

Interlocutory AFR

High Court of Judicature at Allahabad
(Lucknow)

Court No. - 2

Case :- SPECIAL APPEAL DEFECTIVE No. - 310 of 2024

Appellant :- State Of U.P. Thru. Prin. Secy. Deptt. Of Revenue
U.P. Lko. And 5 Others

Respondent :- Vishwanath Vishwakarma

Counsel for Appellant :- C.S.C.

Counsel for Respondent :- Arvind Kumar Vishwakarma

Hon'ble Rajan Roy,J.

Hon'ble Om Prakash Shukla,J.

1) Heard.

2) This is an appeal by the State under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 (in short 'the Rules, 1952') challenging the judgment dated 18.09.2023 passed in Writ-A No.4422 of 2015 (Vishwanath Vishwakarma vs. State of U.P. & Ors.).

3) A preliminary objection was raised by Sri Ramesh Kumar Srivastava, learned counsel for the respondent regarding maintainability of this appeal in view of the provision contained under Chapter VIII Rule 5 of the Rules, 1952, a Full Bench decision in the case of '**Sheet Gupta vs. State of U.P.**' reported in AIR (2010) Allahabad 46 and various Division Bench judgments in the cases of '**Kaushal Kishore Singh vs. Shubh Karan Mishra**' reported in (1996) 27 ALR 128; '**S.B.**

Nath vs. Committee of Management, Anglo-Bengali Inter College & Ors.' reported in (1996) 1 UPLBEC 102; '**Block Education Officer, Chhata Agra vs Prescribed Authority'** reported in 2017 (4) ALJ 574 and '**Ramesh Kumar vs. State of U.P.'** reported in 2017 (4) ADJ 496. He has also relied upon a Supreme Court decision reported in (2011) 2 SCC 212 '**State of U.P. & Ors. vs. Madhav Prasad Sharma'** wherein an appeal under Chapter VIII Rule 5 of the Rules, 1952 was held to be not maintainable in view of the fact that the writ court had considered the validity of an appellate order, apart from the punishment order, passed under Uttar Pradesh Subordinate Police Officers/ Employees (Punishment and Appeal) Rules, 1991 (hereinafter referred to as 'the Rules, 1991') framed under the Police Act, 1861.

4) However, Sri Shailendra Kumar Singh, learned C.S.C. along with Sri Vivek Shukla, learned Addl. C.S.C. appearing for the State has relied upon a Division Bench decision of this court rendered on 25.05.2017 in Special Appeal Defective No.248 of 2017 '**Triyugi Narayan Shahi vs. State of U.P. & Ors.'** wherein it has been held that in a case where apart from a punishment order, an appellate order has been passed, under the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (in short "the Rules of 1999") which were challenged before the writ court, against such judgment and order passed by the writ court, special appeal will not lie because of the wording used in Rule 5 of Chapter VIII of the Rules, 1952, as, the Rules, 1999 have not been framed under any State or Central enactment referable to the State List or the Concurrent List in the Seventh Schedule of the Constitution of India rather

they have been made under the proviso to Article 309 of the Constitution of India.

5) We had noticed this objection in our earlier order dated 31.05.2024 and have heard the matter on the said issue today.

6) Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 reads as under:-

"5. Special appeal :- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction [or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award--(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

7) All the judgments cited by Sri Ramesh Kumar Srivastava, learned counsel for the respondent are those wherein orders were passed in appeal referable to rules made under an enactment, whether State or the Central, which were referable to the State List or the Concurrent List of the Seventh Schedule to the Constitution of India. In none of these cases, order was passed in an appeal under any rules made by the State

Government under the proviso to Article 309 of the Constitution of India.

8) When we peruse the provisions of Article 309 of the Constitution of India, it reads as under:-

"309. Recruitment and conditions of service of persons serving the Union or a State.—Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

9) Article 309 of the Constitution of India is part of Chapter I of Part XIV of the Constitution of India and the heading of the Chapter is 'Services under the Union and the States'.

10) As per Article 309 of the Constitution of India, subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. Thus, as per the said provision, recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or the State may be regulated by an Act of appropriate legislature.

11) The proviso to Article 309 goes on to state - provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed to such services and posts **until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.** Thus, the proviso provides an alternative to the main provision till any enactment is made under the main provision.

12) The main provision in Article 309 is for regulating conditions of service etc by an Act of appropriate legislature. It is only in the absence of any enactment on the subject i.e. until provision regulating the conditions of service is made by or under an Act of the appropriate legislature under Article 309 of the Constitution of India, rules can be made by the President or the Governor of a State, as the case may be, regulating the conditions of service including recruitment, not otherwise. The Rules so made under the proviso to Article 309 also have a legislative character. Therefore, the Rules of 1999 which have been made under the proviso to Article 309 of the Constitution of India are by way of an alternative flowing from the said provision and essentially, it is exercise of legislative function in the absence of an enactment promulgated by the competent legislature.

13) Reference may be made in this regard to a decision reported in (1990) 2 SCC 707 '**Mallikarjuna Rao & Ors. vs. State of Andhra Pradesh & Ors'**, para no.13 wherein reads as under:-

"13. The Special Rules have been framed under Article 309 of the Constitution of India. The power under Article 309 of the Constitution of India to frame rules is the legislative power..."

