
(2010) 09 AHC CK 0381
In the Allahabad High Court
Case No : Service Bench No. 5 of 2010

Luxmi Kant Shukla

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 16-09-2010

Acts Referred:

Business Rules, 1975 — Rule 2, 3, 8
Constitution of India, 1950 — Article 166
Fundamental Rules, 1963 — Rule 56
Uttar Pradesh Government Servants (Conduct) Rules, 1956 — Rule 6

Citation : (2010) 09 AHC CK 0381

Hon'ble Judges : Devi Prasad Singh, J

Final Decision : Allowed

Judgement

Devi Prasad Singh, J.

1. Petitioner, member of the Provincial Civil Services (in short referred as PCS) had preferred the present writ petition under Article 226 of the Constitution of India against the impugned order by which representation submitted by the petitioner with regard to voluntary retirement under Fundamental Rule 56 has been rejected by the Principal Secretary of the State Government.

2. The brief facts given rise to the present controversy is discussed hereinafter. The petitioner after joining the PCS rendered about 31 years of service. He published three poetry books namely. In the year 2005, he published a book with regard to Ram janm bhumi/babri mazjid dispute titled as. In December 2006, the petitioner published another literary work with the title. The publication of the book placed the petitioner's service career in jeopardy and he was suspended by the government by an order dated 12.2.2008 in contemplation of departmental enquiry for misconduct. The order of suspension was passed on the ground that petitioner had committed misconduct under Rule 6 of the U.P. Government Servant Conduct Rule 1956 (in short 1956 Rules) readwith U.P. Government Servant (Discipline and Appeal) Rule 1999 (in short Rule 1999).

3. The order of suspension was subject matter of dispute before this Court in a Writ Petition No. 256 (SB) of 2008. A Division Bench of this Court by an order dated 14.3.2008 had stayed the order of suspension on the ground that allegation contained therein prima facie, does not constitute misconduct under Rule 6 of the 1956 Rule and also prima facie, it infringe the petitioner's fundamental right conferred by Article 19(1) (a) of the Constitution of India.

4. The State Government has issued an order to ban the book in pursuance to power conferred by Section 95(1) of the Code of Criminal Procedure by office memorandum dated 5.5.2008.

5. The action of the State Government taken under Section 95 (1) read with Section 96 of the CrPC was subject matter of dispute before the Full Bench of this Court in a case registered as Criminal Misc. Case No. 17071 of 2008 and 145 of 2009. The Full Bench of the High Court had allowed the petition and declared the notification illegal and ultra vires and nullified the same. The notification dated 5.5.2008 was quashed by the Full Bench by its judgment and order dated 11.9.2009.

6. The interim order staying the order of suspension passed by a Division Bench of this Court dated 14.3.2008 was subject matter of appeal before Hon"ble Supreme Court. While admitting the writ petition and staying the order of suspension a Division Bench had framed the following questions for adjudication. The same is reproduced as under:

"In view of above, the arguments advanced by the learned counsel for the parties is of public importance. Out of others following questions called for adjudication under writ jurisdiction:

(1)Whether under Rule 6 of the 1956 Rule for the publication of book depicting certain historical facts coupled with social evils makes out a case of misconduct and for the publication of such book for a government servant, prior permission from the government is required under the Service Rules?

(2)Whether publication of a book by the government servant narrating the historical facts and other related matters criticizing castism or caste culture or social evils is permissible and protected by fundamental right of freedom of expression under Article 19 (1) (a) of the Constitution of India?

(3)Whether order of suspension may be passed for the charges which may not makes out a case for major penalty under U.P. Government Servant (Disciplinary and Appeal) Rules 1999?

(4)Whether the allegations on record and contents of the book make out a case to charge the petitioner for the misconduct on the basis of any statutory provision or law time being in force?

(5)Whether a person who has been charged for abuse of power, misappropriation of fund or facing CBI enquiry or misconduct in any other form can be appointed

as enquiry officer? In case such person is appointed as enquiry officer whether a charged employees has got the right to raise objection keeping in view the principle that justice should not only be done but appears to have been done?

The discussion made hereinabove along with other grounds raised in the present writ petition requires consideration by exercising power under Article 226 of the Constitution of India. It is a fit case for admission and interim relief.

In view of above, the writ petition is admitted.

Let notice be issued to opposite party no. 4 returnable at an early date.

Four week's time is allowed to the learned Standing counsel to file counter affidavit, one week thereafter for rejoinder affidavit.

Keeping in view the urgency in the matter, list this petition immediately after five weeks before appropriate Bench for peremptorily hearing.

Till further orders of this Court, the further operation of the impugned order of suspension dated 12th February, 2008, a copy of which has been annexed as annexure1 to the writ petition and the impugned order dated 19th February, 2007, a copy of which has been annexed as annexure11 to the writ petition shall remain stayed."

7. Hon"ble Supreme Court by an order dated 16.5.2008 in Special Leave to Appeal No. 12749 of 2008 stayed the interim order. Thereafter, their Lordships of Hon"ble Supreme Court in the aforesaid appeal on 25.8.2008 were pleased to direct that no final decision with regard to imposition of penalty shall take place until further orders. The order dated 25.8.2008 passed by their Lordship of Hon"ble Supreme Court is reproduced as under:

"Upon hearing counsel the Court made the following

O R D E R

Learned counsel for the petitioner seeks finally a week time to file rejoinder affidavit. List this matter for final disposal after two weeks.

The final decision imposing penalty, if any, shall not be passed until further orders."

8. Keeping in view the aforesaid interim order where right of the petitioner was safeguarded their Lordship had disposed of the the Special Leave Petition by an order dated 14.11.2008. The order dated 14.11.2008 passed by Hon"ble Supreme Court while finally deciding the Special Leave to appeal is reproduced as under:

"Upon hearing counsel the Court made the following

O R D E R

The respondent was placed under suspension pending departmental enquiry on

12.2.2008. the petitioner appointed an Enquiry Officer on 19.2.2008. The respondent filed W.P. No. 256/2008 challenging the order of suspension and for quashing the order appointing enquiry officer making various allegations about the suitability of the enquiry Officer. He also sought a direction to restrain the Enquiry officer from proceeding with the enquiry. The High Court, on 14.3.2008, while admitting the writ petition and ordering notice, stayed the orders of suspension dated 12.2.2008 and the order dated 19.2.2008 appointing the enquiry officer.

Feeling aggrieved, the State has filed this SLP. This Court on 16.5.2008, while issuing notice, granted interim stay of the impugned order dated 14.3.2008. Subsequently, on 25.8.2008 this Court directed that the enquiry if proceeded with, as a consequence of the interim order of stay by this Court, final decision imposing penalty shall not be passed until further orders.

The SLP is against the interim order of the High Court and that interim order has been modified by the orders of this Court dated 16.5.2008 and 25.8.2008. Writ petition is still pending. In the circumstances all that is required to be done is to dispose of this SLP with a request to the High Court to dispose of the Writ Petition expeditiously and pending such disposal, continue the interim direction that no final decision imposing any penalty shall be passed until the writ petition is disposed of.

We order accordingly and dispose of this SLP. The contentions of both parties are left open."

9. A plain reading of the judgement of Hon"ble Supreme Court shows that while disposing the SLP finally requested the High Court to decide the writ petition expeditiously and pending disposal of writ petition interim order passed by Hon"ble Supreme Court was to continue. The tenor of order of Hon"ble Supreme Court seems for disposal of writ petition on merit.

10. However, it appears that later on a Division Bench of this Court vide order dated 15.5.2009 disposed of the writ petition directing the respondents to conclude the enquiry in accordance to law expeditiously. A Division Bench found it not justifiable to interfere with the matter and left the entire controversy to be sorted out by enquiry.

11. It appears that Division Bench could not take note of the fact that writ petition was admitted and certain questions were framed (supra) and Hon"ble Supreme Court had virtually maintained the interim order to some extent with request to High Court to decide the writ petition but it appears that attention of the court could not be invited to the fact that admitted petition ordinarily should be adjudicated on merit more so when Hon"ble Supreme Court had protected the petitioner's right by maintaining the interim order to some extent. Relevant portion of the order dated 15.5.2009 passed by the Division Bench is reproduced as under:

".....We do not think that this case comes in that category of very rare and exceptional cases. We see no reason that the two judges of this Division Bench should waste time to adjudicate the matter, which should be adjudicated by the Enquiry Officer and thereafter, by the Disciplinary Authority.

In these circumstances, we dispose of the writ petition finally directing that the proceedings before the Enquiry Officer will commence afresh from the stage the chargesheet was given to the petitioner.

The petitioner will have two weeks" time from today to file his reply to the chargesheet before the Enquiry Officer and thereafter, the enquiry will proceed in accordance with rules and laws.

