

(2019) 03 PAT CK 0038

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 14230, 14455 Of 2007

Kashi Nath Singh

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 29-03-2019

Acts Referred:

Police Act, 1861 — Section 2, 2A, 3, 4, 7, 8A, 12
General Clauses Act, 1897 — Section 3(51)
Bihar And Orissa General Clauses Act, 1917 — Section 4(46)
Bihar Police Manual, 1978 — Rule 4(1), 4(72), 660(b), 661(b), 663, 663(d)
General Recruitment Rules, 1957 — Rule 3
Constitution Of India, 1950 — Article 13, 14, 15, 16, 141, 162, 166(3), 226, 309, 311, 313, 320(3), 320(3)(b), 368

Citation : (2019) 2 PLJR 293

Hon'ble Judges : Amreshwar Pratap Sahi, CJ;Rajeev Ranjan Prasad, J;Mohit Kumar Shah, J

Bench : Full Bench

Advocate : Ramchandra Singh, Shankar Kumar, Dimpal Kumari, Anjani Kumar, Shailendra Kumar Singh, Ram Hirday Prasad, Suryadeo Yadav

Final Decision : Allowed

Judgement

Amreshwar Pratap Sahi, CJ

1. I have had the benefit of going through the scholarly judgments of my esteemed colleagues Hon'ble Mr. Justice Rajeev Ranjan Prasad and Hon'ble Mr. Justice Mohit Kumar Shah and I find myself in full agreement with the same. However, I would like to add a few words to support the conclusions already drawn in order to understand the status of the Bihar Police Manual as well as scope and extent of the powers of Director General of Police/Inspector General of Police to make appointments.

2. The issue with regard to the power of the Director General of Police/Inspector General of Police to make appointments without issuing any advertisement already stands concluded by the judgment of the Apex Court in the case of State

of Bihar & Ors. vs. Chandreswar Pathak reported in (2014) 13 SCC 232. Apart from this, the contention that a higher authority also enjoys the same powers as possessed by a subordinate officer has to be gathered from the provisions under which such authority is being claimed. I have not been able to find any residuary power in the Director or Inspector General of Police or any such authority conferred on him to appoint a Constable in the manner in which it was done in the cases giving rise to the present controversy. The observations made by a learned Single Judge in the case of Dhruv Prasad & Ors. vs. The State of Bihar & Ors. reported in 1995(2) PLJR 205 in the matter of appointment of Excise Constables that the power which was vested with the subordinate officer, automatically stands vested in the superior officer as the power is administrative in nature, does not appear to be an observation so as to cover the exercise of authority by the Director or Inspector General of Police in the present case. The Bihar Police Manual clearly prescribes that the appointing authority of Constable shall be the Superintendent of Police. There is nothing in the Manual which may give an automatic authority on a superior officer to make appointments on the post of Constable. An administrative power also, which creates any rights or divests a person of something tangible, has to be by way of codified authority and cannot be presumed to be suo motu in existence. The assumption of power for being exercised is dependent upon the existence of the power and not otherwise. There is, therefore, no rule of administrative law which may on the facts and issues arising in the present case allow the Court to presume the existence of such authority or power in the Director or Inspector General of Police, that too even without advertisement.

3. Coming to the issue of the status of the Bihar Police Manual, in the state of Uttar Pradesh there are a set of regulations namely U.P. Police Regulations, the status whereof came up for consideration in several decisions. I would like to refer to the Division Bench Judgment in the case of Moonglal vs. The D.I.G. (Karmik) U.P. Police and others reported in (1994) 2 SLR 473 (DB) = 1993 SCC Online ALL 301. Paragraphs 12 to 15 of the said judgment are extracted hereinunder:-

"12. U.P. Police Regulations is compilation of Government Orders issued from time to time. Certain regulations are referable to Section 7 of the Police Act; they have statutory force. Other regulations do not have statutory force; they only contain guidance for the officers and officials concerned. A later Government Order supersedes the earlier Government Order on the same subject. If Government Order referable to Regulation 520 was issued subsequent to Government Order referable to Regulation, the former will prevail over the latter. There is no material on record to show that the Government Order referable to Regulation 1 was issued subsequent to the Government Order referable to Regulation 520. Accordingly we are unable to sustain the appellant's plea that Regulation 520 is invalid as it is contrary to Regulation 1.

13. It also needs to be pointed out that Regulation 1 prohibits Inspector General

of Police from delegating his power to transfer clerical staff to Deputy Inspector General of Police but it does not prohibit the State Government from making fresh prescription of the authority competent to effect transfer. In our opinion, Regulation 520 contains a fresh and independent conferment of power upon the Deputy Inspector General of Police.

14. We have mentioned, hereinabove, that the U.P. Police Regulations is mostly compilation of the Government Orders issued from time to time except a few provisions which are referable to statutory provisions. Chapter XXXII, which bears the heading "Departmental Punishment and Criminal Prosecution of Police Officers," contains regulations which have been framed in exercise of powers conferred under Section 7 of the Police Act, 1861. The regulation contained in this chapter have therefore statutory force as held by their Lordships of the Supreme Court of India in State of U.P. V. Babu Ram Upadhyaya. The regulations contained in Chapter XXXIV have not been framed either under section 7 of the Police Act or under any other statutory force. Regulation 520 dealing with transfer falls under this chapter.

15. By reference to the provision of Government of India Act, 1935 and of Constitution of India, the learned counsel for the appellant tried to submit that the regulations have statutory force. Even by acceptance of this argument the impugned order of transfer does not suffer from any infirmity as in our opinion the transfer order is fully within the ambit the scope of Regulation 520. In view of the above , the appeal fails and is hereby dismissed with costs to the respondents."

4. A learned Single Judge of the Allahabad High Court in the case of Shesh Mani Dubey vs. State of U.P. and Ors. decided on 25th July, 2007 followed the Division Bench Judgment in the case of Moongalal (supra). A challenge raised to the order of transfer, the same view has been reiterated in Paragraph 18 of the said judgment reported in 2007 7AWC 7663All. Consequently, if the provisions can be correlated to any statutory law then the same would partake the nature of enforceable law.

5. My esteemed Brother Rajeev Ranjan Prasad, J. has very lucidly expressed the meaning of the word rule by referring to the provisions of the General Clauses Act. I would like to add at this stage that the Bihar Police Manual in the strict sense is not a regulation as understood under our legal framework and for which I would place reliance on the Constitution Bench pronouncement of the Apex Court in the case of Sukhdev Singh and Ors. vs. Bhagatram Sardar Singh Raghuvanshi and Anr. reported in (1975) 1 SCC 421. The same was a case where a Corporation had framed certain regulations and that came up for consideration before the Apex Court. The regulations framed by companies incorporated under the Companies Act and regulations framed by statutory corporations was distinguished and while doing so the principles of administrative law relating to subordinate legislations, rules and regulations as well as delegated legislation was discussed in detail. Reference be had to paragraphs 10 to 33 in particular of

the said reported judgment that has been again reiterated in a three Judges decision in the case of St. Johns Teachers Training Institute vs. Regional Director, National Council For Teacher Education and Anr. reported in (2003) 3 SCC 321. Paragraph 10 of the said report which in turn relies on Sukhdev Singh Case (supra) is extracted hereinunder:-

"10. A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislations. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and regulations made by reason of the specific power conferred by the statutes to make rules and regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the statute. The process of legislation by departmental regulations saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of rules and regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature being overburdened and the needs of the modern-day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature."

6. Even assuming for the sake of argument that the Bihar Police Manual is a compilation of administrative instructions or Government orders then if a pre-Constitution Act, namely the Police Act, 1861 has been taken recourse to for framing certain revised administrative instructions, they can also be construed to be in continuation of such laws and instructions (in the present case the Bihar and Orissa Police Manual, 1930) that were in force immediately before the commencement of the Constitution so as to save State action keeping in view the provisions of Article 313 of the Constitution of India. I would like to adopt the reasoning of the principle which leans in favour of even saving administrative instructions that may be necessary for governance in the absence of Statutory Rules or any law to the contrary. The Bihar Police Manual is a compilation which

has continued to be observed for the purpose, as presently involved, for appointments throughout the State in the Bihar Police Forces. It therefore has the mandate of the Government which in turn is entrusted with the obligation of governance including police administration being an exclusive State subject. The observance of the instructions contained in the Bihar Police Manual are binding on the State of Bihar and even it is argued that some of the provisions are directory in nature, then too even such provisions are not meant to be disobeyed or acted in breach thereof. A Division Bench of the Allahabad High Court while interpreting the provisions of Regulation 541 of U.P. Police Regulations relating to termination and period of probation held that the regulations did have mandatory force. The said judgment is in the case of State of U.P. and Ors. vs. Radha Kishan and Anr. (Writ Petition No. 8251 (S/B) of 1987) decided on 23.12.2009.

7. I am therefore inclined to hold that even though the compilation of the Bihar Police Manual cannot be described as rule or regulation having been framed in the exercise of powers under any statutory law, and may not partake the nature either of subordinate or delegated legislation, yet the Bihar Police Manual being binding on the Government, they deserve to be followed by the respondents so long as no rule is been framed in this regard.

8. I would also concur with the opinion of my esteemed colleagues that taking a clue from the complications that gave rise to a spurt of litigation, the Government of Bihar needs to address itself on the issue of incorporating an appropriate State amendment in the Police Act, 1861 on the same pattern as has been done by the State of U.P. and the State of West Bengal conferring authority on the State to frame rules, and frame them, when the State Government already has rules in place for most of the Government services in the State of Bihar. This will help a long way in maintaining transparency and prevent any ambiguity or arbitrariness in the exercise of powers by any authority of the State Police Services.

9. I would also, therefore, answer the reference on the same terms as opined by my esteemed Brother Rajeev Ranjan Prasad, J. in the concluding part of his judgment.

Per: Rajeev Ranjan Prasad, J.:-

1. This Full Bench has been called upon to resolve the conflicts noticed firstly by the learned Single Judge while hearing the two writ applications. Vide order dated 22.04.2015 the learned Single Judge referred the cases in hand to Hon'ble the Chief Justice to consider as to whether the matter has to be referred to a larger bench. These matters were, thereafter, placed before the Hon'ble Division Bench on 16.04.2018 when having noticed the observations of the learned Single Judge in the order dated 22.04.2015, the Hon'ble Division Bench directed for placing the matter before Hon'ble the Chief Justice for referring the matter to a Larger Bench for resolving the issue in question. I will reproduce the order dated 22.04.2015 passed by the learned Single Judge as well as the order dated

16.04.2018 passed by the Hon'ble Division Bench of this Court but before doing that it would be appropriate to first notice the brief facts of the cases hereunder:

CWJC No. 14455 of 2007.

