

(2018) 12 UK CK 0074

In the Uttarakhand High Court

Case No : Writ Petition (S Of B) No. 543 Of 2018

Kanwar Amninder Singh

APPELLANT

Vs

High Court Of Uttarakhand And Another

RESPONDENT

Date of Decision : 19-12-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 114, Order 47 Rule 1
Uttarakhand Government Servant (Discipline And Appeal) Rules, 2003 — Rule 4, 4(1)
Constitution Of India, 1950 — Article 226
Uttarakhand Government Servants' Conduct Rules, 2002 — Rule 3(1), 3(2)

Citation : (2018) 12 UK CK 0074

Hon'ble Judges : Ramesh Ranganathan, CJ; Manoj K. Tiwari, J

Bench : Division Bench

Advocate : T.S. Bindra, Paresh Tripathi

Judgement

Ramesh Ranganathan, CJ

1. The High Court of Uttarakhand and the Registrar General have filed this application seeking review of the order passed by the Division Bench in Writ Petition (S/B) No. 543 of 2018 dated 26.10.2018.

2. The respondent-writ petitioner filed Writ Petition (S/B) No. 543 of 2018 seeking a writ of certiorari to quash the suspension order dated 22.04.2018 issued by the respondents-review applicants, and to direct them to permit the petitioner to resume his duties as the 1st Additional District Judge, Haridwar or at any other transferred place; to issue a writ in the nature of mandamus commanding the respondents-review applicants to take a decision on the explanation to the charge sheet submitted by the petitioner expeditiously, and within a time bound period as may be fixed by this Court.

3. Based on a complaint dated 19.03.2018, the petitioner was placed under suspension vide Office Memorandum dated 22.04.2018 in contemplation of an inquiry. Contending that Rule 4(1) of the Uttarakhand Government Servant (Discipline and Appeal) Rules, 2003, as amended in the year 2010, required the

order of suspension to specify that the charges against the concerned government servant were so serious that, in the event of these being established, a major penalty would be inflicted, and the impugned order of suspension had not complied with the requirement of Rule 4(1), the respondent-writ petitioner invoked the jurisdiction of this Court questioning the said order of suspension. A charge sheet dated 01.08.2018 was issued to the petitioner which he claims to have received on 10.08.2018. The petitioner submitted a reply to the charge sheet on 31.08.2018 and, on the ground that the charge sheet was issued more than 90 days after the order of suspension dated 22.04.2018, the petitioner sought a direction from this Court to quash the order of suspension.

4. In the order under review, the Division Bench noted that a complaint was lodged against the petitioner on 19.03.2018 for the incidents which took place on 31.01.2018 and 02.02.2018; in case, such serious incidents had happened on 31.01.2018 and 02.02.2018, it should have been brought to the notice of the Higher Authorities by the complainant immediately instead of filing the complaint on 19.03.2018; it was not discernable, from the material placed on record whether the petitioner was associated during the course of the preliminary inquiry conducted by the District Judge, Haridwar; the suspension order dated 22.04.2018 stated that the petitioner was placed under suspension with immediate effect, in the exercise of the powers conferred under the Constitution of India and all other powers enabling it in this behalf; no Article of the Constitution, which enabled the High Court to place the petitioner under suspension, was pointed out by the counsel appearing on behalf of the High Court; it was desirable for the High Court to at least specify the Act or Rule position whereby the petitioner was placed under suspension; but they were not dilating further on this issue.

5. After going through the contents of the Office Memorandum dated 22.04.2018 (the order of suspension), the Division Bench observed that, by the use of expression "will" employed in Rule 4(1), it was clear that the said Rule was imperative and mandatory in nature; and the impugned order did not mention that the charges levelled against the petitioner were serious and, in the event of these allegations being established, a major penalty would be inflicted upon the petitioner. The writ petition was allowed, and the impugned order of suspension dated 22.04.2018 was quashed and set aside. The Division Bench further directed that the petitioner should be posted back at the same place where he was serving at the time of issuance of the suspension order, and he should also be paid arrears of salary etc. The Division Bench, however, made it clear that it had not expressed any view on the charges framed against the petitioner.

6. Before us Sri Paresh Tripathi, learned counsel appearing on behalf of the review applicants, would submit that the attention of the Division Bench was not drawn to the earlier judgment of this Court in *Attar Singh Rathod vs. State of Uttarakhand & others* 2010(2) UD 140 wherein the very same Rule 4 was held to be directory, and not mandatory; the Division Bench judgment, in *Attar Singh*

Rathod1, constitutes a precedent binding on a Coordinate Bench; failure on the part of the subsequent Division Bench to notice the earlier Coordinate Bench judgment, and taking a view different therefrom, would constitute a ground for review; further the Division Bench had, in the order under review, directed payment of arrears of salary etc. even though no such relief was sought for in the writ petition; such a direction is also contrary to Rule 54 of Chapter VIII of the Financial Hand Book, Volume II (Parts II to IV); and the further direction that the petitioner be posted at a particular place was a direction which could not have been issued in writ proceedings under Article 226 of the Constitution of India.