14) In another decision reported in AIR 1975 SC 1116 '**Raj Kumar vs. Union of India & Ors.'**, Hon'ble the Supreme Court has held that it is now well established that rules made under proviso 309 of the Constitution of India are legislative in character.

15) Similar opinion has been expressed by Division Bench of this Court in the case reported in 2017 (8) ADJ 715 (DB) '**Assistant Superintendents, Government Observation Homes Union & Ors. vs. State of U.P. & Ors'** and it has been observed that Article 309 proviso is very wide and confers coextensive legislative power upon Governor or Government of India, as the case may be, to frame rules of recruitment and conditions of service of post or service in connection with State or Central as the case may be. Para no.41 thereof reads as under:-

"41. If rules relating to "recruitment" and "conditions of services" of any post or cadre have been framed by Act of Provincial or Central Legislature, only then, and to the extent provisions have to be made by such legislation, Governor would cease to have power to frame rules under proviso to Article 309, otherwise Article 309 proviso is very wide and confers coextensive legislative power upon Governor or Government of India, as the case may be, to frame rules of recruitment and conditions of service of post or service in connection with State or Central as the case may be. The

only restriction on the power under proviso to Article 309 is, provisions of Constitution namely, fundamental right etc. Rules framed under proviso to Article 309 are to be consistent with specific provisions of Constitution."

16) It being so, it is very difficult to accept that while special appeal would not lie if the writ court has passed an order in a writ petition wherein an order passed in appeal referable to rules framed under a statute, which is referable to the State List or the Concurrent List of the Seventh Schedule to the Constitution of India, is an issue, but, if such an order has been passed by the writ court where an appellate order referable to rules made under the proviso to Article 309 of the Constitution of India is concerned, special appeal would lie.

17) In fact, any such enactment regulating the conditions of service of recruitment to public services posts in connection with the affairs of the State, even if referable to the State or Concurrent List of the Seventh Schedule to the Constitution of India, would, fundamentally be referable to Article 309 as its source that is the enabling provision, it is the substantive provision.

18) In this scenario, it would be rather unreasonable and discriminatory to say that in a case of judgment and order of a writ court in a writ wherein an order passed in an appeal under the rules referable to proviso to Article 309 of the Constitution of India was also in issue, a special appeal can be filed, whereas, such an appeal cannot be filed where the writ court has considered an appellate order passed under rules or Regulation made under a Statute/ Act which is also referable to

Article 309. Entries in the State or Central List (in this regard Entry-41 of the State List deals with State Public Services) relating to regulation of conditions of service, are also referable to Article 309 for the purpose of legislation in respect of public services and posts its connection with the affairs of the Union or of any State. This would clearly create a dichotomy one which appears to be irreconcilable and unreasonable.

19) The object behind Rule 5 is that if a writ petition has been filed directly challenging an order without any appeal, revision etc then against the judgment of the writ court an appeal would provide an opportunity to correct an error which would not be necessary if prior to filing the writ petition a statutory appeal had already been preferred, as, providing a further appeal before the Division bench would be unnecessary and cumbersome.

20) It is true that rules regulating conditions of service made under the proviso to article 309 may have to give way to such rules made under a statute in view of article 309 but this does not have much relevance so far as chapter VIII Rule 5 of the Rules, 1952 is concerned. For the purposes of the said rule, an appeal preferred under both the provisions stands on the same footing for all practical and legal purposes especially in view of the object behind such a rule.

21) A purposive interpretation keeping in mind not only the letter but the object/intent behind rule 5 is to be resorted, rather than a literal one. The word 'Act' used in the exclusionary part of said rule should include rules made under the proviso to Article 309 on the same analogy as it includes

rules made under statute referred therein and it should be understood and applied accordingly.

22) However, in keeping with judicial propriety as a Coordinate Bench of this Court in **Triyugi Narayan Shahi (supra)** has taken a contrary view, we are of the opinion that this issue is required to be referred to a larger Bench so that legal position in this regard is settled.

23) We, accordingly, refer the following question for consideration by a larger Bench:-

(i) Whether, considering Article 309 to the Constitution of India and Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, especially the object and intent behind the latter rule, an appeal arising out of a judgment of a writ court wherein an appellate order referable to the U.P. Government Servant (Discipline and Appeal) Rules, 1999 framed under the proviso to Article 309 of the Constitution of India was under challenge, a Special Appeal will lie or not, as, in respect of a judgment of a writ court wherein an appellate order passed under rules framed under a statute whether State or Central, referable to the State or Concurrent List of the Seventh Schedule of the Constitution of India, a special appeal is specifically barred by the said Rule; Would it not be discriminatory and unreasonable if the former appeal is maintainable while latter is not maintainable?

(ii) Whether the decision of this Court in the case of **Triyugi Narayan Shahi (supra)** lays down the law correctly with regard to the purport and application of Chapter VIII Rule 5 of the

Allahabad High Court Rules, 1952 in the context of rules made under the proviso to Article 309 of the Constitution of India?

24) Let the records be placed before Hon'ble the Chief Justice for constitution of a larger Bench for considering and answering the aforesaid questions.

25) It is open for the State-appellant to press the application for interim relief before the larger Bench itself.

26) To facilitate the aforesaid, one time adjournment may be prayed for before the Contempt Court.

(Om Prakash Shukla,J.) (Rajan Roy,J.)

Order Date :- 4.7.2024

Shanu/-