2. The petitioner in the present case happens to be an informer of Police. It is said that on the basis of the information supplied by him, the Police had been able to investigate the cases in the appropriate direction leading to arrest of the accused which proved helpful in containing the crime. Vide letter No. 185 dated 21.01.1997 the Superintendent of Police, Kaimur at Bhabhua recommended this petitioner for appointment on the post of constable under special circumstances to the Deputy Inspector General (Hq.), Bihar, Patna in the following words:

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3. Thereafter, vide Memo No. 1780 dated 22.03.1997 as contained in Annexure-4 to the writ application, the Director General and Inspector General of Police issued the directions to the Superintendent of Police, Kaimur in the following words:

"????? ????? ??? ????? ?? ????? ??????? ??????? ??? ????????????? ?????? ?????? ????? ?? ????? ?
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4. The petitioner, thereafter, is said to have undergone physical and written tests for the post of Constable by the appropriate competent authority and was allowed to join on the post of Constable in the year 1997 by the order of the Superintendent of Police, Bhabhua. He was dully allotted Constable No. 272 and was serving in the Police Force. The petitioner was, however, served with a show cause notice dated 31.10.2000 vide Annexure-5 to the writ application calling upon him to show cause as to why his appointment be not cancelled because the same has been done illegally. The petitioner submitted his explanation contending that his appointment has been done considering his acts of bravery and in terms of the provisions of the Bihar Board Miscellaneous Rules, 1958 a higher authority has all the powers of the lower authority hence, in exercise of that power and in larger public interest of the State if the competent authority has appointed him on the post of Constable, it cannot be said to be illegal or for extraneous consideration.

5. The appointment of the petitioner was, however, cancelled by the Superintendent of Police, Kaimur at Bhabhua. A copy of the termination letter as contained in Kaimur ???????? ??????? 549 /2002 is available at Annexure-8 to the writ application which reads as under:

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6. The petitioner preferred an appeal before the Director General and Inspector General of Police, however, those were not considered. The petitioner, thereafter, challenged his termination from service on the grounds inter alia that there was neither any due inquiry held by the respondents nor proper opportunity was given to the petitioner before removal from service. In the writ application he also took a plea that the case of the petitioner is exactly similar to the case of Kamal Chandra Sah Vs. The State of Bihar and Others reported in 2006 (3)PLJR 468. It is one of the contentions of the petitioner that the Bihar Police Manual 1978 (hereinafter referred as 'the Bihar Police Manual' or 'the Manual') is a non-statutory piece of instructions issued by the Government for its' own functioning, it is not akin to legislative act of the Government and therefore, the Government may in appropriate case relax the conditions for appointment and extend the benefits of appointment on the ground of bravery as has been done in the case of this petitioner.

7. The State official respondents have contested the case of the petitioners on the ground that the procedures for appointment to the post of a Constable have been provided under Rule 661(b), 663(d) Appendix 72 Clause 4 of the Police Manual and Police Order No. 288/88. It is contended that the petitioners' appointment has not been made by following the said Rules or the procedures known to law, the appointment being wholly illegal is void ab initio. It is also the stand of the respondents that there was nothing like an absolute power vested in any authority to appoint any person on the ground of his likes as has been done in this case. It is submitted that in the circumstances the petitioner was appointed on the post of constable without making advertisement in terms of requirement of Rule 663(d) as well as without following the procedure of selection, it does not vest any right in him.

8. It is categorically stated by the respondents that the State Government took a decision to cancel the appointments of Police Constables made on large scale in the name of special circumstance without following the due process of selection as envisaged by the relevant Rules. An appointment of a person being Mukhbir/ Informer can in no case be treated as appointment in special circumstance. The petitioner was given an opportunity to show cause which was availed by the petitioner as he filed his reply but the petitioner was not able to defend himself. In such circumstance the appointment of the petitioner has been cancelled.

C.W.J.C. No. 14230 of 2007

9. In this case the admitted fact is that earlier pursuant to the Advertisement No. 1/98 for appointment of Constable the petitioner had participated in the selection

process but he was not appointed on the ground of his height not being appropriate as per requirement. It is stated that the petitioner applied for appointment on the ground that his father Jeetan Yadav was murdered in encounter with the dacoits and one Suryadeo Yadav was also murdered whose son was also appointed as Constable so he should also be appointed as Constable in the light of Police Manual Rules 663. The case of the petitioner was considered and was appointed as Constable. He was also served with a show cause notice which was replied by the petitioner but thereafter, his appointment was cancelled vide Memo No. 671 dated 19.06.2003 as contained in Annexure-3 to the writ application.

10. The stand of the State respondents are that these kinds of appointments were done by the then Director General of Police, Shri S. K. Suxena. It is stated that this Hon'ble Court while hearing C.W.J.C. No. 3959 of 2002 and other analogous matters found that a large number of appointments have been made by Mr. Suxena the then Director General of Police without any advertisement, an inquiry was directed in the said matter which subsequently revealed that a large number of persons were appointed without following any procedure. A decision was then taken to give individual notice to such persons, if they had not been appointed through the procedure as laid down in the Police Manual then their services were required to be terminated. These appointments were held to be a backdoor appointment. The Court relied upon the judgment of Sudhir Kumar Vs. The State of Bihar reported in 2000 (3) PLJR 717 in which it has been held that the Director General of Police has no discretion or power to make appointment on the post of Constable. The said judgment of the learned Single Judge was challenged by filing Letters Patent Appeal which was numbered as L.P.A.No. 1496 of 2001 and L.P.A. No. 1514 of 2001. The Hon'ble Division Bench of this Court upheld the order of the learned Single Judge in the Letters Patent Appeal. A challenge to the termination of the petitioners in all these writ applications, lead case being C.W.J.C. No. 3959 of 2002 was rejected. Thus, the stand of the respondents is that the case of the petitioners being similar, no fault may be found with the order cancellation of their appointments.

11. It appears that the issue arising out of these terminations did not stop here. A writ application being C.W.J.C. No. 3461 of 2004 (Kamal Chandra Sah Vs. The State of Bihar & Ors.) came for consideration before a learned Single Judge of this Court. This was also case of a Constable who had been appointed on 1st November, 2004 without there being any advertisement published offering any such selection. The respondent authorities were of the view that the appointment of the petitioner was contrary to the procedures laid down in Rule 661B of the Police Manual and the appointment is irregular. It was challenged by the petitioner. The learned Single Judge of this Court allowed the writ application after taking the following views:

" It is true that the Government of Bihar, by making the Manual and by providing therein Rule 661B has directed all its officers including the Director General of

Police to recruit constables in the manner as has been provided for in the said Rule. It is the Government of Bihar who has created that Rule and it is, therefore, open to the Government of Bihar to make a departure from that Rule in appropriate cases and the same was done in the instant case by the Government of Bihar for the purpose of rewarding the petitioner for his bravery. It was unjust on the part of the Police Department of the State to think that Government of Bihar cannot make a departure in an appropriate case. It is true that no Officer of the Government of Bihar is capable of acting contrary to the said rule and, accordingly, no officer of the Government can give an appointment contrary to what has been prescribed in Rule 661B of the Manual. However, the Government of Bihar itself could make an exception and the same was done in the instant case. It must be kept in mind that the Manual, as it stands, is a creation of the Government of Bihar in its executive side and not of the Government of Bihar in its legislative side and, accordingly, executive Government of Bihar can always make an exception to Rule 661B of the Manual in deserving cases, but such exception must be made consciously and the same must be apparent on the face of the records.

In those circumstances, the writ petition is allowed and the impugned judgment order dated 3rd February, 2003 as well as the appellate order dated 4th July, 2003 are quashed. Petitioner shall be deemed to be on service all throughout despite the orders dated 3rd February, 2003 and 4th July, 2003 but shall only be entitled to, in the facts and circumstances of the case, remuneration on and from today. Let the petitioner be reinstated forthwith and not later than one month from today".

12. Again an identical issue came for consideration before a Division Bench of this Court in the case of Hemkant Jha Vs. State of Bihar &Ors., reported in 2007(3) PLJR 657. The Hon'ble Division Bench took a view that the appointment of a Constable without following the relevant provisions of the Bihar Police Manual is in violation of the constitutional provisions thus appointment is without following the due process of law and such appointment being illegal could be terminated.

13. Thereafter, came another judgment of the Hon'ble Division bench of this Court in L.P.A. No. 1167 of 2009 and 1015 of 2009 (State of Bihar Vs. Md. Manjoor Alam &Ors.) decided on 08.08.2011 which is at a later point of time. This judgment takes note of the case of Hemkant Jha (supra) but took a different view which is in conflict with the judgment in the case of Hemkant Jha (supra).

14. In the aforementioned circumstances, when the learned Single Judge hearing these two applications found that there is a conflicting view, after noticing the facts of the case, recorded in the concluding part of the order dated 22.04.2015 as under:-

"It was submitted by learned Addl. Advocate General-3 that while the L.P.A. was recently being heard by a Division Bench of this Court i.e. L.P.A. No. 1167 of 2009, it appears that earlier Division Bench order of this Court i.e. Annexure- 'C'

to the supplementary counter affidavit was not brought to the notice of the Division Bench. He submits that on the same issue, earlier Division Bench had already disapproved the appointment of the Constable, which was contrary to the Rule 661(b) & 663 Appendix 72 Clause 4 of the Police Manual and Police Order No. 202 of 1988. The Division bench not only dismissed the L.P.A. which was preferred against the order of the writ court rejecting the writ petitions against such termination, but also the Division Bench has given some observation, which is as follows:-

"This Court on earlier occasion has already directed the State Government to look into such back-door illegal appointments made by the Police Department by violating the rules governing the appointment of constables. In our view, the authorities have rightly acted in cancelling the appointments of the appellants."

In view of the fact that on one issue, there are two contradictory judgments of the Division Bench, this Court is unable to adjudicate on this issue.

Accordingly, it is necessary to direct the Registry to place this matter before Hon'ble the Chief Justice so that the issue may be set at rest by a Larger Bench."

Reference to the Full Bench

15. These writ applications were, however, listed again before another learned Single Judge on 04.08.2015. This time his Lordship in order dated 04.08.2015 recorded that the issue in hand stands clearly settled by the Hon'ble Apex Court in the case of State of Bihar & Ors. Vs. Chandreshwar Pathak reported in (2014)13 SCC 232 as well as the Division Bench of this Court in the case of Hemkant Jha (supra). The cases, however, were placed before Hon'ble the Chief Justice and then both the matters were placed before the Hon'ble Division Bench on 16.04.2018 when the following order was passed :-

"Having heard learned counsel for the parties and keeping in view the observations made by the learned Single Bench on 22.04.2015, we find that there are two conflicting judgments with regard to the issue in question i.e., the appointment on the post of Constable and their termination in the case of Hemkant Jha Vs. The State of Bihar & Ors. reported in 2007 (3) PLJR 657 a detailed consideration of various provisions have been made and an identical writ petition filed has been dismissed. It has been held by the Division Bench in the aforesaid case that once a Constable is appointed in the Department without following the relevant provisions of the Police Manual and in violation of the Constitutional provisions i.e., appointment without following the due process of law such an appointment being illegally could be terminated. However, another Division Bench took a totally different view and held such termination to be illegal and allowed the writ petition in L.P.A. No. 1167 of 2009 and 1015 of 2009 (State of Bihar & Ors. Vs. Md. Manzoor Alam and Ors.).