7. On the other hand Sri T.S. Bindra, learned counsel for the respondent-writ petitioner, would submit that, even if the prior judgment escapes the attention of the subsequent Bench, it is not a ground for review. He would rely on *Dokka Samuel vs. Dr. Jacob Lazarus Chelly* (1997) 4 SCC 478, and *Haridas Das vs. Usha Rani Banik (Smt.) & others* (2006) 4 SCC 78 in this regard. He would further submit that the judgment of the Division Bench in *Attar Singh Rathod1* was a decision *PER INCURIAM*, as the Division Bench failed to notice the earlier binding precedents rendered on a construction of the pre-amended Rule 4; it is only failure to notice a binding precedent which may justify the order being reviewed; since the judgment in *Attar Singh Rathod1* does not constitute a binding precedent, failure to notice the judgment would not justify review of the order; and since the Division Bench judgment in *Attar Singh Rathod1* is a judgment *PER INCURIAM*, the Division Bench, in the order under review, was justified in ignoring the decision, and in holding that Rule 4(1) was mandatory. He would rely on *State of Assam vs. Ripa Sarma* (2013) 3 SCC 63 in this regard. He would content that, as two views are possible, the view taken by the Division Bench would not necessitate review; Rule 5 of the High Court Rules, on which reliance is placed to contend that the petitioner is not entitled for arrears of salary, has no application to the facts of the present case; the direction of the Division Bench to pay the petitioner arrears of salary is a consequential relief, which would automatically follow as a result of the order of the suspension being quashed; the High Court has the power, under Article 226 of the Constitution of India, to mould the relief; and since the direction to pay arrears of salary, etc. is only a consequence of the order of suspension being quashed, it matters little that such a relief was not specifically sought in the writ petition.

8. Sri T.S. Bindra, learned counsel for the respondent-writ petitioner, would fairly state that the direction of the Division Bench, to post the petitioner at a particular place, suffered from an error apparent on the face of the record, and could be set at naught in review proceedings.

9. When we asked both Sri Paresh Tripathi, learned counsel for the review applicants and Sri T.S. Bindra, learned counsel for the respondent-writ petitioner, whether they were aware of the contents of the charge-sheet, both of them stated that a copy of the charge-sheet was, in fact, filed along with the writ

petition. While we would have been reluctant to make the charges levelled, against a senior judicial officer from the Higher Judicial Service, public more so as the truth or otherwise of such allegations must await the outcome of the inquiry proceedings initiated against him, we find that the petitioner himself has enclosed a copy of the charge-sheet along with the writ petition and, therefore, reluctantly quote its contents in this order. They are:

"Charge No. 1:

While you being posted at Hardwar as 1st Additional District & Sessions Judge, it is alleged against you that on 31.01.2018, you called the complainant to your residence around 6:00-6:30 PM, when reached your residence, you intended to commit unnatural offence with him.

On the same day in the dressing room, first you removed all your clothes in his presence and stood in front of him just wearing vest and frenchie. Thereafter, you removed all your undergarments and stood naked in front of him and asked the complainant that he should clean his front and back pubic hairs, because of all these acts of yours, the complainant was feeling shy, embarrassed and nervous also.

It is further alleged by the complainant that on the very same day, when he was about to leave for servant quarter, you hugged him tightly and started pressing his hips and thereafter you escorted him towards the servant quarter. While proceeding towards the servant quarter, you asked the complainant, whether he takes paan, guttka or drinks. You made an offer to complainant that whenever he wishes to drink, he should come to you and both will drink together.

Aforesaid acts of yours amounts to grave misconduct and by your aforesaid acts, you did not show required integrity and devotion as was required from you being a Government Servant / Judicial Officer.

You are, therefore, guilty of grave misconduct and you have violated Rule 3(1) and Rule 3(2) of The Uttarakhand Government Servants' Conduct Rules, 2002.

Charge No. 2:

It is further alleged against you that on 02.02.2018 at about 6:00-6:30 PM, when again complainant came to your residence, you called him in your dressing room and removed all your clothes in his presence and stood quietly naked in front of him. Seeing this the complainant got nervous and started weeping, they you wore your clothes and along with complainant came to the room, where you hugged the complainant tightly and started moving your hands on his back. The complainant somehow managed to free himself from your arms and came towards the kitchen.

Aforesaid acts of yours amounts to grave misconduct and by your aforesaid acts, you did not show required integrity and devotion as was required from you being a Government Servant / Judicial Officer.

You are, therefore, guilty of grave misconduct and you have violated Rule 3(1) and Rule 3(2) of The Uttarakhand Government Servants' Conduct Rules, 2002.

Charge No. 3:

It is also alleged against you by one Sri Sheeshpal Sajwan, that while he was working at your residence prior to complainant, you used to call him in your room and you used to ask him to close the door and at that time, you used to stand naked in front of him.

It is also alleged that some times you used to come in front of him in underwear and used to remove the same before him and used to ask him to wash the same.

It is also alleged against you by him that many times at night you used to call him for giving you body massage and at that time while he used to give you massage you used to be naked or you used to bring down your underwear knee level. It is further alleged by him that he did not report the matter, as you used to tell him that he should not take you lightly as you could do anything to him with the help of police.

You, thereby committed grave misconduct and you did not show required integrity and devotion as was required from you being a Government Servant / Judicial Officer.

You are, therefore, guilty of grave misconduct and you have violated Rule 3(1) and Rule 3(2) of The Uttarakhand Government Servants' Conduct Rules, 2002."

