PETITIONER:
HARKISHAN LAL

Vs.

RESPONDENT:
STATE OF J & K

DATE OF JUDGMENT25/02/1994

BENCH:
HANSARIA B.L. (J)
BENCH:
HANSARIA B.L. (J)
JEEVAN REDDY, B.P. (J)

CITATION:
1994 SCC (4) 422 JT 1994 (2) 619
1994 SCALE (1)848

ACT:

HEADNOTE:

JUDGMENT:
The Judgment of the Court was delivered by
HANSARIA, J.-Procedure is handmaid of justice. That is a trite saying. By the same token, procedural safeguard cannot be placed at such high a pedestal as always to knock down an order passed in violation of the same, if it be otherwise legal. This is due to legal maxim "Quilibet potest renunciare
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juri pro se introducto", meaning, an individual may renounce a law made for his special benefit.
2. The above is the keynote thought which would pervade in the present cases, one of which is an appeal by special leave against the judgment of Jammu and Kashmir High Court in CSA No. 1 of 1989 rendered on April 19, 1990 by which the High Court allowed the appeal of the respondentState and set aside the judgment of District Munsif, Poonch by which a suit of the appellant challenging the order of dismissal passed on January 31, 1978 had been decreed, which order had come to be upheld by District Judge, feeling aggrieved at which the High Court had been approached by way of second appeal. Another is a writ petition filed directly in this Court making a grievance about illegal termination of service and seeking a declaration that dismissal was void and non est.
3. The High Court dismissed the suit of the appellant on two grounds: (1) the civil court had no jurisdiction to entertain the suit; and (2) the suit was barred by res judicata.
4. Shri Mehta appearing for the appellant contends that as the order of dismissal had come to be passed in violation of a mandatory requirement, the view taken that the civil court had no jurisdiction is untenable in law. As to res judicata it is urged that the stand taken by the High Court that this principle applied, because of earlier proceedings in the High Court in Writ Petition No. 28 of 1978 which gave rise

to LPA No. 43 of 1979 was misconceived.

5. Let us first deal with the question of jurisdiction. To decide this, reference may be made to skeletal facts. These are that the conduct of the appellant while serving as a clerk in the Office of Commandant, Home Guards at Poonch came to be enquired in the year 1972 by Anti-Corruption Commission set up under the provisions of Jammu and Kashmir (Government Servants) Prevention of Corruption Act, 1962 (hereinafter referred to as the 'Act'). The Commission vide its order dated March 14, 1974, recommended to the Governor the dismissal of the appellant from service. After receipt of this recommendation the appellant was called upon on July 4, 1974 to show cause as to why he should not be dismissed from service. By communications of August 13, 1974 and January 4, 1976 the appellant approached the officer concerned to supply copy of the proceedings of the inquiry including the report of the Commission to enable him to submit his explanation. This not having been done, the appellant challenged the action by approaching the High Court in WP No. 413 of 1978 which came to be disposed of on March 15, 1978 with the direction to the authorities to make available a copy of the proceedings of the inquiry. Before that order had come to be passed, the appellant had been dismissed from service by an order dated January 31, 1978 which came to be challenged in Writ Petition No. 23 of 1978. That petition was dismissed by judgment dated June 1, 1979 on the ground that a very complicated question of fact was involved. A Letters Patent Appeal being preferred the Bench also took the

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view that "a disputed question of fact of complicated nature was involved". The Bench, however, observed that its order will not "prevent the appellant from pursuing whatever other remedy may be available to him under law".

6. Thereafter started the present proceeding which consists of filing of a suit by the appellant on July 26, 1980 challenging the order of dismissal as void and illegal. The trial court decreed the suit principally on the ground that the appellant had not been supplied with a copy of enquiry proceedings and the dismissal order was passed in violation of the mandatory provision of Section 17(5) of the Act. The District Judge dismissed the State's appeal as being barred by limitation. The High Court dismissed the revision application, whereupon this Court was approached and it directed the District Judge to hear the appeal on merits by its order dated April 25, 1985. The District Judge thereafter took the appeal on his file and upheld the decree of the trial court on the ground that dismissal order having been passed in Violation of Section 17(5) of the Act was null and void. On the High Court being approached in second appeal, it allowed the same on the grounds mentioned above.