We find that even though in the judgment rendered in the case of Md. Manzoor Alam on 08.08.2011 which is later point of time the law laid down in the case of

Hemkant Jha Vs. The State of Bihar & Ors. has been taken note of, but there is no discussion and no reason has been given as to why such judgment is not being followed. Therefore, finding that there is conflict in the two Division Benches judgments the order passed on 22.04.2015 by the learned writ Court is for reference of the matter to a Larger Bench. However, while considering the matter on 04.08.2015, the Bench again found that the issue in question stands settled by the Hon'ble Supreme Court judgment in the case of State of Bihar & Ors. Vs. Chandreshwar Pathak reported in (2014) 13 SCC 232 wherein the stand of the State Government has been approved by the Hon'ble Supreme Court. However, finding the issue to be conflicting in nature the matter has been placed before us.

We find that there being two inconsistent judgments on the same issue by two Division Benches of this Court one in the case of Hemkant Jha Vs. the State of Bihar & Ors. and another in the case of Md. Manzoor Alam (supra), we direct for placing the matter before the Chief Justice for referring the matter to a Larger Bench for resolving the issue in question."

16. The aforesaid order dated 16.04.2018 is therefore, the order of reference which this Full Bench has to answer.

17. Before the Full Bench constituted for this purpose could have taken up these matters for consideration, yet another matter came for consideration before the Hon'ble Division Bench of this Court presided over by one of us (Hon'ble the Chief Justice) in L.P.A.No. 569 of 2018 (Shailesh Kumar Mall @ Shailesh Kumar Vs. The State of Bihar & Ors.). The Hon'ble Division Bench noticed that earlier certain writ applications arising out of similar dismissals came to be filed including C.W.J.C. No. 5279 of 2005, decided on 18th May, 2005, whereby the writ petition was allowed on account of violation of principles of natural justice. The judgment of the learned Writ Court was affirmed in L.P.A. No. 945 of 010 which had arisen out of C.W.J.C. No. 204 of 2004. A Division Bench of this Court on 5th January, 2012 approved the order passed in C.W.J.C. No. 5279 of 2005. In C.W.J.C. No. 3799 of 2006 and C.W.J.C. No. 4097 of 2006 decided on 23rd July, 2012, again learned Single Judge of this Court came to a conclusion that the violation of the principle of natural justice vitiated the impugned order and ultimately orders were quashed with liberty to the respondents to proceed afresh. The Hon'ble Division Bench found that even though the judgment of the learned Single Judge in the case of Sudhir Kumar (supra) was noticed, yet no consideration thereof was given. The Hon'ble Division Bench quoted the relevant part from the judgment in L.P.A. No. 1131 of 1999 which had arisen out of the judgment of the learned Single Judge in the case of Sudhir Kumar (supra). I reproduce the relevant part of the Division Bench judgment dated 15.02.2000 as under:

"Heard learned counsel for the appellant.

We are not persuaded to interfere in this appeal because we find that the

appellant was not even applicant for the post of Constable and his appointment was made de hors the rules on the approval of the Director General of Police. The learned Judge in the impugned judgment and order has carefully considered various provisions of law and has found that the Director General of Police has no special power to recommend/approve an appointment, that too of a person who was not even an applicant. The appeal is dismissed."

18. In the aforementioned background, the Hon'ble Division Bench in the case of Shailesh Kumar Mall (supra) noticed the earlier judgment in the case of Hemkant Jha (supra) and the judgment of the Hon'ble Apex Court in the case of Chandreshwar Pathak (supra) which affirmed the decision in the case of Hemkant Jha (supra). In the case of Shailesh Kumar Mall (supra) the Hon'ble Division Bench vide its judgment dated 08.02.2019 held that the judgment of the Hon'ble Apex Court in the case of Chandreshwar Pathak (supra) finally clinches the issue and the judgments running contrary to the said ratio, therefore, cannot be said to lay down the law correctly.

19. The Full Bench started hearing all these applications on 28.02.2019. The Bench was prima-facie of the view that the issue stands concluded with the pronouncements of the judgment of the Hon'ble Apex Court in the case of Chandreshwar Pathak (supra) but then the hearing proceeded in view of the submissions made on behalf of the petitioners in the light of the judgments of the learned Single Judge of this Court in the case of Kamla Chandra Sah (supra) it would be apt to reproduce the order passed after noticing the contentions of the parties on 28.02.2019:

"Heard Sri Ramchandra Singh, learned counsel for the petitioners and Sri Ram Hriday Prasad, learned counsel in the connected writ application. Sri Anjani Kumar and Sri S.D. Yadav learned Additional Advocate Generals have appeared in both the writ petitions for the respondents-State.

Prima-facie it did appear to us that the issue stands concluded with the pronouncement of the Apex Court in the case of State of Bihar and others Vs. Chandreshwar Pathak reported in (2014) 13 SCC 232 but there is yet another submission made on behalf of the petitioners that deserves to be answered keeping in view the fact that this Full Bench has been constituted to give an authoritative pronouncement in the light of the conflict of the two Division Benches and other judgments that have been placed on record. One of such judgments relied on, and which was part of the pleading, is in the case of Kamal Chandra Sah Vs. The State of Bihar & Ors reported in 2006 (3) PLJR 468.

A learned Single Judge of this Court has opined that the Bihar Police Manual in effect is an executive act and not a Legislative Act so as to deprive the State Government from taking an exceptional stand by making appointments. It is urged by the learned counsel for the petitioners that if the Bihar Police Manual is required to be followed then in that event the State Government also has the power to proceed to make appointments including an appointment of the nature

presently involved and the same should not be annulled on the ground of any alleged statutory violation which otherwise does not exist.

On the other hand, learned Additional Advocate Generals of the State have urged that the Bihar Police Manual derives itself authority in terms of Section 7 read with Section 12 of the Police Act, 1861 as amended thereafter and the preface to the Bihar Police Manual, 1978 itself discloses the status of the source of such power under which the said instructions have been compiled as the Bihar Police Manual. The question therefore is about the status of the said manual and the instructions contained therein keeping in view the pronouncement of the learned Single Judge in the case of Kamal Chandra Sah (supra).

The Police Act, 1861 stands saved as the State legislature has exclusive competence to frame laws relating to the subject of policing with the exceptions as contained in Entry 2 of List II of the VII Schedule of the Constitution of India.

Learned counsel for the State may, therefore, assist the Court with an answer on the aforesaid issue which does not appear to have been the subject matter of consideration in any of the judgments including the judgment in the case of State of Bihar and others Vs. Chandreshwar Pathak (supra) to enable us to further proceed in the matter.

Learned counsel for the petitioners and the respondents may also take notice of a Division Bench judgment of this Court in the case Shailesh Kumar Mall @ Shailesh Kumar vs. The State of Bihar and others decided on 18th February, 2019 in LPA No. 569 of 2018.

Let the matter as prayed for come up on 14th March, 2019."

20. As the status of the Bihar Police Manual has fallen for consideration in order to assist us in answering the reference, the learned counsel for the petitioners and the learned Additional Advocate General No. 4 have addressed this Court on this issue. While it is the contention of learned counsel for the petitioners that the provisions contained in the Bihar Police Manual are not akin to 'Rule' or 'Regulations' akin to a legislative enactment, learned Additional Advocate General-3 has submitted before us that the Bihar Police Manual derives its authority under Section 7 read with Section 12 of the Police Act, 1861 (hereinafter referred to as 'the Police Act' or 'the Act of 1861').

21. A notification dated 27th February, 1979 has been brought on record as Annexure -A to the counter affidavit sworn on 12.03.2019 (it should have been stated as supplementary counter affidavit). According to the notification, issued under the signature of the Special Secretary to the Government Department of Home (Police), by order of His Excellency Governor of State of Bihar, the Governor of Bihar while repealing the Bihar and Orissa Police Manual 1930, made applicable Bihar Police Manual, 1978 with effect from its notification i.e. 27.02.1979. This notification is said to have been published in the official gazette of the State of Bihar. It is the contention of learned Additional Advocate

General-4 that the provisions of the Bihar Police Manual have got a force of law inasmuch as those are in the nature of piece of sub-ordinate legislation. He has relied upon a learned Single Judge judgment of this Court in the case of Prem Chandra Jha & Ors. vs. The State of Bihar & Ors. reported in 2007 (2) PLJR 566 to contend that the status / character of the Manual is a separate Legislation under the rule making powers.

22. Yet another judgment of Hon'ble Division Bench of this Court in the case of The State of Bihar and Others Vs. Rameshwar Nath Mishr reported in 1994 (2) PLJR 98 has been brought to the notice of this Court wherein certain provisions of the Bihar Police Manual came for consideration. In the said case the Hon'ble Division Bench of this Court held that the procedure laid down in the Rules were mandatory and the Bihar Police Manual so far as the same relates to the conditions of services is a rule deemed to have been made under the proviso appended to Article 309 of Constitution of India. It was held that the Rule is legislative in character. Learned Additional Advocate General-4, thus, submits that the Status of Bihar Police Manual is akin to a legislative enactment and therefore, any departure from the provisions of the Police Manual in the matter of appointment of the petitioners will be taken as violation of the procedure which are mandatory in nature.

23. Learned Additional Advocate General-4 has, therefore, contested the submissions of learned counsel for the petitioners that following the views expressed by the learned Single Judge in the case of Kamal Chandra Sah (supra) it may be held that it is open to the Government of Bihar to make a departure from the Rule in appropriate cases. The Government of Bihar, it is submitted, never took any policy decision to relax the procedure of appointment nor authorised the then Director General of Police to make appointments on the grounds referred to therein, that too without any publication of an advertisement for selections in any newspaper.

Consideration

24. Having considered the rival submissions at the Bar, I am of the considered opinion that a little exercise in respect of the status of the Bihar Police Manual would be necessary before answering the reference. It appears from the 'F O R E W O R D' of the Bihar Police Manual that prior to its coming into force the position as existed may be well understood by going through the following words recorded by the then Inspector General of Police, Bihar, Patna :-

"The Bengal Police Manual, first issued in 1884, was a compilation of Government orders by Mr. Botelho, Registrar of the Bengal Police Office. Thereafter, the following revisions took place:-

(i) From 1890 to 1893 by Mr. A. H. Giles, P.A. to the Inspector General and Mr. C.A.Wilkins, I.C.S., (ii) in 1897 by Mr. E.M. Showers, Personal Assistant to Inspector General during the time of Edward Henry (then Mr. Henry), (iii) from 1906 to 1907 by Mr. Daly and from 1909 to 1910 by Mr. Swain, both Personal

Assistants to Inspector-General who did the revision in addition to their own duties, assisted by Mr. B.A. Collins, I.C.S. which was finally published in 1911, (iv) in 1912 by Dr. J. V. Ryan, LL.D., Superintendent of Police when its name was first changed in 1914 as Bihar and Orissa Police Manual. (v) The last revision, before this present Manual, was done in 1923-24 by Mr. R.J. Hirst, Deputy Inspector-General, C.I.D., which was later continued from 1927 to 1929 by Mr. W.A.P. Sealy, Super-intendent of Police on Special Duty and Mr. E.A.O. Perkin, Assistant to the Inspector-General and was concluded in 1929-30 by Mr. C.R.B. Murray, assisted by Mr. R.A.P. Hare, Assistant to the Inspector-General.

