Admn. Estt. Department....

A bare perusal of appointment orders shows that the appointment orders were made after clearance by the SLEC of which the Chief Secretary to the Government of Assam was the Chairman, and the said SLEC was constituted with a view to optimising the utilisation of services of Government employees under the related Memorandum dated 6.12.1999 bearing No. BW.21/99/1. In other words, these appointment orders were made with the knowledge of the Chief Secretary concerned.

9. In terms of Rule 2(i) of the Rules of Business, "Secretary" means:

a Secretary to the Government of Assam and includes Chief Secretary, Additional Chief Secretary, (Principal Secretary), "Special Commissioner, Commissioner and Secretary), Special Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary and an Under Secretary.

From the available materials on records, it is seen that relaxation of the related Service Rules pertaining to appointment of these writ Appellants were made with the concurrence of the Personnel Department as the appointment orders were issued by the Commissioner and Secretary to the Government of Assam, Secretariat Administration (Estt.) Department. There was also approval of the Cabinet in respect of those appointments made in favour of the writ Appellants as seen in the available File on 16.4.2001, after the Draft Cabinet Memorandum was submitted on 12.4.2001 by the Commissioner and Secretary to the Government of Assam, Personnel (A) Department. This related Cabinet Memorandum dated 12.4.2001 is also relevant in the instant case and for just determination of the real points in controversy between the parties, the same is also reproduced as hereunder:

CABINET MEMORANDUM (CIRCULATED UNDER RULE 17 OF THE ASSAM RULES OF EXECUTIVE BUSINESS) File ABP. 156/2000 (12.4.2001)

Sub: Special recruitment to different Grade- III and Grade-IV posts under the Government.

The State Government has been taking various measures for tackling the problem of insurgency and militancy in the State for quite some time. These measures included use of armed and para-military forces on one hand and persuading the cadres of various militant organisations to leave the path of extremism and join the mainstream on the other. Those who have shown interest in return to normal life and have actually done so have been provided appropriate means for rehabilitation. To encourage further the return of more such persons to the normal life and to create an environment within the State against the militancy and for ensuring peace and tranquility, people from different walks of life were involved to supplement the Govt. efforts. The response of the people in this respect has been exceedingly favourable and significant success has been achieved in generating a mass movement against extremism in the State. It was felt that suitable incentives may be given to such persons who have extended their help and cooperation to the Govt. in this task.

Accordingly, it was decided to offer jobs in Grade-III and Grade-IV, subject to vacancies available to such persons either directly or to any other persons as suggested by them. In pursuance of this decision, the posts as shown in Annexure-I have been utilized for such appointments. Beneficiaries of these appointments have been selected strictly under the supervision and direction of the Chief Minister under whose direct supervision the campaign against extremism has been organised in the State. For obvious reasons these appointments have to be made for particular persons and therefore it became essential to make such appointments directly and centrally and in relaxation of different rules for such appointments to the extent necessary. However, no relaxation in educational qualifications for appointment in Grade-III posts has been made.

Cabinet approval is sought for these appointments on the posts as indicated in the Annexure-I in relaxation of the existing rules and procedures.

Sd/- 12.4.2001

Commissioner and Secretary to the Government of Assam, Personnel (A) Department.

10. We have also perused the available records/Govt. files as produced by the learned Advocate General, Assam, at the time of hearing of these appeals. On perusal of those Government files, 3 in number, it has been revealed that the before issuance of the appointment orders in question, the authority examined the matter pros and cons keeping in view the related policy adopted by the Government for affording special recruitment to those deserving people including the present Appellants/Petitioners so as to enable them to return to their normal life and to have appropriate means for rehabilitation, and to encourage further the return of more such persons to the normal life and to create an environment within the State against the militancy and for enduring peace and tranquility, people from different walks of life were involved to supplement the Government efforts, and that being the position, appointments have been given to these writ Appellants/ Petitioners by giving ex post facto approval. According to us, reasons have been given in the office-notes contained in the 3 related Government files, and such appointments were made on special ground thus relaxing the related Service Rules. According to us, if the appointment orders were cancelled without any civil consequences as the terms and conditions of the appointments were subject to discharge without notice and without assigning any reason of that would be otherwise. In other words, no prior notice was called for and there would not be any violation of the principles of natural justice. But in the instant case, the impugned orders of cancellation dated 19.5.2001 speak about the power and jurisdiction of the Appointing Authority and also about the illegality in relaxation of the related Service Rules. To meet the ends of justice, we further highlight one of the impugned orders dated 19th May, 2001, which is relevant and, accordingly, the same is quoted below:

GOVERNMENT OF ASSAM SECRETARIAT ADMINISTRATION (ESTT.) DEPARTMENT  
DISPUR

No. S(E).70/2001/30 Dated Dispur the 18th May, 2001

ORDER

Whereas appointment orders were issued to 67 persons as per list enclosed as Lower Division Assistants on ad hoc basis in the Assam Secretariat (C) vide order No. S(E)70/ 2001/3 dated 30.3.2001.

Whereas an appointment order was issued on ad hoc basis vide order No. S(E)70/2001/4 dated 30.3.2001 to a person as Loka Kanya (Junior).

Whereas it appears that all the above appointments were made in gross violation of the provisions of the Assam Sectt. Subordinate Service Rules, 1963, as under the Rules, the Chief Secretary is the Appointing Authority of the Lower Division Assistants whereas the appointment orders were made by the Commissioner and Secretary, Sectt. Admn. Department without the knowledge of the Chief Secretary;

Also relaxation of the Rules for appointment is illegal.

In the above circumstances, the appointments of 67 Lower Division Assistants and 1 (one) Loka Kanya (Junior) made vide orders quoted above are hereby cancelled.

Sd/- P.K. Bora

This impugned cancellation order speaks that the Chief Secretary is the Appointing Authority and whereas the appointment orders in question were made by the Commissioner and Secretary, Secretariat Administration (Estt.) Department without the knowledge of the Chief Secretary, and relaxation of the Rules for appointment was illegal. We are of the view that the impugned orders of cancellation involve civil consequence thus depriving the legitimate right of the writ Appellants/ Petitioners. In other words, they were not given an opportunity to have their say in the matter/issue before passing the impugned cancellation orders. So far the case laws relied upon and cited by the learned Advocate General, Assam, particularly, the decision of the Apex Court rendered in Aligarh Muslim University and Others Vs. Mansoor Ali Khan, does not support the case of the State-Respondents inasmuch as in that case certain essentials as required under the Aligarh Muslim University Non-Teaching Employees (Terms and Conditions of Service) Rules, 1972, particularly, Rule 10(c)(ii) was held to be applicable to cases of absence of employees beyond 5 years as the termination was automatic in terms of the said Rule for which absence of notice to those employees caused no prejudice to them and, therefore, the termination order was not vitiated. In other words, the said Rule was mandatory in nature.

11. In J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., the Apex Court held that persons appointed on ad hoc basis in

violation of statutory Rules whose services were regularised by purportedly relaxing the rules was ultra-vires the related Service Rules, and the Apex Court further held that relaxation of such Rules was not permissible. This decision also does not help the State-Respondents as the writ Appellants herein were given appointment to the aforesaid posts on special circumstances, as discussed above. In Anr. case between Nazira Begum Lashkar v. State of Assam, (2001) 1 SCC 143, 2001(1) GLT 6, the Apex Court was of the view that appointment of Assistant Teachers of Primary Schools made indiscriminately, without following the statutory Rules immediately after the posts were allotted to different districts at the behest of some unseen hand, would not confer any right on the appointees nor could any such appointees claim any equitable relief from any court, and that apart the appointments stood annulled hardly after six months from the date of appointment in terms of the appointment orders. The case in hand is quite different from the case of Nazira Begum Lashkar (supra).

12. In a case between Sandeep Kumar Sharma Vs. State of Punjab and others, the Apex Court had the occasion to deal with the matter pertaining to relaxation of recruitment Rules and made the following observations:

It is useful to refer to the interpretation given to a similar relaxation clause in service law by a Bench of three Judges of this Court that it must be liberally considered (Vide J.C. Yadav v. State of Haryana). The power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special and deserving situations. Such rule must be construed liberally, according to the learned Judges. Of course arbitrary exercise of such power must be guarded against. But a narrow construction is likely to deny benefit to the really deserving cases. We too are of the view that the rule of relaxation must get a pragmatic construction so as to achieve effective implementation of a good policy of the Government.