So far as the payment of salary and the question of suspension are concerned, we had already passed a detailed order on 08.05.2009 on a miscellaneous application of the petitioner seeking modification of interim order and seeking payment of full salary instead of merely subsistence allowance. That order will also form a part of this order.

In view of the above, the writ petition is disposed of finally."

12. An application was moved by the petitioner for modification of judgement and order dated 15.5.2009. That too was rejected by the Division Bench of this Court vide order dated 8.5.2009 and it appears that this time attention to the order passed by the Hon"ble Supreme Court was drawn and the court held that stay order passed by the Hon"ble Supreme Court stood vacated and for any interpretation or clarification petitioner should approach Hon"ble Supreme Court. The operative portion of the 8.5.2009 is reproduced as under:

....The petitioner contends that by the aforesaid direction both the Supreme Court orders dated 16.5.2008 and 25.8.2008 have been vacated and substituted by the direction restraining taken of final decision. On the other hand the contention of the State is that the orders dated 16.5.2008 and 25.8.2008 have been maintained by the Supreme Court in the order dated 1432008, the Inquiry Officer could not proceed and therefore there could be no occasion for this Supreme Court to restrain passing of final orders in the disciplinary proceedings.

The matter basically calls for interpretation/clarification of the direction of the Supreme Court. This in normal course should be sought form the Supreme Court itself. Thereafter, leaving that remedy open to the petitioner, we decline to clarify the order of this Supreme Court and to decide to virtually clarify the order of the Supreme Court at our level. Consequently we decline to issue any direction for payment of full salary. We have no reason to doubt that if a clarification is given by the Supreme Court the State will abide by the same in letter and spirit.

In the circumstances, the application for modification is rejected."

13. It appears that disciplinary proceeding against the petitioner was concluded and by an order dated 5.8.2008 the Government called on the petitioner to

submit his reply to the enquiry report and the show cause notice keeping in view the provision contained in Rule 9 (4) of the 1999 Rules. After receipt of copy of the enquiry report through the notice dated 15.8.2008 the petitioner has submitted his reply vide his letter dated 2.9.2008, a copy of which has been filed as Annexure20 to the writ petition and stated that enquiry was not concluded in accordance with law and no misconduct is made out. It appears that after receipt of petitioner's reply, opinion was sought from learned Chief Standing counsel of the High Court who opined that the enquiry officer had not acted in accordance with law, hence, it should be held afresh. A report of enquiry officer dated 15.7.2008 was found to be violative of principle of natural justice. A decision was taken keeping in view the office note dated 27.4.2009. A decision was taken to proceed a fresh against the petitioner with approval of the Chief Minister of the State. It shall be appropriate to reproduce the note with regard to approval granted by the Chief Minister of the State, which is as under:

14. By an order dated 1.5.2009 (Annexure26) Shri Vijay Shanker Pandey, I.A.S. was appointed enquiry officer to proceed afresh against the petitioner. When the letter dated 1.5.2009 was served on the petitioner, the petitioner had submitted a reply dated 28.5.2009 to the enquiry officer through Sri Vijay Shanker Pandey (enquiry officer) and stated that even from admitted fact on record it is not a case of misconduct, hence, enquiry may be dropped. Alternatively, the petitioner stated that he may be compulsory retired under Fundamental Rules 56 of the Financial Handbook along with all service benefits. The petitioner also stated that the decision taken to hold fresh enquiry is not by competent person and in view of Full Bench judgement of this court (supra) the respondents have no right to proceed against the petitioner. It shall be appropriate to reproduce relevant portion of the application dated 28.5.2009, which is as under:

15. It appears that later on Shri Vijay Shanker Pandey was replaced by Shri Alok Ranjan Principal Secretary, Urban Development and Environment Department by order dated 1.5.2009. Appointment of Shri Alok Ranjan as enquiry officer was done and following order was passed which is on record :

16. In continuance of earlier representation dated 28.5.2009, the petitioner had submitted a reminder dated 5.10.2009 with the prayer that period of three months have been lapsed, hence, prayer for voluntary retirement should be accepted in view of fundamental right 56(Ga) and he may be paid all retiral dues. Petitioner had also submitted a representation to the Governor of the State for voluntary retirement and also stated that no case of misconduct is made out against him. The representation dated 21.10.2009 has been filed as Annexure38 to the writ petition.

While sending the letter dated 5.10.2009 the subject mentioned therein is that prayer for voluntary retirement made vide representation dated 28.5.2009 (supra) may be accepted and petitioner be relieved from service with consequential benefit with regard to payment of post retrial dues. Letter dated 5.10.2009 is reproduced as under:

"56(d) the period of such notice shall be three months

.....

(ii).....Provided further that such notice given by the government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the government servant shall be informed before the expiry of his notice that it has not been accepted."

1.1995 Supp.(1) Supreme Court Cases 726 (Paras 4 to 6) Union of India and others Vs. Sayed Muzaffir Mir.(page 4)

2.(1999) 4 Supreme Court Cases 293 (Paras 12,13,19), State of Haryana and others. Vs. S.K.Singhal (pages 810)

3.(2010) 3 SCC 290 (Paras, 33, 34, 35). Tek Chand Vs. Dile Ram. (Pages 1415)

Substantial Question of Law

17. It appears that after receipt of petitioner's letter dated 5.10.2009 government had passed the impugned order dated 16.12.2009 rejecting the petitioner's representation with regard to voluntary retirement, hence the present writ petition. The petitioner had while defending the cause in person raised three fold of argument;

(1) Firstly, no misconduct is made out, hence, State has no right to proceed against the petitioner. He also stated that entire action suffers from malice because of truth and exposure made in the book.

(2) Secondly, since no decision was taken within three months with regard to prayer for compulsory retirement a prayed vide letter dated 28.5.2009 petitioner shall deem to be retired under Fundamental Rule 56 (Ga) Part 2.

(3) Thirdly, from the perusal of original record perused by the Court which is noted in the order dated 19.8.2010 and the photostat filed with the writ petition, it is evident that Chief Minister had not signed at any place with regard to rejection of petitioner's representation by impugned order dated 16.12.2009 or initiation or continuance of disciplinary proceeding, hence entire action vitiates. Under Rules of Business, it is Chief Minister who is empowered to take a decision. Since, Chief Minister exercised delegated power of Governor under "Rules of Business" framed under Article 166 of the Constitution of India she cannot make further delegation and at least original decision taken must be under his/her own signature. Bureaucracy can only communicate such decision by issuing government order.

18. The petitioner had relied upon the cases reported in (1974) 2 SCC 831, Samsher Singh Vs. State of Punjab and another; 1995 Supp (1) SCC 76, Union of India and others Vs. Sayed Muzaffar Mir; (1999) 4 SCC 293, State of Haryana and others Vs. S..Singhal and (2001) 3 SCC 290, Tek Chand Vs. Dile Ram.

19. On behalf of the respondents learned Chief Standing counsel has relied upon the judgement of Hon''ble Supreme Court reported in Shamsheer Singh Vs. State of Punjab reported in (1974) 2 SCC 831.

Misconduct

20. The main thrust of the argument of petitioner is that no misconduct is made out under 1956 Regulation. It is also submitted that after Full Bench judgement, whereby notification issued under Section 95(1) of CrPC was set aside, nothing remains for adjudication by the respondents because of publication of book Jattiraj. It has also been submitted by the petitioner in person that Hon''ble Supreme Court had directed that no punishment order shall be passed unless Writ Petition No. 256 (SB) of 2008 is decided on merit. The tenor of the order of the Hon''ble Supreme Court was to decide the writ petition on merit adjudicating the questions framed at initial stage. It has also been submitted by the petitioner in person that Division Bench while relegating the matter to enquiry officer had acted against judicial propriety since, the writ petition was admitted and questions were framed for adjudication of dispute on merit. Submission is, in case, Division Bench admitted the writ petition to decide the issue on merit the other Division Bench has got no right to dismiss the writ petition without adjudicating the matter on merit remitting the case to the enquiry officer.

21. In a case reported in AIR 1959 SC 725, Kavalappara Kottarathil Kochunni Vs. State of Madras, Hon''ble Supreme Court observed that where there was a threat on the part of State to rely certain text by using coercive machinery under an Act it was sufficient infringement of fundamental right and gives right to seek relief under Article 226. High Court should not have dismissed the writ petition.

22. In a case reported in AIR 1965 SC 1150, Devilal Modi Vs. Sales Tax Officer, Ratlam and others, the Constitution Bench of Hon''ble Supreme Court observed that in case, a case is made out for exercise of extraordinary jurisdiction then that must be exercised. Relevant portion from the judgement of Devilal Modi (supra) is reproduced as under:

"There can be no doubt that the fundamental rights guaranteed to the citizens are a significant feature of our Constitution and the High Courts under Art. 226 are bound to protect these fundamental rights. There can also be no doubt that if a case is made out for the exercise of its jurisdiction under Art. 226 in support of a citizen's fundamental rights, the High Court will not hesitate to exercise that jurisdiction."

