20. In view of the foregoing discussion, the impugned judgment and order quashing the order of termination of service of the employee and directing her reinstatement cannot be sustained. The order of termination based on the report of the Scrutiny Committee does not suffer from any infirmity and the High Court should not have interfered with the same."

(33) In the case in hand, from the record, it is proved beyond doubt that the experience certificates pertaining to experience, which was one of the essential qualification, were found to be fake on verification, but still respondents No. 4 to 6 were given appointment. The same resulted in depriving other eligible candidates opportunity to get employment though more meritorious. Even if respondents No. 4 to 6 have been serving for four years now, the equity does not comes into play in such cases as the very foundation of their appointment vanished. The post was usurped by misrepresentation and deception. It was fraud.

(34) For the reasons mentioned above, the selection and appointment of respondents No. 4 to 6 is set aside, being not eligible for the post and having obtained employment by fraudulent means by producing fake experience certificates. As is claimed by the petitioner that he was at Sr. No. 2 in the waiting list, in case it is found to be correct, he be offered appointment from the date respondent No. 4 was offered and joined service. The petitioner be given notional benefit from that date but he will not be entitled to any monetary benefits for the period he did not work.

(35) The petition stands disposed of.

S. Gupta

Before Rameshwar Singh Malik, J

MRS. UPINDER LAMBA — *Petitioner*

versus

CHANDIGARH ADMN. AND OTHERS — *Respondents*

CWP No. 15670 of 1993

November 12, 2014

Service Law — Constitution of India, 1950 — Art. 226, 14 & 16—Writ jurisdiction —Punjab Civil Service Rules, 1970 Vol. I, Part I — Rl. 4.13—'Next below rule'— Principles of natural justice —

Service benefit of 'next below rule' already granted to petitioners-deputationists withdrawn without opportunity to show cause or opportunity of hearing — Held, principles of natural justice violated — Held further, service benefit illegally denied without assigning reasons except audit objection — Serious prejudice caused to petitioners — Authorities acted in arbitrary manner — Writ petition allowed and offending portions of the impugned order set aside.

Held, that it was least expected from the respondent authorities, particularly respondents No.1 and 2, that at least a show cause notice or opportunity of being heard ought to have been granted to the petitioners before passing the impugned orders. It is so said, because the impugned orders were causing serious prejudice to the petitioners, as the same were passed in glaring violation of the basic principles of natural justice. In such a fact situation, it is unhesitatingly held that respondents No.1 and 2 acted in most arbitrary manner, while passing the impugned orders, which are on the face of it, violative of Articles 14 and 16 of the Constitution, thus, cannot be sustained.

(Para 12)

Further held, that the persons affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew in its application to a given case. This unwritten right of hearing is fundamental to a just decision by any authority, which decides the controversial issue affecting the rights of the parties.

(Para 15)

Prashant Kumar Sharma, Advocate for Amar Vivek, Advocate *for the appellant.*

None for Chandigarh Administration.

Vaibhav Sharma, DAG, Punjab.

RAMESHWAR SINGH MALIK, J. (Oral)

(1) This bunch of four writ petitions bearing CWP No. 15670 of 1993, 15671 of 1993, 320 of 1994 and 16642 of 2001 are proposed to be decided together by this common order, as all these cases are arising out of the same set of facts and similar issues are involved therein. However, for the facility of reference, facts are being culled out from CWP No. 15670 of 1993.

(2) Three writ petitions are directed against the order dated 5/18.11.1993 passed by respondent No.2 whereby service benefit of 'Next Below Rule' under Rule 4.13 of the Punjab Civil Services Rules, Volume I Part I (for short ' the Rules') already granted to these petitioners, being deputationists, was withdrawn without issuing any show cause notice or granting any opportunity of personal hearing. The fourth writ petition, i.e. CWP No. 16642 of 2001 has been filed by the petitioner-Mrs. Upinder Lamba, seeking a writ in the nature of Mandamus, directing the respondent authorities to release her death-cum-retirement gratuity and leave encashment along with interest.

(3) Notice of motion was issued and pursuant thereto, respective written statements were filed on behalf of respondents No.1 and 2, whereas respondent No.3 has filed its separate written statements. Petitioners filed their replications.