10. When we asked Sri T.S. Bindra, learned counsel for the respondent-writ petitioner, whether or not the allegations leveled in the charge-sheet, against the petitioner, were grave and serious, learned counsel would submit that, while these allegations were no doubt grave and serious, they were false and devoid of truth. If the allegations levelled against the Judicial Officer (i.e. the respondent-writ petitioner) are, indeed, grave and serious, is failure to say so in the order of suspension fatal?

I. REVIEW OF THE ORDER PASSED BY THE DIVISION BENCH: ITS SCOPE:

11. In examining the question whether the grounds urged on behalf of the review petitioners, would justify the order of the Division Bench, in Writ Petition (S/B) No. 543 of 2018 dated 26.10.2018, being reviewed, it must be borne in mind that there is nothing, in Article 226 of the Constitution, to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may

also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with the appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court. [Aribam Tuleswar Sharma v. Aribam Pishak Sharma and others AIR 1979 SC 1047; Shivdeo Singh and others vs. State of Punjab and others AIR 1963 SC 1909; Smt. Meera Bhanja vs. Smt. Nirmala Kumari Choudhury AIR 1995 SC 455]. Review proceedings are not by way of an appeal, and should be strictly confined to the scope and ambit of Order 47 Rule 1 C.P.C. (Smt. Meera Bhanja7).

12. A party is not entitled to seek review of a judgment merely for the purpose of a rehearing and a fresh decision of the case. [Sajjan Singh vs. State of Rajasthan AIR 1965 SC 845; M/s Northern India Caterers (India) Ltd. vs. Lt. Governor of Delhi (1980) 2 SCC 167]. A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility." [Sow Chandra Kante & another vs. Sheikh Habib (1975) 1 SCC 674; M/s Northern India Caterers (India) Ltd.9].

II. ERROR APPARENT ON THE FACE OF THE RECORD: ITS SCOPE:

13. As noted hereinabove, among the grounds for review, is that the order under review suffers from an error apparent on the face of the record. The error, contemplated under the rule, must be such which is apparent on the face of the record, and not an error which has to be fished out and searched. It must be an error of inadvertence. [Lily Thomas and others vs. Union of India and others (2000) 6 SCC 224]. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident, and if it can be established, it has to be established by lengthy and complicated arguments is not an error apparent. [Satyanarayan Laxminarayan Hegde & others vs. Mallikarjun Bhavanappa Tirumale (1960) 1 SCR 890; Smt. Meera Bhanja7]. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court exercising its power of review under Order XLVII Rule 1, CPC. [Parsion Devi & others vs. Sumitri Devi & others (1997) 8 SCC 715; Haridas Das3].

14. An error apparent on the face of record must be such an error which must strike one on merely looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. (Smt. Meera Bhanja7). Such an error is an error which is a patent error and not a mere wrong decision. (Lily Thomas11). The error must be one which must be manifest on the face of the record. [Hari Vishnu Kamath vs. Syed Ahmad Ishaque & others (1955) 1 SCR 1104; Lily Thomas11]. An error apparent on the

face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. [Lily Thomas¹¹; T.C. Basappa vs. T. Nagappa & another (1955) 1 SCR 250]. A review lies only for correcting a patent error. Where, without any elaborate argument, one can point to the error and say here is a substantial point of law which stares one in the face, a clear case of error apparent on the face of the record can be said to have been made out. [Thungabhadra Industries Ltd. vs. The Government of Andhra Pradesh (1964) 5 SCR 174; Haridas Das³].

III. LAW DECLARED BY THE DIVISION BENCH, IN ATTAR SINGH RATHOD, HOLDING RULE 4(1) TO BE DIRECTORY:

15. Rule 4(1) of the Uttarakhand Government Servants (Discipline and Appeal) Rules, 2003, as amended in the year 2010, reads thus:

"(1) A government servant against whose conduct an enquiry is contemplated, or is proceeding, may be placed under suspension pending the conclusion of the enquiry at the discretion of the appointing authority. It will be clearly mentioned in the suspension order that the charges against the concerned government servant are so serious that in the event of these being established, major penalty would be inflicted:

Provided that suspension should not be resorted to unless the allegations against the government servant are so serious that in the event of these being established may be normally the basis of major penalty;

Provided further that the concerned Head of the Department empowered by the Governor by an order in this behalf may place a government servant or class of government servants belonging to Group 'A' and 'B' under suspension under this rule;

Provided also that in case of government servant or class of government servants belonging to group 'C' and 'D' the appointing authority may delegate his power under this rule to the next lower authority."

16. In holding the amended Rule 4(1) to be mandatory, the Division Bench, in its order under review in Writ Petition (S/B) No. 543 of 2018 dated 26.10.2018, failed to notice the earlier judgment of the Division Bench in Attar Singh Rathod¹, wherein a Co-ordinate Division Bench of this Court, while holding the very same Rule to be directory, had observed:

".....Learned counsel for the appellant submitted that in terms of the amended sub-rule (1) of Rule 4 of the said Rules, it is now mandatory on the part of the disciplinary authorities to use the power of suspension only when grave allegations, which may result in awarding of major punishment, is pending consideration or in contemplation and to state the same in the suspension order. It was submitted that the suspension order does not state so, and at the same time, the reason for the suspension as disclosed does not warrant an enquiry into any grave misconduct which may result in awarding of a major penalty. It was

accordingly, submitted that the part of the impugned order dealing with suspension is also interferable.