23. In AIR 1981 SC 1765, Jasbir Singh Dhillon Vs. Union of India, where at admission stage there was difference of opinion among two Hon''ble Judges. One had dismissed the petition in limine and other had issued rule NISI. Matter was referred to third Judge who also dismissed the petition in limine. Their Lordships held that the case should not have been dismissed in limine. High Court should have issued a rule and after hearing parties on question arose in the case should have decided it after final hearing. Matter was remitted back to High Court to

restore the petition for hearing a fresh on merit.

24. In AIR 1987 SC 1628, Radheshyam Dube Vs. The District Inspector of Schools and others, Hon''ble Supreme Court had set aside the order of High Court where the High Court had dismissed the writ petition without inviting counter affidavit controverting the allegations made in the writ petition. Their Lordship had remanded the matter to the High Court to decide petition on merit after exchange of affidavit.

25. In 1997 (11) SCC 635, Rajasthan Rajya Sahakari Bhoomi Vikas Bank Limited and another Vs. M.D. Omana (Ms) Hon''ble Supreme Court had set aside the order of High Court on the ground that when there has been elaborate discussion of conclusion that writ petition was maintainable matter should be heard by the appropriate Bench on merit keeping the writ petition maintainable.

26. In view of above, law seems to be settled that once the writ petition is admitted and a reasoned order is passed framing questions of law then petition may not be dismissed without recording a finding on merit on the basis of affidavits exchanged between the parties. In the present case, it appears that petitioner who appeared in person could not draw the attention of the court to the settled proposition of law (supra).

27. Submission made by petitioner in person seems to be arguable but judicial propriety and doctrine of finality requires that it should not be looked into since controversy with regard to misconduct is subject matter of dispute in Writ Petition No. 256 (SB) of 2008 which was dismissed and petitioner has got option to raise the issue before Hon''ble Supreme Court. In view of above, we decline to interfere on the ground that no misconduct is made out or in view of the order passed by the Hon''ble Supreme Court respondents have got no right to punish the petitioner.

Voluntary Retirement

28. Coming to the next limb of the argument advanced by the petitioner with regard to voluntary retirement. There appears to be no dispute that application dated 28.5.2009 was submitted to enquiry officer with regard to charges. Simultaneously an alternative prayer was made to accept the petitioner's prayer for voluntary retirement under Fundamental Rule 56 (Ga) on the ground that no misconduct is made out and entire action is nullity in law.

29. Rebutting the submission made by petitioner, learned Chief Standing counsel vehemently argued that application dated 28.5.2009 cannot be treated as an application for voluntary retirement under Fundamental Rules 56 (Ga) as it is not in a required format. Respondents had treated the application dated 21.10.2009 as an application for voluntary retirement, which has been rejected by the impugned order.

30. Submission made by the learned Standing counsel with regard to application dated 28.5.2009 though prima facie seems to be correct but when we come to

application dated 21.10.2009 (supra) it falsify the same. At the face of record, the application dated 21.10.2009 was moved as a reminder in continuance of application dated 28.5.2009. In any case, the application dated 21.10.2009 which is also not in any format may not be treated as application under Fundamental Rule 56 (GA). Literally it seems to be an application/reminder in continuance of representation dated 21.5.2009. In case, the State feels that the application dated 28.5.2009 was not in proper format under Fundamental Rules 56 (Ga) then no decision should have been taken adjudicating the application dated 21.10.2009 treating it to be filed under the Fundamental Rule 56 (ga).

31. The doctrine of approbate and reprobate seems to be well applicable in the present context which apply to the conduct of the parties. Once the State took a decision and accept the subsequent application which was reminder then it has no right to say that application dated 28.5.2009 was not maintainable for voluntary retirement.

32. In a case reported in AIR 1993 SC 352, R.N. Gosain Vs. Yashpal Dhir, Hon"ble Supreme court held as under:

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

33. The aforesaid view has been reiterated by Hon"ble Supreme Court in a case reported in 1998 (6) SCC 358, Babu Ram Vs. Indrapal Singh and 1998 (6) SCC 507 P.R.Deshpande Vs. Maruti Balram Haibatti.

34. In view of above, once State Government entertained the application dated 21.10.2009 as application for voluntary retirement which at the face of record is a reminder in continuance of earlier application dated 28.5.2009 then it lacks jurisdiction not to entertain/treat the alternative prayer made in representation dated 28.5.2009 as prayer for voluntary retirement. The application dated 21.10.2009 was moved in continuance of representation dated 28.5.2009, hence, it has got no independent existence to adjudicate the controversy. The Fundamental Rule 56 (d) (11) of the Financial Handbook provides that notice of voluntary retirement should be given on government servant shall come into effect only if it is accepted by appointing authority. It further provides that in case of contemplated disciplinary proceeding the government servant needs to inform that application has not been accepted. The period of notice shall be 3 months. For convenience Fundamental Rule 56 (C) is reproduced as under:

"2 (c) Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by

notice to the appointing authority voluntarily retire at any time after attaining the age of fortyfive* years or after he has completed qualifying service of twenty years.

4 (d) The period of such notice shall be three months:

Provided that

(i) any such Government servant may by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of fifty years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice, or as the case may be, for the period by which such notice falls short of three months, at the same rates at which he was drawing immediately before his retirement;

(ii) it shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of notice:

Provided further that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated, shall be effective only if it is accepted by the appointing authority, provided that in the case of a contemplated disciplinary proceeding the Government servant shall be informed before the expiry of his notice that it has not been accepted:

Provided also that the notice once given by a Government servant under clause (c) seeking voluntary retirement shall not be withdrawn by him except with the permission of the appointing authority.

5 (e) A retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules to every Government servant who retires or is required or allowed to retire under this rule.

Provided that where a Government servant who voluntarily retires or is allowed voluntarily to retire under this rule the appointing authority may allow him, for the purposes of pension and gratuity, if any, the benefit of additional service of five years or of such period as he would have served if he had continued till the ordinary date of his superannuation, whichever be less;

Explanation(1) The decision of the appointing authority under clause (c) to require the Government servant to retire as specified therein shall be taken if it appears to the said authority to be in the public interest, but nothing herein contained shall be construed to require any recital, in the order, of such decision having been taken in the public interest."

35. A combined reading of Fundamental Rule 56 shows that the period of notice shall be three months but government servant may by order of appointing authority or without such notice or by a shorter notice may retire forthwith at

any time after attaining the age of 55 years and after such retirement government servant shall be entitled for pay plus allowances, if any including the period of notice even if period is less than three months.

36. However, the government employee against whom disciplinary proceeding is pending or contemplated such notice shall be effective only if it is accepted by appointing authority and in the event of contemplated disciplinary proceeding the government servant shall be informed before the expiry of notice that it is not accepted. The proviso further provides that once a notice is given by a government servant under Clause D for voluntary retirement then shall not be withdrawn by him except with the permission of appointing authority.

37. The combined reading of Fundamental Rule 56 with regard to voluntary retirement reveals that once a person inform his or her wishes with regard to compulsory retirement by submitting a representation he or she shall not be entitled to withdrawn such notice or application except with the permission of appointing authority. Meaning thereby government has to inform its decision after receipt of notice or representation rejecting or accepting the prayer for voluntary retirement. There appears to be no redeeming clause in the provision but in case the government does not communicate the decision it shall deem to be accepted by the government and employee shall be entitled to be relieved from service with all service benefits provided under Rule.

38. Hon"ble Supreme Court in a case reported in 1977 (4) SCC 441, Dinesh Chandra Sangma Vs. State of Assam while dealing with paramateria provision in Rule 56 (C) of the Fundamental Rules held that in case the government servant seeks premature retirement the same does not require any acceptance and comes into affect on the completion of the notice period. The ratio of judgement of Dinesh (supra) has been followed in one another reported case in 1978(2) SCC 202, B.J.Shelet Vs. State of Gujarat and 1995 Supp (1) SCC 76, Union of India and others Vs. Syed Muzaffar Mir.

39. In a case reported in 1999 (4) SCC 293, State of Haryana Vs. S.K.Singhal their Lordship of Hon"ble Supreme Court had dealt with all the three categories provided under Rules regarding notice and reiterated the aforesaid principle and held that authority concern must pass positive order withholding permission to retire and must also communicate the same to the employee. It shall be appropriate to reproduce relevant portion from the case of S.K.Singhal (supra) which is as under:

"Thus form the aforesaid three decisions it is clear that if the right to voluntarily retirement is conferred in absolute terms as in Dinesh Chandra Sangma"s case by the relevant rules and there is no provision in Rules to withhold permission in certain contingencies the voluntary retirement comes into effect automatically on the expiry of the period specified in the notice. If, however, as in B.J.Shelat"s case and as in Sayed Muzaffar Mir"s case, the concerned authority is empowered to withhold permission to retire if certain conditions exist, viz. in case the

employee is under suspension or in case a departmental

inquiry is pending or is contemplated, the mere pendency of the suspension or departmental inquiry or its contemplation does not result in the notice of voluntary retirement not coming into effect on expiry of the period specified. What is further needed is that the concerned authority must pass a positive order withholding permission to retire and must also communicate the same to the employee as stated in B.J.Shelat's case and in Sayed Muzaffar Mir's case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that noncommunication of acceptance should be treated as amounting to withholding of permission."