(4) Learned counsel for the petitioners submits that had the petitioners not been deputed by respondent No.3 with respondents No.1 and 2, they would have been promoted to the post of Lecturer. He further submits that, as a matter of fact, this had actually happened, because higher authority of the respondent-department promoted the petitioners to the post of Lecturer, after having found them fully eligible and competent for the said post. He also submits that this was the reason that respondents No.1 and 2 rightly followed the 'next below rule' and the pay scale of the petitioners were accordingly fixed. However, the condition that petitioner will get arrears w.e.f. 25.1.1993 vide communication dated 12.3.1993 (Annexure P-4) was illegal on the face of it, because no such condition could have been put to the detriment of the petitioners. However, before passing the impugned order dated 5/8.11.1993 (Annexure P-6), neither any show cause notice was issued by respondents No.1 and 2, nor any opportunity of being heard was granted to the petitioners, thereby violating the basic principles of natural justice. He prays for setting aside the impugned order dated 5/18.11.1993 and offending portions of orders Annexures P-3 and P-4, by allowing these writ petitions.

(5) Nobody has come present on behalf of respondents No.1 and 2.

(6) Per contra, learned counsel for the State-respondent No.3 submits that although it was correct that had the petitioners not been sent on deputation with respondents No.1 and 2, they would have been promoted to the post of Lecturers w.e.f. 16.3.1968 and would have been entitled for the pay scale for the post of Lecturer, yet when the

petitioners were promoted to the post of Lecturer and were asked to join on the promoted post, they did not do so. Finally, he prays for passing of appropriate order.

(7) Having heard the learned counsel for the parties at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the rival contentions raised, this Court is of the considered opinion that in view of the given fact situation of these cases, all these four writ petitions deserve to be allowed, for the following more than one reasons.

(8) Once it has gone undisputed on record that since respondents No.1 and 2 did not issue any show cause notice, nor granted any opportunity of being heard to the petitioners before passing the impugned orders, there was hardly any material against them to deny the relief being sought by way of these writ petitions. A bare combined reading of communications contained in Annexures P-3 to P-6 would show that no such attempt was made on behalf of respondents No.1 and 2 either to issue any show cause notice or to grant opportunity of being heard to the petitioners, before passing the impugned orders. In this view of the matter, it can be safely concluded that basic principles of natural justice have not at all been complied with by the respondent authorities, while passing the impugned orders and the same cannot be sustained.

(9) Further, once the eligibility, competence and entitlement of the petitioners for promotion to the post of Lecturer with effect from their respective due dates had never been in dispute, service benefit in question has been illegally denied to the petitioners. It goes without saying that if any right of any employee has been infringed or withheld, there should have been a valid reason for it. However, in the present case, no such reason is forthcoming. Having said that, this Court feels no hesitation to conclude that impugned orders are patently illegal and the same cannot be sustained, for this reason also.

(10) The only stand taken by respondents No.1 and 2 in their written statement, while passing the impugned orders was an audit objection. However, even if said ground taken on behalf of respondents No.1 and 2 is accepted, still they were under legal obligation to ensure meticulous compliance of the principles of natural justice. However, they failed to do so. Thus, impugned orders cannot be sustained, for this reason as well.

(11) Similar controversy, as in the present case, fell for consideration before a Division Bench of this Court in CWP No. 314 of 1966. While dispelling the contentions raised on behalf of the State, Division Bench made the following observations, which can be gainfully followed in the present case:-