It is true that the amended provision required the disciplinary authority, while exercising power of suspension, to be cautious and circumspect as regard the nature of the allegations against the person proposed to be suspended and only then to use the power of suspension. It is also true at the same time, that by reason of the amendment it is now a requirement to state so in the body of the suspension order. However, the amended Rule does not show anywhere that non-compliance of the newly incorporated directions would result in any consequence, and accordingly, that part of Sub Rule (1) of Rule 4 of the said Rules, which has been inserted by the amendment, should be deemed to be directory and not mandatory and accordingly, we are of the view that part of the impugned order, dealing with suspension, is not interferable....." (emphasis supplied)

IV. DOES FAILURE TO NOTICE AN EARLIER BINDING PRECEDENT CONSTITUTE AN ERROR APPARENT ON THE FACE OF THE RECORD?

17. Mr. T.S. Bindra, learned counsel appearing for the respondent-writ petitioner, would however submit that mere failure on the part of the Division Bench, to notice an earlier judgment of a co-ordinate Division Bench, would not justify the said order being reviewed. He would rely on *Dokka Samuel*², in this regard. In *Dokka Samuel*², the Supreme Court observed:

"..... It is seen that by an order passed by this Court on 24th November, 1995, liberty was given to the appellant, in the event of the High Court reviewing the order on merits against him, to agitate his rights in this Court. The question is : whether the High Court was justified in reviewing the earlier order and reversing the finding recorded by the appellate Court? It is not in dispute that the sale deed is for a small sum of Rs. 300 and odd and that the property sold commands good market value. The question arises : whether the document was a sale deed or is only a document for collateral purpose? The respondent himself in an earlier suit had pleaded that it was an agreement of sale. In view of such an admission, the High Court has wrongly reversed the decree of the appellate Court holding the transaction to be a real sale. In the second appeal, the High Court confirmed, in the first instance, the decree of the appellate Court. Subsequently, the High Court has reviewed the judgment and reconsidered the matter holding that relevant precedents were not cited. Since this Court had given liberty to raise the questions of review ability of the judgment of the High Court, the question arises : whether the High Court could not have embarked upon appreciation of evidence and considered whether there was an error apparent on the face on record? It was contended before the learned Single Judge that various decisions were not cited; proper consideration was not paid; in fact the sale deed was acted upon; and that there was no proof that the sale was not for valid consideration. The omission to cite an authority of law is not a ground for reviewing the prior judgment saying that there is an error apparent on the face of the record, since the counsel has committed an error in not

bringing to the notice of the Court the relevant precedents. In fact, since the respondent had claimed that it is not a sale deed but was executed for collateral purpose, it was for the respondent to establish that the sale was for real consideration and he had a valid sale deed duly executed by the appellant. The High Court wrongly placed burden on the appellant and reviewed the order and heard the matter on merits. The entire approach of the learned Single Judge is not correct in law....." (emphasis supplied)

18. The Supreme Court, in *Dokka Samuel*², noted that the Single Judge of the High Court had interfered with the order under review on the basis of the contentions urged before him that various decisions were not cited, proper consideration was not paid, the sale-deed was not acted upon, and there was no proof that the sale was not for valid consideration. It is, in this context, that the Supreme Court, while observing that the omission to cite an authority was not a ground for reviewing a prior judgment stating that there is an error apparent on the face of the record since the counsel had committed an error, held that, since the respondent had claimed that it was not a sale-deed but was executed for a collateral purpose, it was for the respondent to establish that the sale was for real consideration, and he had a valid sale-deed duly executed by the appellant; and the High Court had wrongly placed the burden on the appellant, had reviewed the order, and had heard the matter on merits.

19. In relying on judgments of superior courts, it must be borne in mind that a decision is only an authority for what it actually decides, and not every observation found therein nor what logically follows from the various observations made in it. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions, which may be found therein, are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A judgment is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it. It is not a profitable task to extract a sentence here and there from a judgment and to build up on it. [*State of Orissa vs. Sudhansu Sekhar Misra* AIR 1968 SC 647; *Quinn vs. Loathem* 1901 AC 495]. Judgments ought not to be read as statutes. [*Sri Konaseema Co-operative Central Bank Ltd. vs. N. Seetharama Raju* AIR 1990 AP 171]. One line in the judgment of the Supreme Court, in *Dokka Samuel*², cannot be read out of context to hold that failure to notice an earlier binding precedent would not constitute an error apparent on the face of the record; and, therefore, the subsequent order of the Division Bench would not necessitate review.

20. An error apparent on the face of the record may be an error of law, such as failure to take note of an established authority reported in the Law Journal. The Court has the power, in an appropriate case, to review its order because it had overlooked a leading authority on a clear matter of law. [*Sri Rajah Bommadevara Venkatarayulu Naidu Bahadur Zamindar Garu vs. Sri Rajah Lanka Venkata*

Rattamma Garu AIR 1939 Mad 293; Muddlapur Morari Rao & others vs. Balwanth Dikshit & others AIR 1924 Mad 98; Natesa Naicker vs. Sambanda Chettiar AIR 1941 Mad 918; Income Tax Officer, Masulipatnam & another vs. K. Srinivasa Rao AIR 1969 AP 441]. If there is a legal position clearly established by a well-known authority, and by some unfortunate oversight the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may be a ground coming within the category of an error apparent on the face of the record. [Muddlapur Morari Rao²¹; Natesa Naicker²²].