13. Yet, in Anr. case between S.L. Kapoor Vs. Jagmohan and Others, the Apex Court has held that non-observance of natural justice is itself prejudice to any man and proof of prejudice independently or proof of denial of natural justice is unnecessary. In Basudeo Tiwary Vs. Sido Kanhu University and Others, the Apex Court held thus:

The law is settled that non-arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14. It has come to be established, as a further corollary, that the audi alteram partem facet of natural justice is also a requirement of Article 14, for natural justice is the antithesis of arbitrariness. In the sphere of public employment, it is well-settled that any action taken by the employer against an employee must be fair, just and reasonable which are the components of fair treatment. The conferment of absolute power to terminate the services of an employee is an antithesis to fair, just and reasonable treatment. This aspect was exhaustively considered by a Constitution Bench of this Court in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others,



14. It is true that any appointment order can be terminated at any time without notice if the same has been made contrary to the provisions of the related Act or Service Rules or regulation, if any, but the reason thereof has to be recorded, and unless such finding/reason is recorded, the cancellation/termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was made in accordance with the provisions of the related Act, Rules, etc. In the instant case, such exercise is absent though reason has been assigned that the Chief Secretary is the Appointing Authority of Lower Division Assistants, and the appointment orders in question were made by the Commissioner and Secretary to the Government of Assam, Secretariat Administration (Estt.) Department without the knowledge of the Chief Secretary and relaxation of the related Service Rules too was illegal. According to us, if the impugned cancellation orders are innocuous in terms of appointment orders, that would be otherwise, but the authority concerned assigned some reasons involving civil consequences, i.e., cancellation of appointment orders in question without prior notice. In the light of the aforesaid principles of law as highlighted in the foregoing paragraphs of this judgment, we are of the view that the action of the State-Respondents in cancelling the appointment orders of the writ Appellants/Petitioners is violative of the principle of natural justice. It is not disputed that there is a relaxation clause in the related Recruitment Rules in the instant case and the authority concerned had relaxed the related Rules so as to achieve effective implementation of the good policy of the Government, i.e., special recruitment, as discussed above. Prof. HWR Wade in his book "Administrative Law, Fourth Edition, said:

Where an administrative act or decision is vitiated by a breach of natural justice, the court may award any appropriate remedies. The remedy will frequently be certiorari to quash, on the footing that the vitiated decision is void and a nullity. For this same reason a declaratory judgment is equally effective, as in *Ridge v. Baldwin*, (1964) AC 40, Occasionally, where injury is done, there will be grounds for an action for damages.

Traditionally natural justice has been confined to the two rules now to be discussed, that a man may not be judge in his own cause; and that a man's defence must always be fairly heard. It has not, as yet, included the requirement that reasons should be given for decisions. On the other hand there is an isolated judicial statement that natural justice requires decisions to be based on some evidence of probative value. The courts are now so conscious of natural justice that they may well extend its scope in both these directions.

15. In our considered view, the learned Single Judge has failed to examine the important material facts and laws as existed in the present case while passing the impugned common judgment and order in the connected writ petitions as the writ Appellants/Petitioners were entitled to notice/notices, and they have been condemned unheard thus depriving their legitimate right.

16. For the reasons, discussions and observations made above, we are of the

view that the writ Appellants/Petitioners could make out a case to justify interference with the impugned common judgment and order dated 28.9.2001 passed by the learned Single Judge in Writ Petition (Civil) Nos. 4324/2001, 4299/2001, 3677/2001, 4324/2001 and 4303/ 2001, and, accordingly, the said common judgment and order is hereby set aside.

17. In the result, the present 5 writ appeals are allowed thus allowing the aforesaid writ petitions and quashing the impugned cancellation orders dated 19.5.2001 with the direction that the State-Respondents will take back the writ Appellants/Petitioners in service within a period of three weeks from the date of receipt of a certified copy of this judgment and order by issuing necessary orders. However, it is made clear that the writ Appellants/Petitioners would not be entitled to arrear salary, if any, keeping in view the principle of "no work no pay". Considering however the entire facts and circumstances of the case, we leave the parties to bear their respective costs.