40. In one another case reported in 2001 (3) SCC 290, Tek Chand Vs. Dile Ram again Hon"ble Supreme Court reiterated the aforesaid proposition of law and held that if the appointing authority does not refuse to grant permission for retirement before expiry of period specified in the notice, then the retirement sought for become effective from the date of expiry of said notice.

41. In view of above, in case, alternative prayer made in the letter dated 28.5.2009 treated as an application for voluntary retirement then the impugned order passed by the authority adjudicating the controversy under Fundamental Rules 56 (C) shall vitiate and petitioner shall deem to be retired. However, since, State had treated the letter dated 21.10.2009 as a letter under Fundamental Rule 56 (C) though it is a reminder and adjudicated the dispute rejecting the petitioner's prayer which seems to be not correct and sustainable under law. For the reasons discussed hereinabove it shall be appropriate that State should reconsider the issue keeping in view the observation made hereinabove and pass afresh order.

Purpose of Signature

42. The question of public importance raised and involved as to whether while exercising power under the "Rules of the Business" it is necessary to sign on the decision taken on record.

43. The purpose of signature is to authenticate action and establish that the decision has been taken by the competent authority. In case an order or decision is signed then there can not be any other interpretation except that the person who was made signature had applied his or her mind in the decision making process. No matter who communicated the order.

44. Making of signature on record also removed possible doubt as to who has taken the decision. Once a person signed on an order then it shall be binding and make accountable such person.

45. In Stroud's Judicial Dictionary of Word and Phrases, Seventh Edition, Volume 2 page 2545 the word "signature/signed" has been discussed and defined as under:

"Signed;Signature.Speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself or by his authority (R. v. Kent Justices L.R. And Q.B. 305), with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed. In Morton V. Copeland (16 C.B.. 535), Maule J., said., "Signature does not, necessarily, mean writing a person's Christian and surname, but any mark which identified it as the act of the party", but the reporter adds in a note, "provided it be proved or admitted to be genuine, and be the accustomed mode of signature of the party". Without more, "to sign" is not the same as "to subscribe"."

46. In Words and Phrases Permanent Edition Volume 39 published by West Publishing Co. page 365, the word "signature" has been described as under:

"...As defined by Bouvier, "signature" is understood as the art of putting down a man's name at the end of an instrument to attest its validity. Wade Vs. State, 2 S.W. 594, 22, Tex.App. 256.

The word "signature" is defined as the act of putting down a man's name at the end of an instrument to attest its validity, and writing, as words traced with a pen, or stamped, printed, engraved, or made legible by any other device. Smith v. Greenville County, 199 S.E. 416, 419, 188 S.C. 349."

47. Further in Words and Phrases (supra) purpose of requirement of signature has been described as under:

"Under statute respecting execution of Wills, a holograph will must be signed by the testator in such a manner as to make it manifest that the name is intended as a signature, and in absence of any affirmative evidence on face of the paper that it is intended as a signature, testator's name appearing at the commencement or in the body of the will is not a sufficient "signature". Hall v. Brigstocke, 58 S.E. 2D 529, 532, 190 Va. 459, 19 A.L.R. 2D 921.

Testator's name is not to be considered a "signature" to a will unless face of instrument discloses that it was intended as such and signature then is only an authentication as to so much of the writing as it was designed to authenticate. Fenton v. Davis, 47 S.E. 2N 372,376, 187 Vs. 463.

A "signature" consists both of the act of writing one's name and of intention thereby to finally authenticate the instrument. Lee Vs. Vaughan's Seed Store, 141 S.W. 496, 498, 101 Ark. 68, 37 L.r.A.N.S., 352; Kirkpatrick v. board of Canvassers, 44 S.E. 465, 468, 53 W.Vs. 275.

Name appearing on instrument is not considered as "signature" unless inserted or adopted with intent to authenticate the writing. Dorian Holding & Trading Corporation v. Brunswick Terminal & Ry. Securities Co., 245 N.Y.S. 410, 412, 230 App. Div. 514.

A signature, according to Greenleaf, consists both the act of writing the party's

name and of the intention of thereby finally authenticating the instrument. *Vines v. Clingfost*, 21 Ark. 309, 312; *Watson v. Pipes*, 32 Miss. 451, 466; *Board of Trustees Seventh St. Colored M.E. Church v. Campbell*, 21 So. 184, 187, 48 La. Ann. 1543; *Davis v. Sanders*, 19 S.E. 138, 139, 40 S.C. 507.

A "signature" is said to consist of two parts the act of writing the name, and the intention of thereby finally authenticating the instrument. This, however, relates to the signature of an individual to papers of a private nature, and, when its sufficiency is put to the test, he is estopped from denying that it is his signature by proof of the fact that he directed it to be written for him, and that it was done in his presence. From this proof the act and intent on his part are sufficiently made out. *Walker v. Mobley, Tex.*, 105 S.W. 61, 62, citing 2 Greenl. Ev. 674."

48. In Black's Law Dictionary, Ninth Edition, Bryan A. Garner Editor in Chief the word "signatory" has been defined as under:

Signatory (sign?toree), n. (1866) A person or entity that signs a document, personally or through an agent, and thereby becomes a party to an agreement . signatory, adj.

49. In ENCYCLOPAEDIC LAW LEXICON Volume 4, ASHOKA LAW HOUSE NEW DELHI (INDIA), 21ST CENTURY UNABRIDGED, the word "signature" has been defined as under:

Signature. No precise or exact definition of the word "signature" is given in the Indian Income Tax Act or in any other law. In the General Clauses Act also there is no exhaustive definition of the word. It only says what the word "signature" shall include. It includes the affixing of a mark. In India it is a common practice that when the executant of a document is illiterate he simply touches the pen wherewith some person signs his name for him. Reference in this connection may be made to page 972, para 1659, of Gour on the Law of Transfer. The signature made in this way is personal signature of the executant. It is his autograph. No question of agency arises in such a situation. *Commissioner of Agricultural Incometax, West Bengal Sri Keshab Chandra Mandal*, (1950) 18 ITR 569 at 582 (SC).

It is quite true that when signature by an agent is allowable the writing of the name of the principal by agent is considered as the signature of the principal himself. But this result only follows when it is allowable for the agent to sign the name of the principal. If on a construction of a statute signature by an agent is not found allowable then the writing of the name of the principal by the agent however clearly he may ave been authorised by the principal cannot be understood as the signature of the principal for the purposes of that statute. If a statute requires only personal signature of a person, which also includes a mark, the signature or the mark must be that of the man himself. There must be physical contact between that person and the signature or the mark put on the document. *Commissioner, Agricultural Incometax v. Keshav Chandra*, AIR 1950 SC 265 at 271 : 1950 SCJ 364 : 1950 SCR 435 : (1950) 18 ITR 569 : ILR (1951)

2 Cal 7."

50. In Wharton's Law Lexicon Fourteenth Edition, Universal Law Publishing Col. Pvt. Ltd the word "signature" and purpose of signature has been defined as under:

"Signature, a sign or mark impressed upon anything; a stamp, a mark; the name of a person written by himself either in full or by initials as regards his Christian name or names, and in full as regards his surname, or by initials only (In the goods of Blewitt, (1880) 5 P.D. 116), or by mark only, though he can write (Baker v. Denning, (1938) 8 Ad. & E. 94)

Signature is required to authenticate a will (see WILL), a deed after 1925 (Law of Property Act, 1925, s. 73), a guarantee and other documents mentioned in the Statute of Frauds (see FRAUDS, STATUTE OF), and a risk note within the meaning of the seventh section of the Railway and Canal Traffic Act, 1854 (see RISK NOTE). Pleadings must be signed by counsel if settled by him, and if not, by the solicitor or the party; R.S.C. 1883, Ord. XIX, r.4. No fee to counsel is allowed on taxation unless vouched by his signature. Ibid., Ord. LXV., r. 27, reg. 52.

Signmanual. 1. The royal signature. Sometimes required by statute as evidence of the authority of the sovereign, e.g., by the Jud. Act, 1925, s. 4 (2), replacing Jud. Act, 1873, s. 31, in reference to the transfer of a judge of the High Court from one division thereof to another. Towards the end of the reign of King George the Fourth, the royal signature was, in consequence of the king's illness, by 11 Geo, 4 & 1 Wm. 4, c. 23, authorized to be affixed for him by commission."