2. After India's Independence, Police Manual, Volume I was reprinted in 1949 and 1955 at the Government Press, Gulzarbagh where all the amendments issued serially for several decades and kept there in booklets were incorporated. Subsequently, the translation of Police Manual, Vol. I in Hindi was done at the initiative of Sri Sarda Prasad Verma, the then Inspector-General of Police by Deputy Superintendent of Police Sri Kedar Nath Mishra "Prabhat" and Sri Ram Gopal Sharma "Rudra". This was published in two parts. The first part which contained chapters 1-14 and the second part which contained chapters 15-36 were published in 1965 and 1971 respectively.

3. The State Government particularly at the initiative of Sri Ramanand Tiwari, Minister, Home (Police) (formerly a constable who had joined the freedom movement of Mahatma Gandhi in 1942) took the decision of revising the Police Manual and Sri Badri Narain Sinha, I.P.S. Deputy Inspector-General of Police was specially selected for this work. He started the work of revision from 1st June, 1971 in right earnest. Later, a committee was formed of the following persons:-

(1) Sri Trilok Nath, I.P., Inspector-General of Police-on Special Duty-cum-Chairman.

(2) Sri Fazlur Rahman, M.L.A. (later Union Minister)Member.

(3) Sri Jai Narayan, who after resigning from I.P.S..... Member.

(4) Sri Kumar Taranand Singh, Resident Director,Member.

(5) Sri Satyendra Narain Agrawal, Ex-Deputy.....

..Member.

(6) Finance Commissioner, (7) Home Secretary, (8) Law Secretary, and (9) Dy. I.G. (Admin.) as ex-officio members, besides (10) Member-Secretary Sri Badri Narain Sinha.

4. Sri Sinha, prepared an exhaustive questionnaire which was widely circulated. On transfer, he handed over charge to Sri Duniya Lal, I.P.S., Dy. I.G. of Police in July, 1972. Unfortunately, Sri D. Lal died premature on 9th August, 1972.

5. Sri Jyotindra Mohan Prasad, I.P.S., Superintendent of Police was posted as Member-cum-Secretary in August 1972, later promoted as Dy. I.G. the same

year. He is still continuing.

6. The Police Manual Revision Committee incorporated the recommendations of the Bihar Police Commission submitted in 1961 by Sri Mithilesh Kumar Sinha, I.P., retired Inspector-General of Police and it took extracts from the Police Order book also which had been revised in 1969. Moreover, the new Criminal Procedure Code (2 of 1974), Bihar Accounts Code and new system of Accounts and the recommendations of the sub-committee of the Legislative Assembly specially set up for reforms in the Police organization have made significant changes in the Manual. The committee interviewed a large number of persons, both officials and non-officials and finished revision of all the three Volumes of Police Manual by October, 1974 in Hindi.

7. An Implementation Committee was then set up with Sri Ajit Kumar Ghosh, I. P., Director-cum-Inspector-General of Police as Chairman in November, 1974 with Sri Narendra Pal Singh, I.A.S., Joint Secretary, (later Additional Secretary), Home (Police) as Member, but soon, this committee was reconstituted with Sri Narendra Pal Singh as Chairman and Finance Secretary, Law Secretary and Dy. I. G. (Admin.) as ex-officio members. In this the names of Sri Ram Nandan Prasad, Addl. L.r. and later Sri Gobind Prasad, Dy. L.R. deserve mention. Sri Jyotindra Mohan Prasad, Member-Secretary continued as before. Sri Prasad also translated all the three Volumes of the Police Manual into English with the help of Sri Satish Chandra Misra, Rajbhasha Officer and thus, both English and Hindi versions are being published. Sri A. K. Ghosh, who later took over as Special Secretary, Home (Police) made a thorough check of Police Manual, Volume I before he retired on 31st March, 1977. The Cabinet approved the revised Manual in December, 1977.

8. Lastly, the assistance given by Assistants Sarbshri Birendra Narain Jha, Singheshwari Prasad Singh and Chandra Shekhar Prasad Singh and Typist Sri Sheo Nath Pandit has to be appreciated.

9. The revised Manual is dedicated to the cause of selfless public service by policemen and is offered to all. Any suggestions for its improvement are welcome."

25. The preface of the Bihar Police Manual reads as under:-

"PREFACE

The Bihar Police Manual, 1978 [Vol. I (Rules), Vol. II (Forms) and Vol. III (Appendices)] is issued by and with the authority of the State Government under sections 7 and 12 of the Police Act V, 1861. All the rules etc. therein are binding on all police officers and are an authoritative guide to other concerned officers of Government."

26. Police Act, 1861 is a pre-independence Act. The Act has been amended from time to time after independence and there are several State Amendments also. Section 2 of the Police Act, 1861 is the enabling provision for issuance of order by the State Government to Constitute the police force which reads as under:

"S.2, so far as it is related to the provinces under the administration of the Lieutenant-Governor of Bengal, repealed by the Bengal Police Act, 1869 (Ben. Act 7 of 1869).

2. Constitution of the force.-The entire police-establishment under a State Government shall, for the purposes of this Act, be deemed to be one police force See note to S. 8, infra, as to enrolment of the police force in certain places., and shall be formally enrolled and shall consist of such number of officers and men, and shall be constituted in such manner, The words "and the members of such force shall receive such pay" omitted by A.O. 1937.[***] as shall from time to time be ordered by the State Government Certain words omitted by A.O. 1937. [***].

Inserted by A.O. 1937[Subject to the provisions of this Act, the pay and all other conditions of service of members of the subordinate ranks of any police force shall be such as may be determined by the State Government.]

State Amendments-[Uttar Pradesh].- In its application to the State of Uttar Pradesh, after S.2, insert the following section, namely:-

"2-A. Civil aviation personnel to be police force.- (1) The provisions of this section shall have effect notwithstanding anything contained in any other provisions of this Act or in any other law for the time being in force.

(2) On and from such date as the State Government may, by notification, appoint in this behalf, the entire civil aviation personnel employed immediately before that date shall, for the purposes of this Act, become members of a police force and shall be formally enrolled in accordance with the provisions of section 8-A and any new such members shall, thereafter, be appointed in such manner, as shall, from time to time, be ordered by the State Government:

Provided that any civil aviation personnel employed before the said date may, by notice addressed to the Director General, Civil Aviation, Uttar Pradesh served within a period of thirty days from the said date, intimate his option not to become a member of the said police force, and upon receipt of such notice, the post in the Civil Aviation Department held until then by him shall stand abolished and his services shall stand terminated and he shall be paid an amount equivalent to his three months salary as compensation.

(3) The pay and allowances payable to, and the other terms and conditions of service of civil aviation personnel shall such as may be prescribed by rules made by the State Government.

(4) The civil aviation personnel shall discharge such duties as may be specified by general or special orders of the State Government from time to time pertaining to maintenance of air craft belonging to, or hired by, the State Government, security at the Airport at Lucknow or at any other airport specified by a general or special order of the State Government and other duties incidental thereto or connected therewith.

(5) The civil aviation personnel shall have such privileges and exercise such powers necessary for the discharge of the said duties as may be specified by general or special orders of the State Government.

(6) The administration of the civil aviation personnel shall be vested in the Director General, Civil Aviation, Uttar Pradesh who shall be assisted by the Additional Director (Administration) Civil Aviation, Uttar Pradesh and such other officers and employees as may be specified by the State Government from time to time."-Uttar Pradesh Act 33 of 2001, S.3 (w.e.f. 10-08-2001).

[West Bengal].- In its application to the State of West Bengal, after S.2, insert the following section, namely:-

"2-A. Power of State Government to make rules.- (1) Subject to the provisions of this Act, the State Government may make rules relating to recruitment, conditions of service, disciplinary proceedings and punishments in respect of members of the subordinate ranks of the police force.

(2) Any rules, orders or regulations made before the commencement of the Police (West Bengal Amendment) Act, 1963, by any authority in respect of the aforesaid matters, shall, in so far as they are not inconsistent with the provisions of this Act, be deemed to have been validly made and shall continue in force until other provisions are made in this behalf."-West Bengal Act 38 of 1963, S. 3 (w.e.f. 3-2-1964)."

27. Some of the States like Uttar Pradesh and the State of West Bengal have come out with some State Amendments by incorporating Section 2-A conferring powers upon the State Government to make Rules relating to recruitment, conditions of service, disciplinary proceedings and punishment in respect of the members of the Subordinate Ranks of the Police Force. At the Bar this Court has been informed that so far as the State of Bihar is concerned, no State Amendment has been brought after Section 2 of the Act of 1861. No order under Section 2 of the Act of 1861 has been produced before us.

28. Sections 7 and 12 on which reliance has been placed by learned Additional Advocate General-4 are quoted hereunder for a ready reference:

"7. Appointment, dismissal, etc., of inferior officers- Substituted by A.O. 1937, for certain words [Substituted by A.O. 1959 (as amended by C.O. 29), for 'Subject to such rules'. [Subject to the provisions of article 311 of the Constitution, and to such rules] as the State Government may, from time to time, make under this Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspector-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks] whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same;

Substituted by Act 8 of 1895, S. 2, for certain words [or may award anyone or more of the following punishments to any police officer Inserted by A.O. 1937 [of

the subordinate ranks] who shall discharge his duty in a careless or negligent manner, or who by any act of his own shall render himself unfit for the discharge thereof, namely:-

(a) fine to any amount not exceeding one month's pay; (b) confinement to quarters for a term of not exceeding fifteen days, with or without punishment-drill, extra guard, fatigue or other duty;

(c) deprivation of good-conduct pay;

(d) removal from any office of distinction or special emolument.] For Cl. (e), applicable to certain areas in U.P., see U.P. Act 2 of 1944

State Amendments-[Punjab, Haryana and Chandigarh].- In its application to the States of Punjab and Haryana and Union territory of Chandigarh, in S.7-

(a) after the words "dismiss suspend or reduce", insert "either in rank or within a time scale"; and

(b) after the Cl. (d), add the following clause, namely:-

"(e) stoppage of increments".- East Punjab Act 30 of 1948, S. 2 and Central Act 31 of 1966, S. 88 (w.e.f. 1-11-1966).

[Uttar Pradesh].- In its application to the whole of U.P., except the Jaunsar-Bawar Pargana of the Dehradun district and the portion of the Mirzapur district of sought of Kaimur Range, in S.7, add the following clause, namely:-

"(e) withholding of increments or promotion including stoppage at an efficiency bar."-Uttar Pradesh Act 2 of 1944, S. 4 (w.e.f. 1-4-1944).

(i) In its application to the State of Uttar Pradesh, in S.7, for the words "Inspector-General", substitute "Director-General-cum-In-spector-General, Inspector-General".-Uttar Pradesh Act 10 of 1984, S.5.