> "Note 4 quoted above elaborates what is well known in official parlance as the 'next below rule'. Though the import of this rule is well understood in service rule all over the country, yet no definition thereof appears in the Punjab Civil Services Rules. No precise definition of this rule need be laid down. However, what is intrinsically indicated by the 'next below rule' is that an officer out of his regular line (including deputation etc.) is entitled to be promoted to be shown as holding a higher post in the parent department if the Government servant next below him has been so promoted. This rule ensure to the officer within his regular line or serving on deputation in an other department that he shall be restored to the position he would have occupied in his parent department had he not been so deputed. Though the language in which the provisions of Note 4 are couched is rather ambiguous, yet it clearly emerges there from that it is directed to protect the interests of an officer who though entitled to officiating promotion cannot in fact avail of the opportunity due to his being, what the rule states as out of the 'regular line' or outside the ordinary line of service. The provisions of Note 4 further provide that the proper course should be to make arrangements to enable those officers, who are out of the regular line or on deputation to other departments, to be released from such special posts in order not to deprive them of the chances of officiating promotions which may accrue of officiation promotions which may accrue to them for a substantial period. Thus a requirement is cast on the Government to arrange to recall an officer to whom a chance of officiating promotion is likely to accrue. However, it is provided that where in public interest or other exigencies of service an officer cannot be recalled then in such a case he would be entitled to be compensated by the parent department with the pay of the Higher Paid post. In substance, therefore, the provisions of Note 4 imply that either the Government recalls an officer eligible for officiating promotion back to the regular line or failing that, provision is made for compensating such an officer if he is not, or cannot be so recalled.

Admittedly, the petitioner has a distinguished service record and there is no blemish whatsoever on that score. None of the bars enumerated in Note 4 can possibly apply to the case of the petitioner and indeed it is not the case of the respondents that they do. Thus, the case of the petitioner falls clearly within the ambit of Note 4(i) and he would thus be entitled to the benefits which must necessarily accrue by the application of the 'next below rule'.

Mr. Mongia, the learned counsel for the respondent, has then argued that even though the provisions of the rule were applicable to the case of the petitioner he has himself waived or forfeited the right thereto. He has argued strenuously that the petitioner in his demi official letter dated the 2nd of June 1959 had requested on his return from the Ministry of Rehabilitation he should preferably be posted to Delhi as his own son was taking training as a Chartered Accountant at Delhi and there was no hostel accommodation for such training. He submits that since the petitioner was posted for some time as an Additional District and Sessions Judge in Delhi from 13th September, 1959, he should thus be deemed to have waived his right to the benefits of the "next below rule"

There is hardly any force in this contention. The request of the petitioner for a posting at Delhi was an innocuous one in the ordinary course of service. The petitioner was never expressly recalled nor at any stage did he decline to go back to his parent department. It was never the case of the respondent that the petitioner, even on being informed that he would lose the benefits of the Selection Grade, declined to return to service in the State of Punjab. Therefore, it is patent that at no stage did the petitioner, even remotely suggest that he would forego the benefits of the Selection Grade which were in fact very important to the petitioner as the difference in the emoluments of the two grades was in fact very substantial.

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In the replication to the affidavit filed by respondent No.1 it has been expressly averred that Sh. P.D. Sharma (now Mr. Justice P.D. Sharma) and Shri P.P.R. Sawhney had been given the benefit of the 'next below rule' with effect from the 11th of May, 199. it was pointed out that as a matter of fact they had been allowed the emoluments and benefits of the Selection Grade District and Sessions Judge during this period and, therefore, the requirements

of rule 4.13 and the notes there under had been satisfied too. This fact has not been controverted by the learned counsel for the respondents. The position, therefore, is that persons senior to the petitioner who were identically situated in the sense that they were also not serving at the relevant time within the State of Punjab have been accorded the benefits under the rule. Similarly it is the admitted position that person junior to him namely Sarvshri Badri Parshad Puri and Hans Raj have also enjoyed the benefits of the selection Grade between the period of 11th of May, 1959 and 18th of October, 1960. one fails to see by what logic possibly, can the petitioner be denied his right of the Selection grade in these circumstances.

It is also noticeable form the above facts that in fact the benefits of the rule have been accorded to a number of officers much larger than the vacancies which had arisen in the Selection Grade of the Superior Judicial Service. This being the factual position the contention of the learned counsel for the respondents that the petitioner would not be entitled to the benefits because he was not at No.1 or No.2 of the list of seniority of the Superior Judicial Service officers must necessarily fail."

(12) Further, it was least expected from the respondent authorities, particularly respondents No.1 and 2, that at least a show cause notice or opportunity of being heard ought to have been granted to the petitioners before passing the impugned orders. It is so said, because the impugned orders were causing serious prejudice to the petitioners, as the same were passed in glaring violation of the basic principles of natural justice. In such a fact situation, it is unhesitatingly held that respondents No.1 and 2 acted in most arbitrary manner, while passing the impugned orders, which are on the face of it, violative of Articles 14 and 16 of the Constitution, thus, cannot be sustained.