21. Failure to notice and give effect to binding authority, because of failure of counsel to draw the attention of a Judge to such an authority, would constitute an error apparent on the face of the record. [Sri Karutha Kritya Rameswaraswami Varu vs. R. Ramalinga Raju & others AIR 1960 AP 17]. A counsel's mistake is sufficient ground for a review. [K.Srinivasa Rao²³; Rekanti Chinna Govinda Chettyar & others vs. S. Varadappa Chettyar & others (1939) 2 MLJ 809]. Where there is an error apparent on the face of the record, the question as to how that error occurred is of no relevance for the purpose of review, and it is immaterial whether such error occurred by reason of the counsel's mistake or had crept in by reason of oversight on the part of the court. [The Selection Committee for Admission to the Medical and Dental College, Bangalore vs. M.P. Nagaraj AIR 1972 Mysore 44; Mt. Jamna Kuer vs. Lal Bahadur & others AIR 1950 F.C. 131].

22. In Commissioner of Sales Tax, J&K and others vs. Pine Chemicals Ltd. and others (1995) 1 SCC 58, the Supreme court observed:

".....In our respectful opinion, the decision in Indian Aluminium (1976) 4 SCC 27 which was a decision rendered by a Bench of three learned Judges was binding upon the Bench which decided the Pine Chemicals (1992) 2 SCC 683. (This Bench too comprised three learned Judges). It is, however, interesting to notice that when the above two decisions were brought to the notice of the Bench, it referred to the ratio of the said decisions but neither followed it nor made any attempt to distinguish it but proceeded to make it a basis for their decision notwithstanding the fact that the said ratio ran exactly counter to the one adopted by the Bench. The two decisions did not certainly support the interpretation adopted in the judgment under review. On the contrary, they and in particular the decision in Indian Aluminium, militated against the said interpretation. It is for this reason, coupled with the fact that the interpretation placed in the judgment under review on Section 8(2-A) may affect a large number of cases all over the country, that we agreed to re-examine the issue, which we would not have agreed to ordinarily....."

.....With respect, we are unable to appreciate the above reasoning which is at variance with the clear and simple language employed in Section 8(2-A). The language of the sub-section does not bear or admit the construction placed upon it in the judgment under review. We are, therefore, of the opinion that the judgment under review suffers from a manifest error of law, an error apparent on the face of the record, and, therefore, liable to be reviewed. We are also of the

opinion that in the interest of law, it is necessary that the said error is rectified....." (emphasis supplied)

23. In *Pine Chemicals Limited* (extracted hereinabove), the earlier judgment in *Pine Chemicals* [(1992) 2 SCC 683] was reviewed on the ground that the decision rendered by the earlier three learned Judge Bench in *Indian Aluminium Cables Ltd. vs. State of Haryana* AIR 1976 SC 1711, which was binding on the Bench which decided *Pine Chemicals* [(1992) 2 SCC 683], was not followed. It is evident, therefore, that failure to notice an earlier binding precedent constitutes an error apparent on the face of the record justifying the order being reviewed.

24. In *Pine Chemicals Ltd.* [(1995) 1 SCC 58], yet another reason why the Supreme Court reviewed its earlier order was that the interpretation placed on a statutory provision, in the judgment under review, may affect a large number of cases. We shall examine, later in this order, whether a similar exercise needs to be undertaken by us also in the present case.

V. FACTORS TO BE TAKEN INTO CONSIDERATION IN DETERMINING WHETHER A PROVISION IS MANDATORY OR DIRECTORY:

25. While the earlier Division Bench, in *Attar Singh Rathod*¹, held that Rule 4(1) did not show that its non-compliance would result in any consequence, and that part of sub-rule (1), which had been inserted by the amendment, should be deemed to be directory and not mandatory, the subsequent Division Bench, in the order under review, has held the very same provision [Rule 4(1)] to be mandatory on the ground that, by use of the word "will", Rule 4 was imperative and mandatory in nature. While the construction to be placed on Rule 4(1), and the question whether it is mandatory or directory, would, ordinarily, not be examined in review proceedings, suffice it to note that, in the case of directory provisions, substantial compliance is adequate unless it is established that violation of a directory provision results in loss or prejudice to a party. Even in the case of mandatory provisions, interference does not follow as a matter of course. A mandatory provision, conceived in the interest of the party, may be waived by that party, while a mandatory provision conceived in the public interest cannot be waived by a party. The construction of the expression "shall" (or "will") depends on the provisions of the particular Act/Rules, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction, and such other considerations. [*Govindlal Chhaganlal Patel vs. Agricultural Produce Market Committee* AIR 1976 SC 263; *Khub Chand & others vs. State of Rajasthan & others* AIR 1967 SC 1074; *State of U.P. & others vs. Babu Ram Upadhyaya* AIR 1961 SC 751].