[West Bengal].- In its application to the State of West Bengal, for S. 7, substitute the following sections, namely:- "7. Punishment of subordinate ranks of the police force in disciplinary cases.- The appointing authority, or an officer not lower in rank than the appointing authority, shall be competent to inflict all punishments on the members of the subordinate ranks of the police force in disciplinary cases.

7-A. Validity of appointment, dismissal and punishment of subordinate ranks of the police force in certain cases.- Notwithstanding anything contained elsewhere in this Act or any rule, regulation or order made thereunder, all appointments made by the Inspector-General or any other authority subordinate to him, all orders of dismissal or removal from office passed by any such authority, not being an authority subordinate to the authority by which the respective appointments were made, and all orders inflicting any other punishment passed by any other authority, before the commencement of the Police (West Bengal Amendment) Act, 1963, in respect of the subordinate ranks of the police force shall be deemed to be, and to have always been, validly passed."- West Bengal

Act 38 of 1963, S.4 (w.e.f. 3-2-1964).

12. Power of Inspector-General to make rules.-The Inspector-General of Police may, from time to time, subject to the approval of the State Government, frame such orders and rules as he shall deem expedient relative to the organization, classification and distribution of the police force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrements and other necessities to be furnished to them; the collecting and communicating by them of intelligence and information' and all such other orders and rules relative to the police force as the Inspector-General shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties."

29. In the present case, as I have seen that the heading of Section 7 started with the words "Appointment" but the Section nowhere talks of appointment. This has compelled me to discuss as to how the heading of Section 7 should be interpreted. There are conflicting opinions on the question as to the weightage to be assigned to the headings. G.P.Singh in his book "Principles of Statutory Interpretation" has discussed and quoted the view of M. Patanjali Sastri, J. (as His Lordship then was) in the case of Commissioner of Income Tax Bombay Vs. Ahmedbhai Umarbhai and Co., Bombay reported in AIR 1950 SC 134 saying that "Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment". In the case of M/S FRICK INDIA LTD. VS. UNION OF INDIA AND OTHERS reported in AIR 1990 SC 689 the Hon'ble Supreme Court expressed as follows:-

"the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision."

30. In the case of Raichurmatham Prbhakar and another Vs. Rawatmal Dugar reported in (2004) 4SCC 766 at page 775, referring to the conflicting opinions relating to the use of heading or titles prefix to sections or group of sections, Lahoti, J. expressed himself as follows:-

"it is permissible to assign the heading or title of a section a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject-matter dealt with thereunder. The heading or title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject-matter dealt with by the enactment underneath; though the name would always be brief having its own limitations.

In case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder."

31. There is no dispute that under the Entry 2, List II of the VII Schedule of the Constitution of India, 'Police' (including railway and village police) subject to the provisions of Entry 2A List I falls in the State List and it is the State Legislature that is competent to make laws relating to 'Policing' in the State. The contention of the learned Additional Advocate General as regards the Status of Bihar Police Manual, when is examined in the light of Section 7 of the Act of 1861, it would appear that heading of the Section start with words 'Appointment, dismissal, etc. of interior officers', the body of section no where talks of 'appointment'. This provision specifically says that it is subject to the provisions of Article 311 of the Constitution of India and to such rules as the State Government may make under this Act.

32. The question is whether Bihar Police Manual may be said to be a Rule framed by the State Government under Section 7 of the Police Ac. I am of the considered opinion that it cannot be said to be a Rule as envisaged under Section 7 of the Act of 1861. It is at best the revised version of the compilation of the various government orders which existed in the pre-independence era coupled with certain recommendations of the Police Commission. It has no doubt been revised by a Committee constituted for this purpose by the State Government. The Police Manual Revision Committee has, while revising the Police Manual incorporated the recommendations of the Bihar Police Manual Commission submitted in the year 1961, brought some significant changes in the light of the Criminal Procedure Code (Act 2 of the 1971). The revised Manual was placed before the Cabinet which approved it in the year 1977. Such approval of the Cabinet alone cannot be said to be in exercise of a Rule making power, for that I find no material placed before us that the approved manual was ever placed before the Governor of the State. The Bihar Police Manual has been approved by the Cabinet, but has not been issued under authentication of the Governor, and not published in the official gazette of the State of Bihar.

33. At this stage it would be in the fitness of the things to take note of Article 13 and 309 of the Constitution of India as under:

"13. Laws inconsistent with or in derogation of the fundamental rights.- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Inserted by the Constitution (Twenty-fourth Amendment) Act, 1971, SZ [(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]"

"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 persons as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor The words "or Rajpramukh" omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. [***] 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."

34. By virtue of Article 13 it may be easily found that the Police Act being a pre-independence Act applies to the extent they are not inconsistent with the provisions of Part III of the Constitution of India. In Clause 3 of Article 13 the word "law" will take into its fold those Government's Order which found part of the compilation of the Bengal Police Manual first issued in 1884 but then after India's independence when the State Government was looking to make rules regulating the recruitment and conditions of service of the posts in connection with the affairs of the State, it could have been done only under an Act of appropriate Legislature under Article 309 and rule framed thereunder or until that time by making rules under proviso to Article 309 of the Constitution of India. Such rules could have been made by inserting an enabling provision after Section 2 of the Act of 1861. It is for this reason that the State like the State of West Bengal inserted section 2-A by State Amendment after Section 2 of the Police Act 1861 and also declared that any rules, orders or regulations made before the commencement of the Police (West Bengal Amendment) Act, 1963, by any authority in respect of those matters will be deemed to have been validly made and shall continue in force.

35. The Bihar Police Manual no where says that the Manual has been made in

exercise of the power conferred by a statutory provision. All that its preface says is that it has got authority of the State under Sections 7 and 12. In case of a delegated legislation, it is well settled that the authority is to be stated as it would be impermissible if the delegatee is allowed to take shelter behind the undisclosed authority. In the case of *U.P. State v. Murtaza ali and another* (F.B.) reported in AIR 1961 ALLAHABAD 477 (V 48 C 120) the Hon'ble Bench was considering the question referred to the Full Bench "as to whether the regulations regarding dismissal, removal or reduction of Municipal employees, printed at page 654 of the Municipal Manual, 1952 Edn. are valid ?" The Hon'ble Full Bench answered the question in negative. In the said case the Hon'ble Full Bench found that the regulation was not in respect of the matter regarding which a rule could have been made, it was held in the said case that the rule making authority cannot enlarge legislatively that field and it would not be open for the rule making authority to add to the efficacy of the power by additional means. The view of the Hon'ble Full Bench has been summarized in the following paragraphs:-

"In the guise of the phrase it is not open to the rule-making authority to add to the efficacy of the power by additional means. In other words, one may complement but not supplement a granted power. (*Carbines v. Powell*, 36 C.L.R. 88 at p. 92). The power bestowed by the phrase will authorise the provision of subsidiary means of carrying into effect what is enacted in the Act or any other law itself and will comprehend what is incidental to the execution of their specific provisions. But such a power will not enable the rule making authority to add new and different means of carrying them out....."

36. The logic which may be deduced from the aforesaid judgment of the Full Bench of Allahabad High Court is that in absence of their being any enabling provision either under Section 7 or Section 12 of the Act of 1861 conferring the power upon Inspector-General of Police to frame such orders and rules relating to recruitment or conditions of service of a members of the Police force, it cannot be held that the Bihar Police Manual is a piece of delegated legislation much less a subordinate legislation.

37. As it appears from Annexure-'A' to the counter affidavit of the State of Bihar, a notification dated 27th February, 1979 was issued saying that the Bihar Police Manual is made applicable with effect from the date of notification. I respectfully beg to differ with the views taken by the Hon'ble Division Bench of this Court in the case of *Rameshwar Nath Mishr* (supra) saying that Bihar Police Manual is a Rule deemed to have been made under the proviso appended to Article 309 of the Constitution of India and it is legislative in character. It is neither the stand of the State that the Bihar Police Manual has been issued by way of a Rule under proviso to Article 309 of the Constitution of India nor this Court would be justified in conferring the status of 'a deemed rule' upon the Bihar Police Manual while answering the reference. By no stretch of imagination it can be said to be legislative in character. Similarly with utmost respect, I am of the view that the

Hon'ble Single Judge of this Court in the case of Premchandra Jha &Ors. (supra) had no legal foundation available to hold that the Bihar Police Manual is a subordinate legislation under the rule making powers. It is certainly not a piece of a subordinate legislature inasmuch as the Manual has not been framed by the State Government under any Rule making powers. It is a document published under the signature of the Inspector-General which is said to have got approval of the Cabinet. Section 7 as noticed above nowhere confers any power upon the State Government to make Rules relating to appointment. The State Government has not inserted any provision after Section 2 of the Act of 1861. No order under Section 2 has been issued so far.

38. The word "Rule" has been defined under Section 3 (51) of the General Clauses Act, 1897 and the same definition has been reiterated under Section 4 (46) of the Bihar & Orissa General Clauses Act, 1917. It reads as under:-

"4 (46) "Rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment;"

39. As stated above, neither Section 7 nor Section 12 of the Act of 1861 are the enabling provisions conferring power upon the State Government to make Rules relating to recruitment and conditions of service, therefore, if the State Government has approved the Bihar Police Manual conferring power upon certain authorities to make appointment in the Police force, it will be a case of exercise of power in excess to the delegations made under the Act of 1861. It is interesting to note that that under Section 3 which provides for superintendence in the State Government the word "Appoint" which was earlier existing was omitted by A.O. 1937. To meet the exigencies, therefore, the State of Uttar Pradesh and the State of West Bengal have brought State Amendments in respect to the application of Section 4 of the Police Act 1861. The notification dated 27th February, 1978 as contained in Annexure-A to the counter affidavit of the State of Bihar only mentions that Bihar Police Manual 1978 is made applicable with effect from the date of issuance of the notification. It cannot be interpreted to mean and understand that the Bihar Police Manual is a rule framed by the State or the Inspector-General in accordance with the delegated power under Rule 7 and 12 of the Act of 1861.

40. Going through Section 12 of the Act of 1861, I find that under this provision the Inspector General of Police has been conferred with power, subject to the approval of the State Government to frame such orders and rules as it shall deem expedient relating to the organization, qualification and distribution of the Police Force, places at which the members of the force shall reside and the particular services to be performed by them, their inspection, the description of arms, accouterments and other necessities to be furnished to them. Whole reading of Section 12 would show that the Inspector General of Police has not been conferred with any power, subject to the approval of the State Government to frame orders and rules relating to appointment of members of Police Force. The cluster of words namely, 'organization, classification and distribution' of

Police Force are the words of same feather and if 'Noscitur a Sociis' is a rule of interpretation then the meaning of a word is to be judged by the company it keeps. "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words formed in immediate connection with them." (Refer Angus Robertson in George Day (1879) 5 AC 63 p.69) as quoted in Chapter 5, Syn 8 in the book Principles of Statutory Interpretations).

