

(2009) 12 AHC CK 0275

In the Allahabad High Court

Case No : Special Appeal Defective No. 1320 of 2009

Hukumdar Tiwari

APPELLANT

Vs

Inspector General of Police, Bareilly Range and Others

RESPONDENT

Date of Decision : 14-12-2009

Acts Referred:

Constitution of India, 1950 — Article 372, Entry 2 of List II, Schedule 7
Uttar Pradesh Police Act, 1861 — Section 2, 46, 7

Citation : (2009) 12 AHC CK 0275

Hon'ble Judges : Sunil Ambwani, J and Virendra Singh, J

Final Decision : Dismissed

Judgement

Shri M.S. Pipersenia has raised a preliminary objection that special appeal is not maintainable under Chapter VIII Rule 5 of the Allahabad Court Rules, 1952, as the learned Single Judge has dismissed the writ petition arising out of an order passed by the revisional authority under U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 (Rules of 1991). The revisional authority had upheld the order of the appellate authority refusing to interfere with the order of termination of the service of the petitioner as police constable on the ground that he had overstayed the sanctioned leave by 220 days without any good or sufficient ground.

Shri M.S. Pipersenia has relied upon the judgment of this Court in Shyam Bihari Vs. State of U.P. & Ors., 2005 (60) ALR 257 in which following Vajara Yojna Seed Farm, Kalyanpur (M/s) & Ors. Vs. Presiding Officer, Labour Court, U.P. Kanpur & Anr., (2003) 1 UPLBEC 496 the Division Bench held as follows:

"The emphasis given by Sri Jain is that there should be strict interpretation of the appellate and revisional jurisdiction as provided for in Chapter VIII, Rule 5 of the Rules of the Court. The words used under Chapter VIII, Rule 5 of the Rules of the Court are "under any Uttar Pradesh Act or under any Central Act". When the appellate forum has been created under the rules which are framed under the Act, it cannot be said that appellate forum is not under the Act. The words used

under Chapter VIII, Rule 5 of the Rules of the Court are not "by the Act" but the words are "under any Uttar Pradesh Act or under any Central Act". The State Legislature by Uttar Pradesh High Court (Abolition of Letter Patent Appeals) Act, 1962 abolished several categories of special appeals which were provided for in Letters Patent. One of the category of the appeal, which was excluded, was the category under which writ petition were filed against appellate or revisional jurisdiction. The object clearly was when one appellate or revisional authority has examined the matter and thereafter learned Single Judge decided the writ petition, no special appeal be provided. We do not see any difference in the forum of appeal provided under the Rules or the Act."

A full bench of this Court in *Sheet Gupta Vs. State of U.P. & Ors.*, Special Appeal No.1942 of 2008 decided on 11.12.2009 considered a reference to resolve a conflict between *Ram Dhyan Singh Vs. State of U.P. & Ors.*, 2004 (3) AWC 2559 and? the view expressed in *Vajara Yojna Seed Farm, Kalyanpur (M/s) and others Vs. Presiding Officer, Labour Court II, U.P. Kanpur & Anr.*, (2003) 1 UPLBEC 496 and held as follows:

"The exercise of original jurisdiction by any tribunal, Court or statutory arbitrator or exercise of appellate or revisional jurisdiction by the Government or any officer or authority is to be under any U.P. Act or any Central Act with respect to the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India. The powers have to be exercised under the Act and not given by the Act. As held by the Apex Court in the case of *Dr. Indramani Pyarlal Gupta* (supra) the words "powers exercised under the Act" would comprehensively embrace in its power conferred by any bye laws or delegated legislation. If the appellate or revisional powers has been conferred by the Government through an order issued under the delegated provisions of the Act then it is definitely a power exercised under the Act and in that event no special appeal under Chapter VIII Rule 5 of the Rules would lie against the judgment and order passed by the learned single Judge. In the present case, we find that the Commissioner had exercised powers conferred under Clause 28 of the Distribution Order, 2004, which order has been passed under the provisions of the Act, therefore, the appellate power has been exercised under the Act and, thus, no special appeal would lie. It may be mentioned here that right of an appeal is a statutory right and not a vested right and can be hedged by conditions as held by the Apex Court in the cases of *Smt. Ganga Bai*(supra) and *Vijay Prakash & Jawahar* (supra). The Division Bench of this Court while deciding the case of *Ram Dhyan Singh*(supra), has incorrectly taken the view that the order should be passed in exercise of appellate or revisional jurisdiction conferred by some Act whereas under Chapter VIII Rule 5 of the Rules, a special appeal would not lie if the appellate or revisional jurisdiction have been conferred on an authority under any U.P. Act or Central Act relating to any of the entries enumerated in the State List or Concurrent List of the Seventh Schedule of the Constitution of India.

In the case of Hasib Ahamad (supra), a Division Bench of this Court has held that a special appeal is not maintainable under Chapter VIII Rule 5 of the Rules against the judgment of a learned single Judge arising out of a writ petition in which the appellate order has been passed by the Commissioner. We are in respectful agreement with the aforesaid view.

Conclusion

In view of the foregoing discussion, we are of the considered opinion that the law laid down in the case of Ram Dhyani Singh (supra) that a special appeal would lie against the judgment and order of a learned single Judge wherein the appellate order passed under the Government Order issued in exercise of the power under the Act does not lay down the correct law.

In view of the foregoing discussion, our answer to the question referred to us is as follows:

A special appeal would not lie under the provisions of Rule 5 of the Chapter VIII of the Rules where the judgment has been given by a learned single Judge in a writ petition directed against an order passed in an appeal under paragraph 28 of the Distribution Order, 2004."

Shri K. Shahi, learned counsel for the petitioner states that the Rules of 1991 have been made under the Police Act, 1861. It is a Central Act and thus the special appeal would be maintainable.

The Police Act was enacted in 1861. It is an existing law under Art.372 of the Constitution of India. The powers of enacting such law can be traced to Entry.2 of List 2 of the State list in Schedule 7 of the Constitution of India, which reads: "Police (including railway and village police) subject to the provisions of Entry.2 A of List 1".

The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 have been made in exercise of powers under subsection (2) and (3) of Section 46 read with Sections 2 and 7 of the Police Act, 1861. The Rules, therefore, are made under the Act, which is referable to Entry.2 in the State list and thus under Rule 5 in Chapter VIII of the Rules of the Court a special appeal arising out of judgment of learned Single Judge from an appellate or revisional forum, is not maintainable.

The special appeal is thus dismissed as not maintainable.