7. Let us now examine whether the view taken by the High Court that civil court's jurisdiction was barred is tenable. In taking this view the High Court has relied on Section 20 of the Act which has provided that: "Nothing done or purporting to have been done under this Act shall be called in question in any Court."

8. Shri Mehta urges that the finality given by Section 20 of the Act could not have ousted the jurisdiction of civil court in the present case inasmuch as the dismissal order being a nullity, court's jurisdiction did not get barred because of the aforesaid provision. To bring home this submission of law, we are referred by the learned counsel to the Constitution Bench decision of this Court in Ram Swarup v. Shikar Chand1 in which case the Bench while considering

the effect of Section 3(4) of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 which had provided that "the order of the Commissioner under sub-section (3) shall, subject to any order passed by the Commissioner under Section 7(F), be final", opined in paragraph 13 that the bar created by the aforesaid provision would not operate in cases where the plea raised before the civil court goes to the root of the matter and this would be so where the impugned order is a nullity.

9. Shri Mehta contends that as provision of Section 17(5) of the Act was held to be mandatory by a Full Bench of Jammu and Kashmir High Court in State of J & K v. Abdul Ghani Patwari2 the dismissal order has to be regarded as nullity. This submission is buttressed by referring to one of the illustrations given in paragraph 13 of Shikar Chand case1 which is that if a statute were to grant permission to a landlord to sue tenant after issuance of notice, non-issuance of the notice would render the impugned order completely invalid. It is urged that Section 17(5) of the Act having provided:

1 AIR 1966 SC 893: (1966) 2 SCR 553

2 AIR 1979 J&K 17: 1978 Lab IC 1326: 1979 Kash LJ 46

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"After the Commission submits its recommendation and after the Governor arrives at a provisional conclusion in regard to the penalty to be imposed, the accused shall be supplied with the copy of proceedings of the inquiry and called upon to show cause by a particular date why the proposed penalty should not be imposed upon him." (emphasis supplied)

the order of dismissal passed without supplying copy of the proceedings of the inquiry, which provision was held as mandatory in the aforesaid Full Bench, has to be regarded as invalid; and so, because of what was stated by the Constitution Bench in Ram Swarup case' civil courts' jurisdiction cannot be held to have been barred.

10. In support of his submission, Shri Mehta has also relied on Shiv Kumar Chadha v. Municipal Corpn. of Delhi3 in which a three-Judge Bench of this Court speaking through N.P. Singh, J., while examining the question of bar of civil courts' jurisdiction because of the provisions contained in Delhi Municipal Corporation Act, 1957, held that the order being nullity in the eye of law, the same amounted to "jurisdictional error" because of which civil courts' jurisdiction was not barred as the impugned order was outside the Act.

11. We may not labour much on this point because of the aforesaid legal proposition and also because of what was pointed out by a Constitution Bench in Dhulabhai v. State of M.p.4 that exclusion of jurisdiction of civil court should not be readily inferred. So we agree with Shri Mehta that the High Court erred in law in holding that the civil courts' jurisdiction was barred, inasmuch as there being violation of mandatory provision as contained in Section 17(5) of the Act, it can well be said that the respondents had no jurisdiction to pass the impugned order and by doing so they committed a "jurisdictional error".

12. Insofar as the second ground given by the High Court - the same being bar of res judicata - it is clear from what has been noted above, that there was no decision on merits as regards the grievance of the appellant; and so, the principle of res judicata had no application. The mere fact that the learned Single Judge while disposing of the Writ Petition No. 23 of 78 had observed that:

"This syndrome of errors, omissions and oddities, cannot be explained on any hypothesis other than the one that there is

something fishy in the petitioner's version.....
which observations have been relied upon by the High Court in holding that the suit was barred by res judicata do not at all make out a case of applicability of the principle of res judicata. The conclusion of the High Court on this score is indeed baffling to us, because, for res judicata to operate the involved issue must have been "heard and finally decided". There was no decision at all on the merit of the grievance of the petitioner in the
3 (1993) 3 SCC 161
4 AIR 1969 SC 78: (1968) 3 SCR 662: (1968) 22 STC 416
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aforesaid writ petition and, therefore, to take a view that the decision in earlier proceeding operated as res judicata was absolutely erroneous, not to speak of its being uncharitable.
13. In view of the aforesaid, the judgment of the High Court cannot be sustained. The cases have presented no difficulty to us so far. The head scratching important question is what consequential order is required to be passed, keeping in view the Constitution Bench decision in Managing Director, ECIL, Hyderabad v. B. Karunakar5 in which case it was held that non-furnishing of a copy of inquiry officer's report would not make an order of dismissal per se bad if that order had come to be passed before November 20, 1990, which is the date of the decision of this Court in Ramzan Khan case6. The dismissal order in present case had been passed long before the aforesaid date. As per the decision in ECIL, in such a case the matter has to be referred back as indicated in paragraph 31 of the judgment according to which on the matter being taken up again the employee would be served with copy of the report and would be given an opportunity to show as to how his or her case was prejudiced because of the non-supply of the report. Then, if after hearing the parties, the court/tribunal were to come to conclusion that the non-supply of the report had made no difference to the ultimate finding 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 dismissal on the ground that the report was not given; resorting to short cuts were desired to be avoided.
14. Shri Mehta has strenuously urged that this part of ECIL decision would not apply to the facts of the present case inasmuch as requirement to serve a copy of the proceedings of the inquiry cannot be said to be part of natural justice here, which was the view taken in Ramzan Khan case6 and which aspect had come to be principally examined in ECIL case5. The aforesaid requirement in case at hand owes its origin to a statutory provision - the same being Section 17(5) of the Act. Learned counsel has drawn our attention to what has been stated in paragraph 33 of the ECIL case5 in which the Bench accepted that the law laid down in Ramzan Khan case6 stating that the decision in that case was prospective would not apply to those cases where the service rules with regard to disciplinary proceedings had made it obligatory to supply a copy of the report to the employee. The present being such a case, Shri Mehta urges that the dismissal order has to be set aside by us in this proceeding itself, as the dismissal having been passed in violation of mandatory provision was null and void and a void order has no legs to stand.
15. We have duly considered the aforesaid submission and because of what is being stated later we would have to disappoint the learned counsel because, according to us, a