41. Learned Additional Advocate General has submitted before us that the word 'organization' will take within its fold the power to make orders and rules with regard to appointment also. This contention is unacceptable as the Bihar Police Manual, in the context of the present case which relates to appointment of Police Constables, cannot be said to be either a Rule under Section 7 or 12 of the Act of 1861. At the Bar this Court has been informed that while the State Government has framed Rules relating to appointment and service conditions of the persons holding a civil post in the State Government, no Rule relating to the members of the Police Force has been framed. I can only expect that after this judgment the State Government will be required to analyze the need for appropriate measures for bringing adequate State Amendments in the Act of 1861 and by making Rules relevant for this purpose.

42. In view of the foregoing discussions, it is my firm opinion that the status of Bihar Police Manual, 1978 is not that of 'Rule' or 'Regulations' framed by the State Government.

43. In the context of these cases, I now proceed consider as to whether the contention of learned counsel for the petitioners that the Bihar Police Manual being a creation of Government of Bihar in its executive side, the provision thereof may be relaxed by the Government so as to make an exception to Rule 661B of the Manual in certain cases.

44. In this connection, I find that Bihar Police Manual has got approval of the Cabinet. Its' applicability has, however, been notified under order of the Governor, referring to Sections 7 and 12 of the Act of 1861. To me it appears that reference of Section 7 and 12 is a wrong labelling of the provision of law. I am of the view that the notification as contained in Annexure- 'A' to the counter affidavit is in the nature of an executive order as envisaged under Article 166(3) of the Constitution of India. The executive power of the State is co-extensive and co-incidental to the legislative power. By virtue of Entry 2, List II under the Seventh Schedule, the State Government in its' executive side can make orders and issue the same by order of the Governor. It will govern the field until by a legislative enactment and rule framed thereunder the field is occupied. In view of the law laid down by the Hon'ble Supreme Court in the catena of decisions particularly the Constitution Bench judgment of the Hon'ble Apex Court in the case of State of Karnataka Vs. Uma Devi reported in 2006 (4) SCC 1 it has now been settled that the appointments made without following due process as per mandate of the Constitution are illegal appointments. The Manual being an executive document contains provisions such as Rule 663(d) which says that

selection shall be made after publication of notice in the newspaper. In absence of any rule, regulations or an order contrary to the provisions of the Manual, the provisions contained in the Manual relating to process of appointment is required to be followed as it is in tune with the Constitutional Mandate. Paragraph 33, 39 and 54 of the Hon'ble Constitution Bench judgment in the case of Uma Devi (supra) are quoted hereunder for ready reference:

"33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularisation. The cases directing regularisation have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

39. There have been decisions which have taken the cue from Dharwad case Dharwad District PWD Literate Daily Wage Employees Assn. v. State of Karnataka, (1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902 : (1990) 1 SCR 544 and given directions for regularisation, absorption or making permanent, employees engaged or appointed without following the due process or the rules for appointment. The philosophy behind this approach is seen set out in the recent decision in Workmen v. Bhurkunda Colliery of Central Coalfields Ltd. (2006) 3 SCC 297 : 2006 SCC (L&S) 530 : JT (2006) 2 SC 1 though the legality or validity of such an approach has not been independently examined. But on a survey of authorities, the predominant view is seen to be that such appointments did not confer any right on the appointees and that the Court cannot direct their absorption or regularisation or re-engagement or making them permanent.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

45. In the case of Sudhir Kumar (supra) this Court has taken note of the fact that no general order or regulation of the State Government is available to support the contention that the appointment of the appellants is akin to compassionate appointment for which the State Government has taken a policy decision and prescribed Rules. It is apparent from the materials available on the record in these cases that save and except that it was presumed by the petitioners that in their cases the State Government has relaxed the conditions which power it has, there is no material to show that the State Government had at any point of time taken a policy decision to make appointment on the ground of bravery without following the due process of appointment. No such authority was vested with the then Director General of Police. In the case of Kamalchandra Sah (supra), to me it appears, with utmost respect to the learned Single Judge, the Hon'ble Single Judge proceeded to assume that the State Government had

approved the appointment of the petitioner in the said case as a deserving candidate and had made out an exception. No material was placed before the learned Single Judge in the case of Kamalchandra Sah (supra) to show that any such policy decision was in existence on the said date. If there was no such policy decision, I would reiterate that in absence of there being any Rule, even the guidelines in terms of Rule 660 (b) read with 663(d) of the Bihar Police Manual were required to be followed.

46. In the case of Hamkant Jha (supra) the Hon'ble Division Bench of this Court has recorded as under in paragraph 6, 7 and 8

"6. On going through the impugned judgments, the relevant facts and the judgment in the case of Sudhir Kumar, it is found that on facts there is no meaningful and serious challenge to the relevant facts that concerned employees in these matters have been appointed on the post of Constable without any advertisement and without following procedure of appointment. No general decision or order or regulation of the State Government is available to support the contention that appointment of the appellants is akin to compassionate appointment for which the State Government has taken a policy decision and prescribed rules. In fact, there is no controversy or issue in these matters because on admitted facts it is clear that the appointment of the appellants on the post of Constable were made through a backdoor method in complete disregard of procedure for appointment laid down in relevant rules in the Police Manual and in violation of constitutional mandate of equality in public employment. The State has rightly relied upon various judgments including that of a Constitution Bench of the Apex Court in the case of Secretary, State of Karnataka v. Uma Devi, reported in (2006) 4 SCC 1 [:2006(2) PLJR (SC) 363], to submit that such appointment do not confer any right on the appointees and in such cases of appointments made without following due process as per mandate of the Constitution or the relevant rules for appointment, the Court cannot direct for grant of benefits like absorption, regularization or re-engagement. Those principles, though considered in that case in the context of absorption/regularization, will apply with equal force where such illegal appointment has been terminated and the Court is called upon to consider such order and the connected issue of ordering for reinstatement i.e. for continuation of such illegal appointments. That constitution Bench judgment has emphasized the relevant aspects in paragraphs 33 and 39 and in paragraph 54 it has been clarified that those decision which run counter to the principles settled in that decision, or in which direction run counter to that decision, will stand denuded of their status as precedents. The same principles of law flows from a Division Bench judgment of this Court in the case of Amrendra Singh v. State of Bihar, 1999 (3) PLJR 984.

7. Having found that the appellants/employees concerned are backdoor appointees as held by the learned Judges in the impugned orders and they have no right to their posts, we are now required to consider the submissions advanced on behalf of the appellants that the impugned orders should be set

aside because the termination orders were issued by the various Superintendents of Police not of their own free will but rather under the directions of the higher authorities including the State Government and that principles of natural justice were not complied with in relation to some of the petitioners/appellants.

8. The submissions noticed above must be decided in the background of facts of each case. In the present case the facts noticed in brief disclose that large scale backdoor appointments were detected to have been made during the tenure of a particular Director General of Police. An enquiry was held and thereafter, as a result of such enquiry directions were issued by the higher authorities to the Superintendents of Police, the competent authority to make appointments to the post of Constable, to issue show Cause notices wherever such backdoor appointments are detected and to take action for their termination. The issue is whether the State Government and the successor Director General of Police could have held such enquiry and issued such directions or not. In order to ensure rule of law and obedience to constitutional mandate governing public employment, the State and its officials must be held duty bound to take such steps and there is no legal infirmity in such action."

47. The Hon'ble Apex Court in the case of Chandeshwar Pathak (supra) has also taken note of paragraph 35 and 36 of the judgment of the Hon'ble Apex Court in the case of State of Orissa and another v. Mamata Mohanty, (2011) 3 SCC 436 which are reproduced hereunder:

"35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide Delhi Development Horticulture Employees' Union v. Delhi Admn. (1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386 : AIR 1992 SC 789, State of Haryana v. Piara Singh (1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403 : AIR 1992 SC 2130, Excise Supdt. v. K.B.N. Visweshwara Rao (1996) 6 SCC 216 : 1996 SCC (LS) 1420, Arun Tewari v. Zila Mansavi Shikshak Sangh (1998) 2 SCC 332 : 1998 SCC (L&S) 541 : AIR 1998 SC 331, Binod Kumar Gupta v. Ram Ashray Mahoto (2005) 4 SCC 209 : 2005 SCC (L&S) 501 : AIR 2005 SC 2103, National Fertilizers Ltd. v. Somvir Singh (2006) 5 SCC 493 : 2006 SCC (L&S) 1152 : AIR 2006 SC 2319, Telecom District Manager v. Keshab Deb (2008) 8 SCC 402 : (2008) 2 SCC (L&S) 709, State of Bihar v.

Upendra Narayan Singh (2009) 5 SCC 65 : (2009) 1 SCC (L&S) 1019 and State of M.P. v. Mohd. Abraham (2009) 15 SCC 214 : (2010) 1 SCC (L&S) 508.)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

48. After taking note of the aforesaid judgments, the Hon'ble Apex Court held that in the absence of any advertisement or selection process the appointment of respondents is not protected and could be validly terminated.

49. The Hon'ble Division Bench of this Court has in the case of Shailesh Kumar Mall (supra) also taken note of the aforesaid judgments and agreed with the views of the Hemkant Jha (supra).

50. On going through the judgment dated 08.08.2011 passed by Hon'ble Division Bench of this Court in L.P.A. No. 1167 of 2009 and L.P.A. No. 1015 of 2009, it appears that although the earlier judgment of this Court of a co-ordinate Bench in the case of Hemkant Jha (supra) was relied upon on behalf of the State and the same was taken note of, but the Division Bench was impressed with the submissions that in similar circumstance in the case of Mithilesh Kumar Singh and Sushil Kumar Yadav the matters had gone to the Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 3508 of 2008 (arising out of L.P.A. No. 690 of 2006) and in Civil Appeal No. 280 of 2007 where the Hon'ble Apex Court rejected the argument of the State of Bihar and observed as under:-

"We are satisfied on the ground of equity that the incumbent should be allowed to continue as he has been in service from 1993 and was appointed only on the ground of his father being died while discharging his duties during the Election. Therefore, it was an equity which prevails with us."

51. In L.P.A. No. 1167 of 2009 and L.P.A. No. 1015 of 2009 the Hon'ble Division Bench has also taken note of the fact that the Apex Court had observed that without going into the merits of the case their Lordships thought it proper to allow him to continue in service as his father died while discharging the duty during election.

52. It appears to me that the Hon'ble Division Bench while hearing L.P.A. No. 1167 of 2009 and L.P.A. No. 1015 of 2009 could not appreciate that there was a

co-ordinate Bench judgment in the case of Hemkant Jha (supra), therefore, in case any contrary view was to be taken, the matters were required to be referred to a larger bench. The judgment dated 08.08.2011 in L.P.A. No. 1167 of 2009 (State of Bihar Vs. Md. Manjoor Alam &Ors.) and L.P.A. No. 1015 of 2009 (State of Bihar Vs. Md. Manjoor Alam &Ors.) are, thus, per incurium and do not lay down the correct law.