(13) The view taken by this Court also finds support from the numerous judgments of the Hon'ble Supreme Court. The development of law relating to the applicability of the rule of Audi Alteram Partem to administrative actions, can be traced right from ***A.K. Kraipak Union of India***[1]***, Ridge*** *versus* ***Baldwin***[2]***, Sayeedur Rehman*** *versus* ***State of Bihar***[3]***, State of Orrisa*** *versus* ***Dr. (Miss) Binapani Dei***[4]***, Menaka***

[1] (1962) 2 SCC 262
[2] 1964 AC 40
[3] Bihar (1973) 3 SCC 333

Gandhi *versus* ***Union of India***[5]***, and Mohinder Singh Gill*** *versus* ***Chief Election Commissioner***[6]**.**

(14) The law laid down in all these judgments has been consistently followed by the Hon'ble Supreme Court in catena of judgments and the recent judgments are ***Sri Radhy Shyam (dead) through L.Rs and others*** *versus* ***State of U.P. and others***[7]***, Darshan Lal Nagpal (dead) by L.Rs.*** *versus* ***Government of NCT of Delhi and others***[8]**.**

(15) The persons affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew in its application to a given case. This unwritten right of hearing is fundamental to a just decision by any authority, which decides the controversial issue affecting the rights of the parties.

(16) No other argument was raised.

(17) Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since the impugned order dated 5/18/11/1993 (Annexure P-6) and offending portions of orders dated 23.2.1993 and 12.3.1993, whereby arrears of salary were not allowed to the petitioners, are hereby set aside.

(18) Consequently, respondents No.1 and 2 are directed to do the needful within a period of three months from the date of receipt of a certified copy of this order. As a consequence of the order passed in the three writ petitions, fourth writ petition, i.e. CWP No. 16642 of 2001 is also allowed.

(19) Directions are issued to the respondents to release the amount on account of death-cum-retirement gratuity and leave encashment in favour of the petitioner without any further delay. Since these retiral benefits are being illegally withheld by the respondents, petitioner shall also be entitled for interest @ 9% per annum from the date amount became due till the date of actual payment. In case needful is not done

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[4] AIR 1976 SC 1269
[5] (1978) 1 SCC 248
[6] (1978) 1 SCC 405
[7] 2011 (5) SCC 553
[8] 2012 (2) SCC 327

within stipulated period, petitioner shall be entitled for interest @ 12% per annum.

(20) Resultantly, all these four writ petitions stand allowed, however, with no order as to costs.

S. Gupta

Before Dr. Bharat Bhushan Parsoon, J

SMT. KAPILA SHARDA — *Petitioner*

versus

SMT. DHANPATI DEVI AND OTHERS — *Respondents*

CR No. 5578 of 2013

November 03, 2014

Code of Civil Procedure, 1908 — Order XXIII Rule 1(3) — Dismissal of application for permission to withdraw suit with liberty to file afresh on same cause of action — Suit sought to be withdrawn as Plaintiff realized it was inherently flawed and had formal and incurable defects — Perusal of provision reveals that Court can allow such withdrawal with liberty to file afresh if earlier suit likely to fail due to formal defect — Party not to suffer for lapse on part of counsel — Other party can be compensated by costs — Petition allowed and liberty granted to Petitioner to withdraw suit and file afresh on same cause of action.

Held, that when concededly defects in the suit are such which cannot be cured by way of amendment in the pleadings under Order VI Rule 17 CPC and the defects, inter-alia, were technical and formal, there is no other option but to allow withdrawal of the suit with liberty to file a fresh one on the same cause of action…..In any case, the parties do not lose or win on technicalities of law but on the merit and worth of their substantive rights.

(Para 19 and 20)

Further held, that perusal of this provision reveals that the Court can allow the plaintiff to withdraw the suit with liberty to file fresh one on the same cause of action when the earlier suit is likely to fail by reason of some formal defect….. Merely because counsel for the petitioner-plaintiff committed some mistake in drafting the pleadings and such defect is not curable by amendment of the same though the mistake can be rectified by allowing the plaintiff to avail the remedy