view different from the one expressed in
5 (1993) 4 SCC 727: 1993 SCC (L&S) II 84: (1993) 25 ATC 704: JT (1993) 6 SC 1
6 Union of India v. Mohd. Ramzan Khan, (1991) 1 SCC 588: 1991 SCC (L&S) 612: (1991) 16
ATC 505
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paragraph 31 of ECIL5 cannot be taken even in a case of the present nature. This is for the reason that violation of the mandatory provision at hand cannot be said to have per se rendered the order a nullity.
16. As to when violation of a mandatory provision makes an order a nullity has been the subject-matter of various decisions of this Court as well as of courts beyond the seven seas. This apart, there are views of reputed text writers. Let us start from our own one time Highest Court, which used to be Privy Council. This question came up for examination by that body in Vellayan Chettiar v. Government of the Province of MadraS7 in which while accepting that Section 80 of the Code of Civil Procedure is mandatory, which was the view taken in Bhagchand Dagadusa v. Secretary of State for India in Council8 it was held that even if a notice under Section 80 be defective, the same would not per se render the suit requiring issuance of such a notice as a precondition for instituting the same as bad in the eye of law, as such a defect can be waived. This view was taken by pointing out that the protection provided by the Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right. A distinction was made in this regard where the benefit conferred was to serve "an important purpose", in which case there would not be waiver (see paragraph 14).
17. This point had come up for examination by this Court in Dhirendra Nath Gorai v. Shudhir Chandra Ghosh9 and a question was posed in paragraph 7 whether an act done in breach of a mandatory provision is per force a nullity. This Court referred to what was stated in this regard by Mookherjee, J. in Ashutosh Sikdar v. Behari Lal Kirtania10 at page 72 and some other decisions of the Calcutta High Court along with one of Patna High Court and it was held that if a judgment-debtor, despite having received notice of proclamation of sale, did not object to the non-compliance of the required provision, he must be deemed to have waived his right conferred by that provision. It was observed that a mandatory provision can be waived if the same be aimed to safeguard the interest of an individual and has not been conceived in the public interest.
18. The aforesaid view was reiterated in Lachoo Mal v. Radhey Shyam11 in which it was stated, qua Section 1-A of U.P. (Temporary) Control of Rent and Eviction Act, 1943, that the same being meant for the benefit of owner of buildings, if a particular owner did not wish to avail of the benefit of the section, there was no bar in his waiving the benefit. It was further observed in this connection in paragraph 8 that no question of policy, much less public policy being involved, the benefit or advantage could always be waived.
7 AIR 1947 PC 197: 74 IA 223: (1947) 2 MLJ 208
8 54 IA 338
9 AIR 1964 SC 1300: (1964) 6 SCR 1001
10 ILR 35 Cal 61, 72:
11 CWN 101 1: 6 CLJ 320
11 (1971) 1 SCC 619: AIR 1971 SC 2213
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19. What has been held in Indira Bai v. Nand Kishore12 by a three-Judge Bench speaking through Sahai, J. of this Court is still more clinching inasmuch as in that case the right conferred on a pre-emptee by Section 8 of the Rajasthan Pre-emption Act, 1966 requiring a vendor to serve notice on persons having right of pre-emption as a condition of validity of transfer was held as amenable to waiver. It was pointed out that the nature of the interest created by the aforesaid section was a right of the party alone and not of the public as such. It was then observed that if it be a right of the party alone it is capable of being abnegated, as such a right cannot be said to involve any interest of community or public welfare so as to be in mischief of public policy.

20. Having seen the pronouncements of judicial fora, we can now inform ourselves as to the view of the reputed authors on interpretation of statutes as well as administrative law. We may start with what has been stated in Maxwell's The Interpretation of Statutes. This aspect has been dealt at pages 328-330 (12th Edn.) and it has been stated that if the benefit be for the protection of an individual in his private capacity the same can be waived. To illustrate, reference has been made about waiver of the benefit of the Limitation Act. This is on the maxim of law "Quilibet potest renunciare juri pro se introducto", meaning "an individual may renounce a law made for his special benefit". Maxwell then says that if the benefit be one which has been imposed in public interest there can be no waiver of the same.

21. Craies in his Statute Law has opined the same, as would appear from what has been stated at page 269 of 7th Edn. By drawing attention to the aforesaid maxim, it has been observed that if the object of a statute is "not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable". To illustrate this principle, it has been stated that if the statutory condition be imposed simply for the security or the benefit of the parties to the action themselves, such condition will not be considered as indispensable and either party may waive it.

22. Crawford in his Interpretation of Laws takes the same view as would appear from pages 540-542 (1989 Reprint). The learned author while quoting the aforesaid maxim states at page 542 that requirement like giving of notice may be waived as the same is intended for the benefit of the person concerned.

23. We may also refer to the views expressed by Francis Bennion in his Statutory Interpretation (1984), wherein this aspect has been dealt with at pages 27 et seq and it has been stated that if the performance of statutory duty be one which would come within the aforesaid maxim, the person entitled to the performance can effectively waive performance of the duty by the person bound. As an illustration mention has been made (at page 29) of

12 (1990) 4 SCC 668: 1990 Supp (1) SCR 349

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decisions in Toronto Corpn. v. Russell13 and Stylo Shoes Ltd. v. Prices Tailors Ltd. 14 wherein it was held that a duty to give notice of certain matters can be waived by the person entitled to notice, if there is no express or implied indication that absence of notice would be fatal.