53. On the strength of the aforesaid discussions which have been made hereinabove, I would answer the reference as follows:

54. The judgment of the Hon'ble Division Bench in the case of Hemkant Jha (supra) lays down the correct law. The corollary of the same would be that the judgment of the Hon'ble Division Bench in L.P.A. No. 1167 of 2009 and 1015 of 2009 are in the teeth of the judicial pronouncements by the Hon'ble Apex Court in the catena of decisions noted hereinabove and has been rendered without considering the prior Division Bench judgment in the case of Hemkant Jha (supra) rendered by a Bench of equal strength hence, the judgments in L.P.A. No. 1167 of 2009 and 1015 of 2009 are per incurium. Consequently the view expressed by this Court's judgment in the case of Hemkant Jha (supra) and in view of the law laid down by the Apex Court in the case of Chandreshwar Pathak (supra) is upheld. All judgments of this Court taking a contrary view are overruled.

55. The reference is answered accordingly.

Per: Mohit Kumar Sah, J.:

The undisputed material facts of these cases and the questions for determination by this Full Bench have been succinctly set out in the erudite judgment of Hon'ble the Chief Justice and my esteem brother Hon'ble Justice Rajeev Ranjan Prasad which I have had the benefit of going through and I fully agree with the line of reasoning as well as the conclusion arrived at, for answering the reference. With a view to buttress the same, I would humbly like to further expound the issue in brief.

2. As regards the status of the Bihar Police Manual, 1978, admittedly, the same has got approval of the Cabinet and its applicability has been notified under the orders of the Governor in purported exercise of powers conferred under Section 7 and Section 12 of the Bihar Police Act, 1861 by a notification dated 27.02.1979 issued by the Home (Police) Department, under the orders of the Governor of Bihar. At this juncture, it would be relevant to note that it is a well settled law that the State Government has executive powers, in relation to all matters with respect to which the legislature of the State has power to make laws. There is no dispute that under Entry 2 List II of the VIIth Schedule to the Constitution of India, "Police", subject to the provisions of Entry 2A List I, falls in the said list. It is the State legislature which is competent to make laws relating to "Policing" in the State.

3. It is equally a well settled law that it is not obligatory for the State Government, under the proviso to Article 309 of the Constitution of India, to make rules of recruitment, appointment etc. before a service can be constituted or a post created or filled, and the State Government, in exercise of its executive power, in relation to all matters with respect to which the legislature of the State has power to make laws, can act under Article 162 of the Constitution of India without a law on the subject matter and there is nothing in terms of Article 309 of the Constitution of India which abridges the said power of the executive. Thus, I am of the view that till statutory rules are framed, in this regard, by the Government under proviso to Article 309 of the Constitution of India, the State Government can definitely issue administrative/ executive instructions/guidelines regarding the principles to be followed in matters of recruitment, appointment, promotion, punishments, transfer, leave, retirement etc. In this regard, it would be relevant to refer to a judgment rendered by the Hon'ble Apex Court in the case of B.N. Nagarajan & Others Vs. State of Mysore & Others, reported in AIR 1966 SC 1942, paragraph nos. 3 to 8 whereof are reproduced herein below:-

"3. We may here dispose of the point whether these rules are executive rules or statutory rules made under Art. 309 of the Constitution. The High Court held that "there can be little doubt that to the extent the Rules deal with the topic of regulating recruitment to Civil Services under the State, the source of the power could only be the proviso to Art. 309 of the Constitution." In our opinion, these rules are not rules made under Art. 309. First, the rules do not expressly say so, and secondly, the rules are dealing with the functions of the commission rather than with laying down the rules regarding recruitment to services or posts. Under Art. 320 (3) of the Constitution, it is the duty of the Government to consult and the duty of the Public Service Commission to advise, inter alia "on the principles to be followed in making appointments to civil services and posts and on the suitability of candidates for such appointments, promotions or transfers." Sub-rule (1) of R. 4 clearly provides the same thing as does Art. 320 (3) (b) and the other sub-rules are really administrative arrangements apparently arrived at between the Commission and the Government as to how the Government and the Public Service Commission will take steps to recruit persons for the State Services or posts.

4. To resume the narrative, on February 10, 1958, the Governor of Mysore, in exercise of the powers conferred by the proviso so art. 309 of the Constitution, made the Mysore State Civil Services (General Recruitment) Rules, 1957, hereinafter called the General Recruitment Rules. There is no dispute that these are statutory rules and in so far as they direct anything to be done in a particular way, the Government would have to comply with the directions. Rule 3 of these Rules, on which reliance has been placed by the learned counsel for the respondents to urge that the Government cannot recruit Assistant Engineers without framing rules, is in the following terms:

"Method of recruitment.-Recruitment to the State Civil Services shall be made by

competitive examination or by promotion. The method of recruitment and qualifications for each State Civil Service shall be as set forth in the rules of recruitment of such service specially made in that behalf."

5. It would be convenient to deal with this argument at this stage. Mr. Nambiar contends that the words "shall be as set forth in the rules of recruitment of such service specially made in that behalf" clearly show that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First it is not obligatory under proviso to art. 309 to make rules of recruitment, etc., before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in *Ram Jawaya Kapur v. The State of Punjab*(1) that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. We see nothing in the terms of art. 309 of the Constitution which abridges the power of the executive to act under art. 162 of the Constitution without a law. It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under art. 162 of the Constitution ignore or act contrary to that rule or act.

6. In the background of this position we are unable to interpret Rule 3 of the General Recruitment Rules as suspending the executive power of the State till rules of recruitment of a service are specially made in that behalf. Rules usually take a long time to make; various authorities have to be consulted and it could not have been the intention of r. 3 of the General Recruitment Rules, 1957, to halt the working of the public departments till rules were framed. This Court considered a similar point in *T. Cajee v. U. Jormanik Siem*, 1961-1 SCR 750 at pp. 762-764: (AIR 1961 SC 276 at p. 281), and arrived at a similar conclusion. The following observations of Wanchoo, J., who delivered the judgment on behalf of the majority, bring out clearly the fallacy in Mr. Nambiar's argument:

"The High Court has taken the view that the appointment and succession of a Siem was not an administrative function of the District Council and that the District Council could only act by making a law with the assent of the Governor so far as the appointment and removal of a Siem was concerned. In this connection, the High Court relied on para 3 (1) (g) of the Schedule, which lays down that the District Council shall have the power to make laws with respect to the appointment and succession of Chiefs and Headmen. The High Court seems to be of the view that until such a law is made there could be no power of appointment of a Chief or Siem like the respondent and in consequence there

would be no power of removal either. With respect, it seems to us that the High Court has read far more into para 3 (1) (g) than is justified by its language. Paragraph 3 (1) is in fact something like a legislative list and enumerates the subjects on which the District Council is competent to make laws. Under para 3 (1) (g) it has power to make laws with respect to the appointment or succession of Chiefs or Headmen and this would naturally include the power to remove them. But it does not follow from this that the appointment or removal of a Chief is a legislative act or that no appointment or removal can be made without there being first a law to that effect."

"Further once the power of appointment falls within the power of administration of the district the power of removal of officers and others so appointed would necessarily follow as a corollary. The Constitution could not have intended that all administration in the autonomous districts should come to a stop till the Governor made regulations under para 19 (1) (b) or till the District Council passed laws under para 3 (1) (g). The Governor in the first instance and the District Councils thereafter were vested with the power to carry on the administration and that in our opinion included the power to appoint and remove the personnel for carrying on administration. Doubtless when regulations are made under para 19 (1) (b) or laws are passed under para 3 (1) with respect to the appointment or removal of the personnel of the administration, the administrative authorities would be bound to follow the regulations so made or the laws so passed. But from this it does not follow that till the regulations were made or the laws were passed, there could be no appointment or dismissal of the personnel of the administration. In our opinion, the authorities concerned would at all relevant times have the power to appoint or remove administrative personnel under the general power of administration vested in them by the Sixth Schedule. The view therefore taken by the High Court that there could be no appointment or removal by the District Council without a law having been first passed in that behalf under para 3 (1) (g) cannot be sustained."

7. Mr. Nambiar in this connection also relied on Arts. 15 and 16 of the Constitution. He urged that if the executive is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Art. 309, Arts. 15 and 16 would be breached because the appointments in that case would be arbitrary and dependent on the mere whim of the executive. We are unable to hold that arts. 15 and 16 in any way lead us to this conclusion. If the Government advertises the appointments and the conditions of service of the appointments and makes a selection after advertisement there would be no breach of Art. 15 or Art. 16 of the Constitution because everybody who is eligible in view of the conditions of service would be entitled to be considered by the State.

8. In conclusion we hold that r. 3 of the General Recruitment Rules, 1957, did not prevent the State from exercising its executive power of appointing Assistant Engineers and determining their conditions of service by executive order."

4. Another leading judgment on the aforesaid issue is the one rendered by the Hon'ble Apex Court in the case of Sant Ram Sharma Vs. State of Rajasthan & Anr., reported in AIR 1967 SC 1910, paragraph nos. 7 to 9 whereof are reproduced herein below:-

7. We proceed to consider the next contention of Mr. N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

8. In *B. N. Nagaraja'n v. State of Mysore*,⁽¹⁾ it was pointed out by this Court that it is not obligatory under the proviso to Art. 309 of the Constitution to make rules of recruitment, etc., before a service can be constituted or a post created or filled, and, secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of Sch. 7, List II. Entry 41, State Public Services, and there is nothing in the terms of Art. 309 of the Constitution which abridges the power of the executive to act under Art. 162 of the Constitution without a law. A similar view was taken by this Court in *T. Cajee v. U. Jormanik Siem*, 1961-1 SCR 750=(AIR 1961 SC 276) where Wanchoo, J., as he then was, who delivered judgment on behalf of the majority, observed as follows at pp. 762-764 of the Report (SCR) = (at p. 281 of AIR):

"The High Court has taken the view that the appointment and succession of a Siem was not an administrative function of the District Council and that the District Council could only act by making a law with the assent of the Governor so far as the appointment and removal of a Siem was concerned. In this connection, the High Court relied on para. 3(1)(g) of the Schedule, which lays down that the District Council shall have the power to make laws with respect to the appointment and succession of Chiefs and Headmen. The High Court seems to be of the view that until such a law is made there could be no power of appointment of a Chief or Siem like the respondent and in consequence there would be no power of removal either. With respect, it seems to us that the High Court has read far more into para. 3(1)(g) than is justified by its language. Paragraph 3(1) is in fact something like a legislative list and enumerates the

subjects on which the District Council is competent to make laws. Under para. 3(1)(g) it has power to make laws with respect to the appointment or succession of Chiefs or Headmen and this would naturally include the power to remove them. But it does not follow from this that the appointment or removal of a Chief is a legislative act or that no appointment or removal can be made without there being first a law to that effect.....