Rules of Business

51. Governor, State of U.P. in exercise of power conferred under Clause 2 and 3 of Article 166 of the Constitution has framed the U.P. Rules of Business 1975 (in short rule of business). Rule 1 of the Business Rule deals with the title, Rule 2 deals with definition of department and Rule 3 deals with disposal of business. Rule 5 deals with the power of Chief Minister, Finance Minister and other Ministers. Rule 8 deals with the submission of cases to the Chief Minister and Governor and Rule 10 deals with the responsibility of departmental Secretaries. Under Rule 11 power has been given to Chief Minister to permit or condone a departure from rules to the extent it deems necessary. It shall be appropriate to reproduce Rules of Business as under:

"The Uttar Pradesh Rules of Business, 1975

IN exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution of India, the Governor of Uttar Pradesh is pleased to make the following Rules, namely :

1. Short title. These Rules may be called the Uttar Pradesh Rules of Business, 1975.

2. Definition In these Rules "Department" means any of the Departments specified in the Business of Uttar Pradesh (Allocation) Rules, 1975.

3. Disposal of Business Subject to the provisions of these Rules in regard to consultation with other departments and submission of cases to the Chief Minister the cabinet and the Governor, all business allotted, to a department under the Business of U.P. (Allocation) Rules, 1975, shall be disposed of by or under the general or special direction of the Minister in charge.

4. InterDepartmental Consultations (1) When the subject to a case concerns more than one department, no order shall be issued until all such departments have concurred, or failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet.

Explanation ? Every case in which a decision, if taken in one department, is likely to affect the transaction of business allotted to another department, shall be deemed to be a case the subject of which concerns more than one department.

(2) Unless the case is full covered by powers to sanction expenditure or to appropriate or reappropriate funds, conferred by any general or special orders made by the Finance Department, no department shall, without the previous concurrence of the Finance Department, issue any orders which may

(a) involve any abandonment of revenue or involve any expenditure for which no provision has been made in the Appropriation Act;

(b) involve any grant of land or assignment of revenue or concession, grant lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession;

(c) relate to the number or grade of posts, or to the strength of a service, or to the pay or allowances of government servants or to any other conditions of their service having financial implications; or

(d) otherwise have a financial bearing whether involved expenditure or not;

Provided that no orders of the nature specified in clause (c) shall be issued in respect of the Finance Department without the previous concurrence of the Department of Personnel.

(5) The Law Department shall be consulted on :

(b) proposals for legislation;

(c) the making of rules and orders of a general character in the exercise of a statutory power conferred on the Government; and

(d) the preparation of contracts and assurances to be entered into by the Government.

(4) Unless the case is fully covered by a decision or advice previously given by

the Department of Personnel that Department shall be consulted on all matters involving

(a) the Determination of the methods of recruitment and conditions of service of general application to government servants in civil employment; and

(b) the interpretation of the existing orders of general application relating to such recruitment or conditions of service.

(5) Notwithstanding anything contained in subrules (1), (2) and (4), the Department incharge of a case may, while consulting any Department other than the Law Department and Finance Department, as required under these rules, set a time limit, which shall ordinarily not be less than two weeks, and if the comments of the Department consulted are not received within that timelimit, the Department incharge of the case may presume that the Department consulted has no comments to offer or no views to express. It may thereupon recall its file from the Department consulted and take its own decision accordingly, except where these rules require the concurrence of the Department consulted.

(6) For the removal of doubts, it is hereby declared that the mere fact that the advice of any other Department is sought should not mean that its consent is necessary, and the Department seeking advice may take its own decision according to these rules while differing from the Department consulted.

(5) Request for Papers (1) The Chief Minister may call for papers from any department.

(2) The Finance Minister may call for papers from any department in which financial consideration is involved.

(3) Any Minister may ask to see papers in any other department if they are related to or required for the consideration of any case before him.

(4) (a) The Cabinet Secretary/Chief Secretary may, on the orders of the Chief Minister or of any Minister or of his own motion, ask to see papers relating to any case in any Department and any such request by him shall be complied with by the Secretary of the Department concerned.

(b) The Cabinet Secretary/Chief Secretary may, after examination of the case, submit it for the orders of the Ministerincharge or of the Chief Minister through the Ministerincharge.

(6) Committee of Cabinet (1) Ad hoc Committees of Ministers may be appointed by the Cabinet or by the Chief Minister for investigating and reporting to the Cabinet on such matters as may be specified, and, if so authorized by the Cabinet, for taking decision on such matters.

(2) Any decision taken by an Ad hoc Committee may be reviewed by the Cabinet.

(3) No case which concerns more than one department shall be brought before

an Ad hoc Committee of the Cabinet until all the departments concerned have been consulted.

7. Submission of cases to the Cabinet All cases specified in the First Schedule to these Rules shall be brought before the Cabinet :

Provided that no case which concerns more than one department shall, save in cases of urgency, be brought before the Cabinet until all the departments concerned have been consulted.

8. Submission of cases to the Chief Minister and the Governor All cases of the nature specified in the Second Schedule to these Rules shall, before the issue of orders thereon, be submitted to the Chief Minister or to the Governor or to the Chief Minister and the Governor as indicated therein.

9. Submission of periodical returns to the Cabinet Each department shall submit to the Cabinet a periodical summary of its principal activities and such other periodical returns, as the Cabinet or the Chief Minister may from time to time require.

10. Responsibility of Departmental Secretaries In each department, the Secretary (which term includes a Special Secretary or Joint Secretary, if any, in independent charge) shall be the administrative head thereof, and shall be responsible for the proper transaction of business and the careful observance of these rules in that department and if he considers that there has been material departure from them he shall personally bring the matter to the notice of the Minister in charge and Chief Secretary. To determine the working as above in the Chief Minister Secretariat, the Principal Secretary/Secretary, Chief Minister will be responsible.

11. Departure from Rules The Chief Minister may, in any case or classes of cases permit or condone a departure from these rules to the extent he deems necessary.

12. Supplementary Instructions These Rules may to such extent as may be necessary be supplemented by Instructions to be issued by the Governor on the advice of the Chief Minister.

13. (1) The Uttar Pradesh Rules of Business, 1955 are hereby rescinded except as respects things done or omitted to be done thereunder.

(2) Notwithstanding such recession, the U.P. Secretariat Instructions, 1955 shall, until rescinded or amended by instructions issued under rule 12 of these rules continue in force as if they were issued under the said rule 12."

52. The second schedule contains the various items which are to be placed before the Chief Minister or the Governor. Relevant provision relating to present controversy are reproduced as under:

"THE SECOND SCHEDULE

(Rule 8)

Cases to be submitted to the Chief Minister and/or the Governor

Serial Nature of cases Authority to whom

no. To be submitted

1. Proposal for the grant of pardons, reprieves The Chief Minister
respites or remissions of punishment or for and the Governor
the suspension, remission or commutation
of a sentence in pursuance of Article 161 of
the Constitution or sections 432 and 433 of
the Code of Criminal Procedure 1973 except
cases of suspension or remission or sentence
for a period not exceeding two months at a time
and one year in the aggregate.

.....

.....

13. Excluding the gazetted officers of class II, proposals The Chief
For the dismissal, removal, reduction in rank, suspens Minister
ion or compulsory retirement of any gazetted officer
belonging to a State Service or of higher status.

14. Proposals for the appointment confirmation (wherever The Chief
Applicable) and posting (whether applicable) of the Minister
following officers :

(a) Secretaries, Special Secretaries and Joint Secretaries
of Departments of Government.

(b) Heads of Departments, Members of the Board of
Revenue and Commissioners including those
holding charge as such in stop gap arrangement.

(c) Special Offices (e.g. Food Commissioner, Planning
Officer etc.)

(d) District Judges.

(e) Additional and Deputy Inspectors General of Police.

(f) Deputy Commissioners or Collectors, Additional Commissioners and Deputy Development Commissioners

(g) Superintendent of Police.

14A Creation of posts carrying pay scales, the maximum of The Chief Which exceeds Rs. 2,500 per month, after clearance being Minister Given by the Finance Minister.

.....

18. Any proposals for the institution of a prosecution by The Chief Government against the advice tendered by the Law Minister Department.

19. Any departure from these Rules which comes to the The Chief notice of the Chief Secretary or the Secretary of any Minister Department"

53. A plain reading of Rules of Business shows that matter with regard to dismissal, removal, reduction in rank, suspension or compulsory retirement of any gazetted officer belonging to a State Service or of higher status shall be submitted to Chief Minister of the State. Thus, under the Rules of Business a decision is to be taken by the Chief Minister with regard to higher officers of State services or higher status.