26. Merely because a provision of law is couched in a negative language, implying mandatory character, the same is not without exceptions; and Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold it to be

directory though worded in a negative form. [Salim Haji Abdul Khayumsab vs. Kumar & others AIR 2006 SC 396]. The question whether a particular provision of a statute which, on the face of it, appears mandatory, in as much as it uses the word "shall", is merely directory cannot be resolved by laying down any general rule. [Raza Buland Sugar Co. Ltd. vs. Municipal Board, Rampur AIR 1965 SC 895].

27. Where the statute provides that failure to observe a particular rule would lead to a specific consequence, the provision should be construed as mandatory. [Sharif-ud-Din vs. Abdul Gani Lone AIR 1980 SC 303; Balwant Singh & others vs. Anand Kumar Sharma & others AIR 2003 SC 1637; Bhavnagar University vs. Palitana Sugar Mills Pvt. Ltd. & others AIR 2003 SC 511; Chandrika Prasad Yadav vs. State of Bihar & others AIR 2004 SC 2036; May George vs. Special Tahsildar & others (2010) 13 SCC 98]. Often the question whether a mandatory or directory construction should be given to a statutory provision may be determined by the expression in the statute itself or the result that would follow non-compliance with the said provision. As a corollary to this rule, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive. [Balwant Singh³⁶; Sutherland's Statutory Construction, 3rd Edn., Vol. 3].

28. While it would not be proper for us to examine the order under review on its merits and record a conclusive opinion whether, or not, Rule 4(1) is mandatory or directory, we have taken note of the principles laid down by courts only to note that the mere use of the word "shall" or "will" would not, by itself, make Rule 4(1) mandatory, nor would failure to mention the consequence, by itself and without anything more, make Rule 4(1) directory. While we must refrain from undertaking the exercise of interpreting Rule 4(1) in review proceedings, the need to review the order in Writ Petition (S/B) No. 543 of 2018 dated 26.10.2018 assumes significance since Rule 4(1) is either directory or mandatory, and cannot be both.

VI. PERMITTING TWO CONFLICTING JUDGMENTS TO REMAIN IN FORCE WILL USHER IN UNCERTAINTY AND CHAOS:

29. If the order under review is permitted to stand, it would then result in two conflicting decisions creating uncertainty and chaos in judicial administration. It must, in this context, be borne in mind that the doctrine of binding precedent has the merit of promoting certainty and consistency in judicial decisions. [Shanker Raju vs. Union of India (2011) 2 SCC 132; Chandra Prakash & others vs. State of U.P. & others AIR 2002 SC 1652]. If one thing is more necessary in law than any other, it is the quality of certainty. [Mahadeolal Kanodia vs. Administrator General of West Bengal AIR 1960 SC 936; Shridhar vs. Nagar Palika, Jaunpur & others AIR 1990 SC 307]. In a country governed by the rule of law, law has to be certain and uniform. [State of U.P. & others vs. Synthetics and Chemicals Ltd. & others (1991) 4 SCC 139; Commissioner of Income Tax vs. B.R.

Constructions 1993 (1) APLJ (HC) 63]. Certainty of the law and consistency of rulings are fundamental to the rule of law. They form the core of judicial discipline, [State of Punjab & another vs. Devans Modern Breweries Ltd. & another (2004) 11 SCC 26; Chandra Prakash⁴¹], and converge to the conclusion that a decision once rendered must later bind like cases. [Mamleshwar Prasad & others vs. Kanhaiya Lal AIR 1975 SC 907].

30. It is an imperative necessity to avoid uncertainty and confusion in judicial decision making. Precedents keep the law predictable. The doctrine of stare decisis promotes certainty and consistency in judicial pronouncements. [Union of India & others vs. Major S.P. Sharma & others (2014) 6 SCC 351]. Stare decisis ensures "certainty" in law so that, in a given set of facts, the course of action which law shall take is discernible and predictable. [Narinder Singh & others vs. State of Punjab & another (2014) 6 SCC 466]. Judicial decorum and certainty of law require a Division Bench to follow the decision of an earlier Division Bench. [Fida Hussain & others vs. Moradabad Development Authority & another (2011) 12 SCC 615; Union of India & others vs. Raghubir Singh & others AIR 1989 SC 1933]. An order passed by the Court, not consistent with its own earlier decisions on law, is bound to send out confusing signals and usher in judicial chaos. [Secretary, State of Karnataka & others vs. Umadevi & others AIR 2006 SC 1806]. In order to guard against the possibility of inconsistent decisions on points of law by different Division Benches, and in order to promote consistency and certainty in the development of the law and its contemporary status, a rule has been evolved that the pronouncement of law by a Division Bench is binding on another Division Bench. (Raghubir Singh⁵¹). The quality of certainty would totally disappear if Judges of coordinate jurisdiction in a High Court start ignoring or overruling one another's decisions. This would result in utter confusion [Mahadeolal Kanodia⁴²; Shridhar⁴³]. Since Rule 4(1) applies not only to all judicial officers, but also to all the Government servants, judicial certainty would require an authoritative pronouncement on the construction to be placed on amended Rule 4(1), and not to let two conflicting judgments continue to prevail.