24. H.W.R. Wade's name is well known in the world of administrative law. He has dealt with this aspect at page 267 of the 6th Edn. of his treatise wherein he has quoted

what Lord Denning, MR said in Wells v. Minister of Housing and Local Government" which is as below:
"I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid."
25. We may end this journey into the field of law by referring to the meaning of the words "irregularity" as given at page 469 of Vol. 22-A of "Words and Phrases" (Permanent Edition) and of 'nullity' at pages 772 and 773 of Vol. 28-A of the aforesaid book. As to "irregularity" it has been stated that it is "want of adherence to some prescribed rule or mode of proceeding"; whereas "nullity" is "a void act or an act having no legal force or validity" as stated at page 772. At page 773 it has been mentioned that the safest rule of distinction between an "Irregularity" and a "nullity" is to see whether "a party can waive the objection: if he can waive, it amounts to irregularity and if he cannot, it is a nullity".
26. Let it now be seen whether the requirement of giving copy of the proceeding of the inquiry mandated by Section 17(5) of the Act is one which is for the benefit of the individual concerned or serves a public purpose. If it be former, it is apparent, in view of the aforesaid legal position, that the same can be waived; if it be latter, it cannot be. Though Shri Mehta has urged that this requirement serves a public purpose, we do not agree. According to us, the requirement is for the benefit of the person concerned which is to enable him to know as to what had taken place during the course of the proceedings so that he is better situated to show his cause as to why the proposed penalty should not be imposed. Such a requirement cannot be said to be relatable to public policy or one concerned with public interest, or to serve a public purpose.
27. We, therefore, hold that the requirement mentioned in Section 17(5) of the Act despite being mandatory is one which can be waived. If, however, the requirement has not been waived any act or action in violation of the same would be a nullity. In the present case as the appellant had far from waiving the benefit, asked for the copy of the proceeding despite which the same was not made available, it has to be held that the order of dismissal was invalid in law.
28. The aforesaid, however, is not sufficient to demand setting aside of the dismissal order in this proceeding itself because what has been stated in
13 1908 AC 493: 24 TLR 908
14 1960 Ch 396: (1959) 3 All ER 901
15 (1967) 1 WLR 1000: (1967) 2 All ER 1041
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ECIL case5 in this context would nonetheless apply. This is for the reason that violation of natural justice which was dealt with in that case, also renders an order invalid despite which the Constitution Bench did not concede that the order of dismissal passed without furnishing copy of the inquiry officer's report would be enough to set aside the order. Instead, it directed the matter to be examined as stated in paragraph 31. [Though there is some controversy, as has been noted at pages 189 to 191 of B.L. Hansaria's Writ Jurisdiction under the Constitution (1992), on the question as to whether violation of natural justice makes an order void or voidable, it has been accepted by this Court in paragraph 18 of Nawabkhan Abbaskhan v. State of Gujarat16 that: "[t]he only safe course, until simple and sure light

is shed from a legislative source, is to treat as void ... any order made without hearing the party affected if the injury is to a constitutionally guaranteed right. In other cases..... As natural justice has since been regarded as a part of Article 14 by two Constitution Benches - see paragraph 72 of Union of India v. Tulsiram Patel17 and paragraphs 109 and 110 of Charan Lal Sahu v. Union of India" - it can be stated as on today that an order made in violation of natural justice is void.]

29. According to us, therefore, the legal and proper order to be passed in the present case also, despite a mandatory provision having been violated, is to require the employer to furnish a copy of the proceeding and to call upon the High Court to decide thereafter as to whether non-furnishing of the copy prejudiced the appellant/petitioner and the same has made difference to the ultimate finding and punishment given. If this question would be answered in affirmative, the High Court would set aside the dismissal order by granting such consequential reliefs as deemed just and proper.

30. The appeal and writ petition are allowed accordingly. As the dismissal order relates back to 1978, we would request the Division Bench of the High Court to dispose of the matter within a period of three months from the date of the receipt of this order. Insofar as the present proceeding is concerned, we make no order as to costs.

16 (1974) 2 SCC 121: 1974 SCC (Cri) 467: AIR 1974 SC 1471
17 (1985) 3 SCC 398: 1985 SCC (L&S) 672: AIR 1985 SC 1416
18 (1990) 1 SCC 613: AIR 1990 SC 1480

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