54. The Rule shows that records shall be submitted to the Chief Minister to take a decision. Submission means for effective decision with due application of mind by the Chief Minister himself and not by the subordinates.

55. The Rules of Business laid down who has to take what decision with regard to subject matter. Usually, these rules enable the Minister in charge of a department to dispose of cases coming before him. Under Rules of Business Minister is also authorized to make standing orders, and to give such direction as he thinks fit for disposal of cases. All these are done on behalf of governor of the state in pursuance to Rules of Business.

56. Article 154 and 166 regulate the working of the state executive. Article 166 relates to conduct of the business of the State Government and is couched in terms similar to those in Article 77. The executive power of the State is vested in the Governor who exercises it either directly or through officers subordinate to him in accordance with the Constitution. Parliament or the State legislature may

confer by law functions on any authority subordinate to the Governor under Article 154(2) (b). Governor empowers to make rule for the more convenient transaction of the business of the State Government under Article 166 (3) of the Constitution of India. Under the Rules of Business, the government business is divided amongst the Ministers as well as Chief Minister and specific functions are allotted to different Ministers. Thus, every executive action of the state government is expressed to be taken in the name of Governor under Article 166 (1) of the Constitution of India. Article 166 prescribed the mode in which an executive action has to be expressed. The orders and instruments made and the executed in the Governor's name rather to be authenticated in such a manner as may be specified in the Rules of Business made by the government. For convenience Article 166 of the constitution of India is reproduced as under:

"Article 166 of the Constitution of India. Conduct of business of the Government of a State

(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instruction which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion"

57. Privy Council in a case reported in A.I.R. (32) 1945 Privy Council 156, Emperor Vs. Sibnath Banerji and others, while considering the case under Government of India Act 1935 with regard to preventive detention observed that under Rules of Business framed by the Governor question of detention is to be transacted by Home Department. The instrument on behalf of the Government to be expressed to be made by or by order of the Governor of Bengal and in the case of special authorization every order or instrument of government of Bengal is to be signed by Secretary or other secretaries. Such signature made by the competent authority are to be deemed to be proper authentication of such orders or instruments.

Thus Privy Council ruled that making of signature by the authorized person shall be sufficient proof with regard to authentication of order or instrument.

58. Hon'ble Supreme Court in a case reported in AIR 1955 SC 160, P. Joseph John Vs. TravancoreCochin while relying upon the judgment reported in AIR 1952 SC 181, Dattatreya Moreshwar Pangarkar Vs. State of Bombay and others, while interpreting Article 166 held that what necessary is to see whether there has

been substantial compliance with those requirement, order of dismissal passed against the employee under Article 311 held to be valid but their Lordship on the ground that notice was signed by the Chief Secretary of the State expressed to be on behalf of government with due opportunity to the petitioner to show cause against the action proposed. The petitioner accepted notice and submitted a response. The Chief Secretary was empowered under the Business Rule. Their Lordship take note of the fact that the decision was taken by the Council of Ministers and Raj Pramukh was having intimation of the decision and duly approved by him.

59. In AIR 1959 SC 65, Messrs. Ghaio Mal and sons Vs. /State of Delhi and others, the question cropped up before Hon''ble Supreme Court was whether in the absence of any concurrence from Chief Minister under the Business Rule licence could have been granted. Their Lordship held that since, from the record, it does not transpire that the Chief Commissioner had made initial or signed with regard to grant of licence it shall not be valid action on the part of state. It cannot be treated as an order properly authenticated to which the presumption raised under Article 166 of the Constitution will attach. To reproduce relevant portion from the case of Messrs Ghaio Mal and sons:

"The records, including the documents now produced before us, do not show that the applications had ever been placed before the Chief Commissioner. There is nothing in the files showing any order or note on the subject made or signed or initialled by the Chief Commissioner. What transpires is that the Excise Commissioner (respondent No.3) had by his letter dated August 31, 1954, recorded the reasons why the appellants' applications could not be entertained, one of the reasons being that they had no premises in the Connaught Place area in New Delhi, that a note was then put up by the Under Secretary, Finance, on September 3, 1954, suggesting that the appellants' application should be rejected, if for nothing else, for their not having any premises in New Delhi (which according to the appellants was not a correct statement in view of their letters referred to above) and that the L2 license should be granted to Messrs. Gaiinda Mall Hem Raj, that the Chief Minister on September 14, 1954, made an order on the file accordingly and finally that the Under Secretary, Finance, wrote the letter "dated December 14, 1954, to the Excise Commissioner intimating that the Chief Commissioner had been pleased to approve the grant of the license to Messrs. Gaiinda Mall Hem Raj.

11. In the view we have taken it is not necessary for us to consider whether the action taken under the Excise Act and the rules thereunder was a judicial or an executive action, for even if it were of the latter category the letter of December 14, 1954, cannot be treated as an order properly authenticated to which the presumption raised by Art. 166 of the Constitution will attach."

60. The Constitution Bench of Hon''ble Supreme Court in a case reported in AIR 1961 SC 221, State of Bihar Vs. Rani Sonabati Kumari, accepted the submission made by counsel that Article 166 (2) indicated the manner in which a previously

made order should be embodied. Their Lordship further observed that it is the essence of rule of law that every authority within the state including executive government should bound by and obey the law. Their Lordship observed that disobedience should not be unchecked during continuance of order of court shall be bad in law and dismiss the appeal filed by the State of Bihar. It shall be appropriate to reproduce relevant portion from the judgement of Rani Sonabati Kumari (supra) which is as under:

"The submission of learned Counsel is correct to this extent that the process of making an order precedes and is different from the expression of it, and that while Art. 166(1) merely prescribes how orders are to be made, the authentication referred to in Art. 166(2) indicates the manner in which a previously made order should be embodied. As observed by the Privy Council in *King Emperor v. Sibnath Banerji* (1) with reference to the term "executive power" in Ch. 2 of Part 3 of the Government of India Act, 1935, corresponding to Part VI, Ch. 11 of the Constitution) "the term "executive" is used in the broader sense as including both a decision as to action and the carrying out of the

decision".

61. In a case reported in AIR 1963 SC 395, *Bachhitar Singh Vs. State of Punjab* the constitution bench of Hon'ble Supreme Court held that to make an opinion amount to decision of the government it should be communicated to person concerned. It has been further held that unless advice of the State has been accepted by the Governor the particular matter does not become the action of the State. Their Lordship further held that Chief Minister will have been within his right to call up the file of his own accord and passed order thereon. Chief Minister may pass appropriate order in a matter by calling any file to be dealt with himself. However, from the judgement of *Bachhitar Singh* (supra) it is obvious that Chief Minister have to apply mind in the decision making process under his own signature to make it an order of Chief Minister.

62. In a case reported in AIR 1967 SC 1145, *M/s Bijoya Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and others*, after considering the Rules of Business and standing order their Lordship of Hon'ble Supreme Court affirmed the judgement of High Court while interpreting Article 166 (2) to the effect that what the authentication makes conclusive under Article 166(2) is that order is made by the Governor. However, Hon'ble Supreme court ruled that whether governor has acted in accordance with law remains open for adjudication by judicial review.

63. In a case reported in AIR 1970 SC 1102, *A. Sanjeevi Naidu etc. Vs. State of Madras*, a Constitution Bench of Hon'ble Supreme Court observed that in every wellplanned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Council of Ministers settle the major policies and programmes of the Government and when a civil servant take a decision, it does not do it as a delegate of the Minister. He does it on behalf of the government. It is always open to a Minister to call for any

file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of government business generally or as regards any specific case. Subject to that over all power, the officers designated by the "Rules" or the standing orders, can take decisions on behalf of the government. These officers are the limbs of the government and not its delegates. (para 12).

64. In AIR 1973 SC 563, *Fonseca (P.) Ltd. Vs. L.C. Gupta*, where an order was passed by officer not authorized by the Rules of Business was held by Hon"ble Supreme Court to be invalid order. Hon"ble Supreme Court proceeded to observe as under:

"It is the Central Government alone that is empowered to make an order under that Rule and under the Rules of Business it would be the Minister or the Officer empowered thereby who alone could exercise those powers in the name of the President. Shri L. C. Gupta admittedly having no such power the order made by him was wholly illegal, ineffective and void. Such an order on the face of it deserved to be quashed and ought to have been quashed on that ground alone by the High Court without deciding the other points some of which are sub judice in proceedings under Act 40 of 1971."

65. In one another case reported in AIR 1975 SC 1755, *Union of India and others Vs. Sri Pati Ranjan* Hon"ble Supreme Court had reiterated the aforesaid proposition and observed as under:

"The decision of any Minister or Officer under Rules of Business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the Rules of Business is the decision of the President or the Governor."

66. The aforesaid proposition of law has been reiterated by Hon"ble Supreme Court in a case reported in AIR 1974 SC 2192, *Samsher Singh Vs. State of Punjab* (para 48).