VII. CAN A SUBSEQUENT DIVISION BENCH IGNORE AN EARLIER DIVISION BENCH JUDGMENT ON THE GROUND THAT IT WAS PER INCURIAM?

31. Mr. T.S. Bindra, learned counsel for the respondent-writ petitioner, would however contend that the judgment of the earlier Division Bench, in Attar Singh Rathod¹, does not constitute a binding precedent as it failed to take note of earlier judicial pronouncements interpreting the pre-amended Rule 4(1), it is a decision rendered PER INCURIAM, and the subsequent Division Bench was, therefore, justified in ignoring the said decision. What does the expression "PER INCURIAM" mean? "Incuria" literally means carelessness. Law declared is not that can be culled out, but that which is stated as the law to be accepted and applied. A conclusion, without reference to the relevant provision of law, is weaker than even casual observations. (Synthetics and Chemicals Ltd.⁴⁴). The 'quotable in law' is avoided and ignored if it is rendered 'in ignoratium of a

statute or other binding authority'. [Young vs. Bristol Aeroplane Co. Ltd.[1944 (2) All ER 293]. The Latin expression "per incuriam" means through inadvertence. A decision can be said generally to be given per incuriam when the Court has acted in ignorance of a binding precedent [Punjab Land Development and Reclamation Corporation Ltd. vs. Presiding Officer, Labour Court, Chandigarh & others (1990) 3 SCC 682].

32. "PER INCURIAM" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that, in such cases, some part of the decision or some step in the reasoning on which it is based, is found, on that account, to be demonstrably wrong. [Morelle vs. Wakeling (1955) 1 All E.R. 708; State of Orissa & others vs. Titaghur Paper Mills Co. Ltd. & another (1985) 3 SCR 26; A.R. Antulay vs. R.S. Nayak and others (1988) 2 SCC 602]. If a decision has been given PER INCURIAM the Court can ignore it. [A.R. Antulay⁵⁷]. A decision should be treated as given PER INCURIAM when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. [Municipal Corporation of Delhi vs. Gurnam Kaur 1989 (1) SCC 101]. A precedent ceases to be a binding precedent when it is rendered per incuriam. (B.R. Constructions⁴⁵).

33. Both Attar Singh Rathod¹ and the order under review have placed two diametrically opposite construction on the amended Rule 4(1), the former holding it to be directory, and the latter declaring it to be mandatory. It is debatable whether judgments of courts, wherein the pre-amended Rule 4 was construed, can be relied upon in interpreting the amended Rule 4(1), as the language of Rule 4(1), prior to its amendment, is at variance with the language of the said Rule after its amendment. In any event, a Division Bench is not entitled to ignore an earlier binding precedent on the ground that the said judgment was rendered PER INCURIAM. The earlier judgment may seem to be not correct, yet it binds the later Bench of co-ordinate jurisdiction. The easy course of saying that the earlier decision was rendered PER INCURIAM is not permissible, and the matter will have to be resolved only in two ways - either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits. [State of Bihar vs. Kalika Kuer & others AIR 2003 SC 2443]. When a bench of co-ordinate jurisdiction disagrees with another bench of coordinate jurisdiction, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety, forms the basis of judicial procedure and it must be respected at all costs. [Vijay Laxmi Sadho (Dr) vs. Jagdish AIR 2001 SC 600]. The subsequent Division Bench cannot ignore an earlier judgment on the ground that it was rendered PER INCURIAM. In the present case, the Division Bench, in the order under review, did not notice the earlier Division Bench judgment in Attar Singh Rathod¹, and has not held the said judgment as PER INCURIAM.

VIII. ARE TWO VIEWS POSSIBLE ON THE CONSTRUCTION TO BE PLACED ON RULE 4(1)?

34. The contention of Mr. T.S. Bindra that, since two views are possible, and the view taken by the subsequent Division Bench is also a possible view on the construction to be placed on the amended Rule 4(1), no interference is called for, does not merit acceptance. In this context, reference can usefully be made to *Pine Chemicals Ltd.*²⁸, wherein the Supreme Court observed:

".....Sri K.K. Venugopal urged strongly that the error, if any, in the judgment under review is not an error apparent on the face of the record, that it is also a possible view and that, in any event, it cannot be said that the view taken in the judgment under review is a view which could not have been possibly taken. Learned counsel pointed out that a large number of High Courts have taken the same view and hence, the error, if any, in the judgment under review is not an error apparent on the face of the record. With respect, we cannot agree. To us, the language employed in the sub-section looks quite clear and unambiguous. It does not admit of any other interpretation that the one placed by us. More important, it was already construed by a Bench of coordinate jurisdiction in *Indian Aluminium* earlier. Another Bench of four learned Judges had also understood the purport of the said sub-section in the same manner - vide *International Cotton Corporation*. In the light of the said binding decisions, it was not open, with great respect, to the Bench deciding *Pine Chemicals* to place the interpretation it did on the sub-section....."

(emphasis supplied)

35. As held by the Supreme Court, in the afore-extracted judgment, in the present case also, two views are certainly not possible. The amended Rule 4(1) is either mandatory or directory, and certainly not both. As we are satisfied that failure of the Division Bench, in the order under review, to take note of the earlier Division Bench judgment in *Attar Singh Rathod*¹, constitutes an error apparent on the face of the record, it should be corrected at the earliest, without driving the parties to the expenses of an appeal. [*Sri Rajah Bommadevara Venkatarayulu Naidu Bahadur Zamindar Garu*²⁰; *M.P. Nagaraj*²⁶].