.....Further once the power of appointment falls within the power of administration of the district the power of removal of officers and others so appointed would necessarily follow as a corollary. The Constitution could not have intended that all administration in the autonomous districts should come to a stop till the Governor made regulations under para. 19(1)(b) or till the District Council passed laws under para. 3(1)(g). The Governor in the first instance and the District Councils thereafter were vested with the power to carry on the administration and that in our opinion included the power to appoint and remove the personnel for carrying on the administration. Doubtless when regulations are made under para. 19(1)(b) or laws are passed under para. 3(1) with respect to the appointment or removal of the personnel of the administration, the administrative authorities would be bound to follow the regulations so made or the laws so passed. But from this it does not follow that till the regulations were made or the laws were passed, there could be no appointment or dismissal of the personnel of the administration. In our opinion, the authorities concerned would at all relevant times have the power to appoint or remove administrative personnel under the general power of administration vested in them by the Sixth Schedule. The view therefore taken by the High Court that there could be no appointment or removal by the District Council without a law having been first passed in that behalf under para. 3(1)(g) cannot be sustained."

9. We pass on to consider the next contention of Mr. N.C. Chatterjee that if the executive Government is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Art. 309, there will be a violation of Arts. 14 and 16 because the appointments would be arbitrary and capricious. In our view, there is no substance in this contention of the petitioner. If the State of Rajasthan had considered the case of the petitioner along with the other eligible candidates before appointments to the selection posts there would be no breach of the provisions of Arts. 14 and 16 of the Constitution because everyone who was eligible in view of the conditions of service and was entitled to consideration was actually considered before promotion to those selection posts was actually made. It was said by Mr. C. B. Agarwala on behalf of the respondents that an objective evaluation of the merit of the officers is made each year and promotion is made on scrutiny of the record- sheets dealing with the competence, efficiency and experience of the officers concerned.....It is therefore not possible to accept the argument of Mr. N. C. Chatterjee that there was any violation of the constitutional guarantee under Arts. 14 and 16 of the Constitution in the present case."

5. Having regard to the well settled law as enunciated by the Hon'ble Apex Court and referred to by me hereinabove, I am of the view that the Bihar Police Manual, which has got approval of the Cabinet and has been notified under the orders of the Governor, will govern the field pertaining to the matters relating to the recruitment, appointment, promotion, punishments, transfer, leave, retirement etc., in the police services, until by a legislative enactment, statutory rules are framed by the State Government. Thus the Bihar Police manual can definitely be said to be very much alive and having the force of Law by virtue of exercise of executive powers by the State Government.

6. Now coming to the complete divergent view taken by a Division Bench of this Court in a judgment dated 08.08.2011, passed in L.P.A. No. 1167 of 2009 (State of Bihar Vs. Md. Manjoor Alam & Ors.) and L.P. A. No. 1015 of 2009 (State of Bihar Vs. Md. Manjoor Alam & Ors.), it would suffice to state that firstly, though in the said judgment dated 08.08.2011, the Judgment rendered by a Division Bench of this Court, reported in 2007 (3) PLJR 657 (Hemkant Jha Vs. State of Bihar & Ors.) has been referred to, wherein the Division Bench has held that an appointment made without adherence to the rules of police manual governing appointment to the post of constable, especially in absence of any decision of the State Government to relax the same, cannot be sustained inasmuch as the incumbents have failed to show any right in themselves to hold the post of constable, nonetheless, the Division Bench, in the said Judgment dated 08.08.2011 has neither distinguished the Judgment rendered in the case of Hemkant Jha (Supra) nor followed the same. Secondly, in the aforesaid judgment dated 08.08.2011, rendered in the case of Md. Manjoor Alam & Ors. (Supra), a so called judgment dated 10.3.2008, passed by the Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 3508 of 2008 (The State of Bihar & Ors. Vs. Mithlesh Kumar Singh) (the number having been wrongly mentioned which should in fact be Special Leave to Appeal (Civil).....CC No. 3508 of 2008), has been relied upon, however, upon probe it has transpired that the said Special Leave to Appeal (Civil).....CC No. 3508 of 2008 has in fact been dismissed in limine by a one line order, passed by the Hon'ble Apex Court, hence, the same cannot, by any stretch of imagination, be treated to be a binding precedent.

7. It is a well settled law that a Special Leave Petition, dismissed in limine without expressing any opinion on the merits of the impugned judgment by a non speaking order, does not amount to acceptance of the correctness of the decision sought to be appealed against. The effect of such a non-speaking order of dismissal in one line only means that the Hon'ble Apex Court has decided that the case is not a fit case where the special leave should be granted, hence, such an order does not constitute a law laid down by the Hon'ble Apex Court for the purposes of Article 141 of the Constitution of India. Reference in this connection be had to a judgment rendered by the Hon'ble Apex Court in the case of State of Manipur Vs. Thingujam Brojen Meetei, reported in (1996) 9 SCC 29. In fact, an order refusing Special Leave to Appeal, passed in one line, does not attract the doctrine of merger and such order passed by the Hon'ble Apex Court does not

stand substituted in place of the order under challenge nor amounts to approval of the view expressed in the decision sought to be appealed against. Another treatise on the aforesaid issue is the celebrated judgment rendered by the Hon'ble Apex Court in the case of Kunhayammed & Ors Vs. The State of Kerala & Anr., reported in AIR 2000 SC 2587.

8. Thirdly, in the aforesaid judgment dated 08.08.2011, rendered in the case of Md. Manjoor Alam & Ors. (Supra), a judgment dated 24.07.2008 passed by the Hon'ble Apex court in Civil Appeal No. 2899 of 2007 (Sushil Kumar Yadav Vs. State of Bihar & Ors.) has been relied upon, however, the same cannot also be treated to be a binding precedent inasmuch as in the said judgment dated 24.07.2008 itself, the Hon'ble Apex Court has clarified that the said judgment will not be regarded as a precedent and moreover the said judgment has been rendered by the Hon'ble Apex Court without either going into the merits of the case or laying down any law. Thus, I am of the view that the aforesaid judgment dated 08.08.2011, passed by the Ld. Division Bench in L.P.A. No. 1167 of 2009 and L.P.A. No. 1015 of 2009 (State of Bihar Vs. Md. Manjoor Alam & Ors.), has been delivered without appreciating the earlier judgment rendered by a coordinate Bench of this Court in the case of Hemkant Jha (supra), as also relying upon such judgments of the Hon'ble Apex Court which cannot be regarded as a binding precedent much less having any force of law inasmuch as no law has been laid down by the Hon'ble Apex Court in the said judgments. In such view of the matter, I am of the view that the judgment dated 08.08.2011 rendered in the case of Md. Manjoor Alam & Ors. (Supra) does not lay down the correct law, especially, since the same is not based on any rational or principle of law, but on equity and on the ground that similarly situated persons are still continuing in the police department which, in my considered opinion, cannot be a ground to approve illegal appointments. It is a well settled law that Courts cannot confer benediction to make appointments on sympathetical grounds when the rules / regulations framed with regard to the same does not contemplate or cover such appointment. It is equally a well settled law that ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment.

9. Last but not the least, the issue in hand stands fully covered by a judgment rendered by the Hon'ble Apex Court in the case of State of Bihar & Ors. Vs. Chandeshwar Pathak, reported in (2014) 13 SCC 232 as well as by a judgment rendered by the learned Division Bench of this Court in the case of Hemkant Jha (supra), as also by the principles enunciated by the Hon'ble Apex Court in a recent judgment rendered in the case of State of Bihar Vs. Kirti Narayan Prasad & Ors., reported in 2019 (1) PLJR 102 SC :: 2018 SCC online SC 2615, paragraph nos. 10, 12, 13, 15, 16 and 17 whereof are reproduced hereinbelow:-

10. On the other hand, learned counsel appearing for the writ petitioners submitted that the writ petitioners have the requisite qualification for being appointed to the post in question. They have been appointed by the committee

constituted and headed by the Regional Deputy Director considering their past health service experience and qualification and posted in different primary health centres and worked for the past 2 to 3 decades. Their appointment is fully protected by the judgment in Umadevi (supra) and M.L. Kesari (supra). Therefore, they cannot be terminated from service at this stage of their career, that too without holding any disciplinary enquiry against them.

12. It is not in dispute that the Government of Bihar in its Administrative Reforms department had issued instructions for appointment to Class III posts in the Government office under its circular No. 16440 dated 3. 12.1980. The said circular applies to Class III posts other than the posts which are filled in by appointment of candidates selected by Bihar Public Service Commission after a competitive examination and to the posts which are governed by the Government resolution dated 28.01.1976. The said circular sets out a detailed procedure for notifying the vacancies in Secretariat and its attached offices, District Magistrates and other Muffassil Offices and for calling for applications, preparation of a common merit list and appointment from the said common merit list in the order of merit. It also provides the procedure for constitution of selection committee, preparation of merit lists and wait list, duration of merit lists and wait list. A similar circular No. 16441 was also issued on 03.12.1980 for appointment to Class IV posts in the Muffassil Offices of the Government. These circulars had been issued to avoid discrimination in appointment to Class III and Class IV posts in the Government offices and provide for generalized procedure in consonance with Articles 14 and 16 of the Constitution. The appointment of the writ petitioners have not been made in accordance with these circulars. Therefore, the contention of the learned counsel for the writ petitioners is that since the writ petitioners have served for more than 10 years and some of them have even completed 20 years of service, they ought to have been regularized in terms of the judgment in Umadevi (supra) and M.L. Kesari (supra).

13. In Umadevi (supra) the Constitution Bench has held that unless appointment is made in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it was an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. A temporary employee could not claim to be made permanent on the expiry of his term of appointment. It was also clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. In paragraph 43 of Umadevi (supra), it was held as under:

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our

Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

(Emphasis supplied)

15. In some of the LPAs the Division Bench appears to have followed paragraph 11 in *M.L. Kesari* (supra) for directing regularisation of service without considering the observations contained in paragraph 7 of the judgment. In paragraph 11, it was observed that "the true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 [the date of decision in *Umadevi* (3)] without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to

be considered for regularisation within six months of the decision in Umadevi (3) as a one-time measure". However, in paragraph 7 after considering Umadevi (supra) this Court has categorically held that for regularisation, the appointment of employee should not be illegal even if irregular.

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi (3), if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

(Emphasis supplied)

16. In *State of Orissa v. Mamata Mohanty*, (2011) 3 SCC 436, this Court has held that once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage. It was held thus:

"68(i) The procedure prescribed under the 1974 Rules has not been followed in all the cases while making the appointment of the respondents/teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the notice board of the College. Some of these teachers did not face the interview test before the Selection Board. Once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage".

(Emphasis supplied)

17. In the instant cases the writ petitioners have filed the petitions before the High Court with a specific prayer to regularize their service and to set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously by concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order. The writ petitioners are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical Officer. They were given notice to establish

the genuineness of their appointment and to show cause. None of them could establish the genuineness or legality of their appointment before the State Committee. The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio. We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularisation of their services by invoking para 53 of the judgment in Umadevi (supra) does not arise. Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise.

10. In conclusion, therefore, I fully agree with the opinion expressed by Hon'ble the Chief Justice and of brother Justice Rajeev Ranjan Prasad. Accordingly, the reference stands answered in the terms already explicated in the judgment of brother Justice Rajeev Ranjan Prasad.