67. In a case reported in AIR 1975 Delhi 221, *Shori Lal Jain Vs. Lt. Governor Delhi and others*, Delhi High Court ruled that under Rules of Business where power has been conferred to Lt. Governor he has to be satisfied while authenticating the notification made with his approval.

68. What will be the effect of signature made by a person authorized under the Rules of Business has been considered by Hon"ble Supreme Court in the case reported in AIR 1996 SC 765, *State of Madhya Pradesh and others Vs. Dr. Yashwant Trimbak*, Hon"ble Supreme Court held that once an order is authenticated under Rules of Business and duly signed by the officer empowered under rule signifies the consent of Governor as well as acceptance of advice rendered. For convenience relevant portion from the judgement of *Yashwant Trimbak* (supra) is reproduced as under:

"Coming to the first question, from a bare look at the order which was served on the respondent, it is implicitly clear that the said order has been executed in the name of the Governor and has been duly authenticated by the signature of the Under Secretary to the Government and therefore the bar to judicial enquiry with regard to the validity of such order engrafted in Article 166(2) of the Constitution will be attracted. The order which is expressed in the name of the Governor and is duly authenticated cannot be questioned in any court on the ground that it is not made or executed by the Governor. The signature of the concerned Secretary or Under Secretary who is authorised under the authentication rules to sign the document signifies the consent of the Governor as well as the acceptance of the advice rendered by the concerned Minister."

69. A plain reading of the observation made by the Hon^{ble} Supreme Court shows that person authorised under the Rules of Business in case made signature over the order in record it shall amount to due authentication of the order by the competent authority. In the present case, though under the Rules of Business, Chief Minister is authorized but she has not made her signature over the order.

70. In a case reported in 2004 (13) SCC 788=2003 AIR (SCW) 7269, Tafcon Projects (I) Pvt. Ltd. Vs. Union of India and others, Hon^{ble} Supreme Court observed that where on the relevant file Minister has signed the various notice put up before him seeking his approval his signature without mode must mean that he has approved the steps taken by department (para 13).

71. Kerala High Court in a case reported in AIR 1970 Ker 252, P.K.Kunju Vs. State of Kerala and others, was seized with the matter with regard to disciplinary action and relied upon the report of commission of enquiry. Kerala High Court held that the order to institute commission of enquiry was not in accordance to law as no order drawn up and signed by the Governor hence the finding of commission was set aside. The Division Bench of Kerala High Court held that even otherwise also under Rules of Business the proceeding must be validly signed or authenticated by the Chief Minister in the absence of authentication by Chief Minister empowered by the Rules of Business the report of the enquiry commission vitiates. Emphasis given by a Division Bench of Kerala High Court is that authentication must be done by the person concerned empowered under Rules of Business under his/her signature.

72. To sum up from the aforesaid various pronouncements of Supreme Court and other High Courts, the decision taken by the Minister or Secretary or Deputy Secretary on behalf of Governor empowered under Rules of Business shall be meet out the requirement of Article 166. The decision so taken with regard to administration or quasi judicial matter should be authenticated by the person concerned who is empowered under the Rules of the Business. In case any other person takes a decision not authorized under the Rules of Business then such decision may vitiate. Decision taken under Rules of Business by the competent person duly authenticated shall deem to be decision of the Government.

73. The requirement of Rule of Business is that authentication must be by the person to whom the Governor delegated power. The decision on the subject matter followed by authentication is to be done by the person authorized under Rules of Business. There is nothing in the Rules of Business which may empower the minister or secretary to run the government by oral instruction in the decision making process. Otherwise also in democratic country person holding public office is neither a king nor queen or a Taluquedar or the Zamindar. He or she is the public servant to serve in accordance to own ability and knowledge. Person holding office shall be accountable for his or her action and whenever a dispute arose or enquiry is held record must be maintained in such a manner so that there may not be any ambiguity as to who has taken a decision in reference to context.

74. In Law Lexicon The Encyclopaedic Law Dictionary by P.Ramanatha Aiyar page 170 the word "authenticate" and "authentication" have been defined as under:

"Authenticate. To give legal validity to; to establish the genuineness of; to make an authentication i.e. an attestation made by a proper officer by which he certifies that the record is in due form of law, and that the person who certified it is the officer appointed to do so[Ss. 21(4) and 21(10) I.P.C.]; [art 77(2), Const.]

"Authentication. In the law of evidence, the act or giving legal authenticity to record, or other written instrument. An attestation made by a proper officer by which he certified that a record is in due form of law, and that the person who certified it is the officer appointed so to do (Black)"

75. The word "decision" in the Law Lexicon (supra) has been discussed as under:

"A "decision" does not merely mean the "conclusion"it embraces within it's fold the reasons which form the basis for arriving at the conclusions. Mukhtion Singh Vs. State of Punjab, AIR 1995 SC 686, 690. (Criminal P.C.(2 of 1974), S.354 (1) (b))"

76. In the Black's Law Dictionary, Ninth Edition, Bryan A. Garner, the word "authenticate" and "authentication" has been defined as under:

"authenticate,vb 1. To prove the genuineness of (a thing). [Cases: Criminal Law44; Evidence366381.] 2. To render authoritative or authentic, as by attestation or other legal formality. See UCC 910 (a) (7).

authentication, n, (18c) 1.Broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence; the condition of being so proved [Cases: Criminal Law 444; Evidence366381.]

2.Specif., the assent to or adoptionn of a writing as one's own.

"The concept of authentication, although continually used by the courts without apparent difficulty, seems almost to defy precise definition. Some writers have construed the term very broadly, as does Wigmore when he states that" when a claim or offer involves impliedly or expressly any element of personal connection

with a corporeal object, that connection must be made to appear....." So defined, "authentication" is not only a necessary preliminary to the introduction of most writings in evidence, but also to the introduction of various other sorts of tangibles, "John W. Strong et al., McCormik on Evidence 218, at 350 (5th ed. 1999)(italic in original)"

77. The word "decision" in Black's Law Dictionary (supra) is defined as under:

"decision, n. (16c) 1. A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case , See judgement (1); Opinion (1)decisional, adj.

Thus, from the dictionary meaning also it reveals that for a person shall deemed to apply his mind, authenticated a document there should be signature of the person concerned. The word "authentication" impliedly require signature by the person authorised under rules or statutory provisions.

78. In Manual of Government Orders Uttar Pradesh Edition 1981 Para 1079 State government deprecated the practice of senior officers and personal staff and minister to give verbal orders to their subordinates for their compliance. To check any possible abuse it was brought that every order shall require confirmation in writing. To reproduce the Manual of government orders:

"MANUAL OF GOVERNMENT ORDERS

UTTAR PRADESH

EDITION 1981

PARA 1079 Regulation of verbal orders given by the senior officers to their subordinates A practice has grown up in which senior officers and personal staffs to the Ministers give verbal orders to their subordinates for compliance. To regularize this position it has been decided that the subordinate concerned will obtain confirmation in writing of such orders as soon as he receives them from the higher authority. If for certain reasons it is not possible to do so at that time, confirmation of the orders should be obtained soon after their compliance.

G. O. no.9/5/78. Karmik¹ dated December 4, 1978"

79. In the case of Godavari Vs. State of Maharashtra reported in AIR 1964 SC 1128 their Lordship held that even duly authenticated order can be questioned on the ground that it was not made by officer duly authorised under the Allocation Rules of Business.

80. The case of Emperor Vs. Sibnath Bannerji (supra) is instructive where in the matter of preventive detention of certain persons it was recorded that "whereas the Governor is satisfied". Privy Council held that condition precedent to the making of valid order of detention i.e. satisfaction of persons authorized to make such order should be looked into. Privy Council found that though the detention

order signed by competent authority to do so under Rules of Business but since, authority had made the order in routine manner and not applied its mind and acted mechanically on the recommendation of police without considering the material before it to satisfy himself independent of Police regulation the condition precedent with regard to satisfaction of authority making order deem to has not been fulfilled.

81. It is settled law that right to live and livelihood are fundamental rights vide *Maneka Gandhi Vs. U.O.I.* AIR 1978 SC 597: 1978 (2) SCR 621: (1978) 1 SCC 248 and *Board of Trustees of the Port of Bombay Vs. Dilip Kumar Raghavendranath Nadkarni*, AIR 1983 SC 109: 1983 (1) SCR 828: (1983) 1 SCC 124 and (2003)6 SCC 1 *Kapila Hingorani versus State of Bihar*, AIR 1991 SC 1902 *Bangalore Medical Trust versus M.S. Muddappa and others*, 2001 Vol. 6 SCC 496 *Hinch Lal Tiwari versus Kamala Devi*, AIR 2007 SC 1046 *Milkman Colony Vikas Samiti versus State of Rajasthan and others* and 2006 Vol. 13 SCC 382 *Nagar Nigam versus A1 Faheem Meat Export (P) Limited*.