36. With a view to end the prevailing uncertainty, which has arisen as a result of two diametrically opposite and conflicting constructions having been placed on the amended Rule 4(1), it is necessary that the order under review is set-aside, and Writ Petition (S/B) No. 543 of 2018 is restored to file to enable a Division Bench of this Court to examine whether the construction placed by the earlier Division Bench, in *Attar Singh Rathod*¹, on the amended Rule 4(1) merits acceptance, or whether a view different therefrom is justified and the amended Rule 4(1) should be held to be mandatory, in which event, the question of law, whether the amended Rule 4(1) is mandatory or directory, may necessitate being referred, for an authoritative pronouncement, to a larger Bench of this Court.

IX. OTHER CONTENTIONS:

37. Before doing so, we must also examine whether the other judgments, relied upon by Mr. T.S. Bindra, learned counsel for the respondent-writ petitioner, are applicable to the case on hand.

38. In *Haridas Das*³, on which reliance was placed by Mr. T.S. Bindra, learned counsel for the respondent-writ petitioner, the Supreme Court observed:

"..... In order to appreciate the scope of a review, Section 114 of the CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict.

This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.

Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection....." (emphasis supplied)

39. As held by the Supreme Court in *Haridas Das*³, the Explanation to Order 47 Rule 1 stipulates that a subsequent judgment, either of a coordinate Bench or of the Supreme Court, is not a ground to review an earlier judgment. In the present case, review is sought not on the ground that a different view was taken in a subsequent judgment, but that the earlier judgment of the Division Bench, in *Attar Singh Rathod*¹, was not noticed by the Division Bench while passing the order under review. Reliance placed, on behalf of the respondent-writ petitioner, on *Haridas Das*³ is therefore misplaced.

40. In the order under review, the Division Bench has opined that the order of suspension referred to the powers conferred under the Constitution of India and no Article of the Constitution, which enabled the High Court to place an employee under suspension, had been brought to its notice. What the Division Bench failed to note, in the order under review, is that, if power to do an act or to pass an order can be traced to an enabling statutory provision, then, even if that provision is not specifically referred to, the act or order shall be deemed to have been done or made under the enabling provision. [*M/s Pine Chemicals Ltd. &*

others vs. Assessing Authority and others (1992) 2 SCC 683]. The Division Bench, in the order under review, has itself taken note of Rule 4(1) of the 2003 Rules, as amended in the year 2010, as the source of power to place a judicial officer (i.e. the respondent-writ petitioner) under suspension. The mere fact that the order of suspension erroneously refers to the provisions of the Constitution is of no consequence, since the High Court has the power under Rule 4(1) of the 2003 Rules (as amended in 2010) to place a judicial officer under suspension.

41. In the order under review, the Division Bench has been critical of the respondent-writ petitioner not being associated during the course of preliminary inquiry conducted by the District Judge. What the Division Bench failed to note is that it is necessary for the disciplinary authority, which orders an enquiry, to be satisfied that there are, prima facie, grounds for holding a disciplinary enquiry and, therefore, before he makes up his mind he will either himself investigate or direct his subordinates to investigate in the matter and it is only after he receives the result of the investigation that he can decide whether disciplinary action is called for or not. [Krishna Chandra Tandon vs. The Union of India (UOI) AIR 1974 SC 1589]. Failure to associate the delinquent employee, in a preliminary inquiry, is of no consequence. It is only if reliance is placed, in the subsequent disciplinary inquiry, on the earlier preliminary inquiry report, is a copy thereof required to be furnished to the delinquent employee. His non-participation in the preliminary inquiry, therefore, matters little.

42. The Division Bench, while setting aside the order of suspension and directing payment of arrears of salary has, however, permitted the inquiry proceedings to continue. While Mr. T.S. Bindra, learned counsel for the respondent-writ petitioner, may be justified in his submission that Rule 54 of Chapter VIII of the Financial Handbook has no application, the fact remains that the petitioner's entitlement for arrears of salary and allowances would depend on the outcome of the inquiry for, if he were to be imposed a major penalty later, the competent authority would then be required to consider whether or not the period of suspension should be treated as on duty. Further the petitioner has not even sought for the relief, of payment of arrears of salary, in the writ petition. The order of the Division Bench, in granting the respondent-writ petitioner a relief which he did not even seek in the writ petition, suffers from an error apparent necessitating its being reviewed.

X. CONCLUSION:

43. Viewed from any angle, we are satisfied that the order of the Division Bench, in Writ Petition (S/B) No. 543 of 2018 dated 26.10.2018, necessitates review for an authoritative pronouncement on the scope and ambit of Rule 4(1) of the 2003 Rules, as amended in the year 2010. The order under review is set-aside, and Writ Petition (S/B) No. 543 of 2018 is restored to file. The said writ petition shall be listed at an early date before a Division Bench of this Court to enable it to consider whether the earlier Division Bench judgment in Attar Singh Rathod¹ needs re-consideration and, if so, whether the matter should be referred to a

larger Bench.

44. The Review Petition is allowed. However, in the circumstances, without costs.