82. A person cannot be deprived from right to live and livelihood arbitrarily without application of mind. Meaning thereby authority authorised under Rules of Business under Article 166 (2) must apply his own mind before authenticating a document. Direction issued without applying mind in a matter where citizens fundamental rights guaranteed under Chapter III of the Constitutions is affected shall be hit by Article 14 and 21 of the Constitution of India.

83. While discharging administrative obligations it was under the common law whereby State was coupled with the power to discharge its duty under oral instruction. During colonial rule also substantial administrative functions were discharged by oral instruction which seems to be antithesis of rule of law in a democratic country.

In the Official Solicitor's Application (on behalf of N and R) for Judicial Review reported in (2005) NIQB 75 it was observed that term direction is perhaps more properly reserved for purely executive instructions. It is meant to issue general instruction in public interest (Bennion on Statutory Interpretation, Fifth Edition).

84. Meaning thereby, oral instruction may be issued in public interest which may not affect constitutionally or statutorily protected individual or public right. In any case, if it is issued, then in terms of government order, it requires immediate ratification in writing by the competent authority.

85. There cannot be in certainty in a system. An order passed in writing or authenticated by the competent authority by making endorsement or putting his or her signature is the element of certainty and makes a person accountable for his or her action. In the event of enquiry or investigation for allegation with regard to abuse of power, the authority who is empowered to discharge duty as the limb of government will have no defence to disown his/her conduct in case order is duly signed.

86. With regard to certainty in the administration Lord Denning in 1961, in a case reported in 1996 4 All ER 523, Percy V. Hall observed as under:

"I can well understand that a byelaw will be held void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. But, if the uncertainty stems only from the fact that the words of the byelaw are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather than unreasonable and invalid...I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or put up with them."

87. In case in the matter of Chief Minister the (Business Rule is interpreted) in such a manner which may permit him to take a decision orally then other limb of the government empowered under the Rules of Business will also be authorised to do so and this will negate the rule of law.

88. Hon"ble Supreme Court in the case reported in AIR 1975 Supreme Court 2299: Smt. Indira Nehru Gandhi Vs. Raj Narain, has defined the Rule of law as under:

"205. Rule of Law postulates that the decisions should be made by the application of known principles and rules and in general such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is not predictable and such decision is the antithesis of a decision taken in accordance with the rule of law."

90. In view of above, communication of an order orally without any endorsement in his or her own handwriting in form of signature or otherwise by a person authorise under the Rules of Business shall neither be lawful nor just and proper.

91. From time to time Hon"ble Supreme Court observed that the law always frowns on uncanalised and unfettered discretion conferred on any instrumentality of the State. The constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines is antithesis of rule of law. When a statute vests unguided and unrestricted power in an authority to affect the right of a person without laying down any policy or principle which is to guide the authority in exercise of this power it will be affected by the vice of discrimination. Uncontrolled and unguided discretionary power is incompatible with Article 14 of the Constitution. One is the power controlled by law countenanced by the Constitution, the other falls outside the constitution. AIR 1987 SC 877, Sheo Nandan Paswan Vs. State of Bihar; AIR 2005 SC 4217, Ajit Kumar Nag Vs. GM (PJ) Indian Oil Corpn. Ltd.; AIR 1984 SC 1064/1071, Sudhir Chandra Vs. Tata Iron and Steel Co. Ltd.; 1978 (1) SCC 248, Maneka Gandhi Vs. Union of India AIR 1974 SC 555 E.P.Royappa Vs. State of Tamil Nadu, AIR 1988 SC 1089, B.B. Rajwanshi Vs. State of Uttar Pradesh, AIR 1983 SC 1235, Suman Gupta Vs. State

of Jammu and Kashmir, AIR 981 SC 1829, Air India Vs. Nergesh Meerza

92. A Division Bench of this Court of which one of us was a Member (Justice Devi Prasad Singh) in a case reported in 2010 (28) LCD 1248 Dhirendra Kumar Rai Vs. State of U.P. held that in India the principle of high authority is not applicable on account of moral devaluation in system. The Division Bench in the case of Dhirendra Kumar Rai (supra) had relied upon the various pronouncements of Hon"ble Supreme Court including AIR 1964 SC 72, S.Pratap Singh Vs. State of Punjab; AIR 1987 SC 294, Shivajirao Nilangekar Patil Vs. Dr. Mahesh Madhav Gosavi and others; 1997 (6) SCC 169, Shri Arvind Dattatraya Dhande Vs. State of Maharashtra and others and AIR 1991 SC 101, Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress.

93. In view of above, government is not expected to take a decision affecting fundamental rights of the citizens orally under the power conferred by Rules of Business. Adjudication of dispute or decision taken orally by expressing the wishes in reference to context is against the constitutional mandate and destructive of democratic polity.

FINDING

94. In view of above, the controversy involved in the present writ petition is sum up as under:

(I) Writ petition to the extent submission made by the petitioner that no misconduct is made out under U.P. Government Servant Conduct Rule 1956 is not maintainable in view of the fact that ground raised by the petitioner while assailing the disciplinary proceeding was subject matter for adjudication before this Court in the Writ Petition No. 256 (SB) of 2008.

(ii) Submission of State with regard to application dated 5.10.2009 moved by the petitioner treating it under Fundamental Rule 56 (ga) of the Financial Handbook seems to be not correct, rather it is an application in the form of reminder in continuance of objection filed with the enquiry report dated 28.5.2009 (supra) where alternative prayer was made for compulsory retirement. Accordingly, impugned order rejecting the application treating it as an application under Fundamental Rule 56 seems to be an incident of non application of mind.

(iii) Business Rule framed under Article 166 specify the jurisdiction conferred on various authorities of the State like Chief Minister, Minister, Secretaries on behalf of the Governor. Jurisdiction exercised under Rules of Business is not a delegated power but it is the decision of government made by authority conferred with power to adjudicate a dispute.

(iv) Unless an order or decision is authenticated by the competent authority in accordance to Rule of Business and keeping in view the letter and spirit of Article 166 (2) of the Constitution, decision so taken shall suffer from infirmity and illegality. It shall be necessary for the authority empowered under the Rules of Business while adjudicating a dispute or taking a decision or passing an order, to

authenticate such order or decision by making an endorsement or putting his or her signature.

(v) Oral instruction issued by a person authorized under the Rules of Business affecting citizen(s) fundamental right or public interest or financial matters it is an incident of nonapplication of mind hence not amount to authentication under Article 166 (2) of the Constitution. It shall be obligatory for the person authorized under Rules of Business to make endorsement by putting his or her signature over the order or decision taken with regard to subject matter involved.

(vi) Signature by the competent authority is the part and parcel of authentication of a document, order or decision taken under the Rules of Business. However, decision so taken may be communicated by an officer or authority subordinate to Chief Minister or Minister of the Department.

95. Hon'ble Supreme Court in *In re the Special Courts Bill, 1978*, reported in AIR 1979 SC 478: (1979) 1 SCC 380 the procedure must be "right and just and fair and not arbitrary, fanciful or oppressive otherwise it will be no procedure at all and the requirement of Article 21 would not be satisfied.

96. Administrative or statutory or the constitutional decision taken by the authorities empowered under Rules of Business to run the administration or the government requires certainty. Signature not only signifies that the person authorized under Rules of Business has applied his or her mind but also make such person accountable for his or her action. Chief Justice Hidayatullah in the case of *Golak Nath and others Vs. State of Punjab* and another reported in AIR 1967 SC 1643 had rightly cautioned, to quote:

"Small inroads lead to larger inroads and become as habitual as before our freedom was won. The history of freedom is not only how freedom is achieved, but how it is preserved."

97. Development of law to take administrative decision orally affecting the fundamental right or involving public exchequer is the reminiscence of the colonial past. In case Article 166 is interpreted loosely it will further deteriorate the administrative machinery in multiple ways. Person holding high public offices are supposed to invest some time to take a decision with full application of mind where citizens fundamental right is affected or matter relates to public interest or investment of fund from public exchequer.

98. In view of above, writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 16.12.2009 issued by the respondent no. 2, a copy of which has been filed as Annexure 1 to the writ petition, with consequential benefits.

A writ in the nature of mandamus is issued commanding the opposite parties to reconsider the petitioner's matter afresh keeping in view the observation made hereinabove expeditiously.

While delivering the judgment, it came to our notice that the services of the petitioner have been dismissed by an order dated 7.9.2010 which has been impugned in a writ petition number 1386 (SB) of 2010 and posted today as fresh matter.

Writ Petition No. 1386(SB) of 2010 has been admitted by this Court. Accordingly, benefit of present judgement is subject to final outcome of pending writ petition 1386(SB) of 2010.

We express our displeasure on state action in not informing the court with regard to order dated 7.9.2010 passed against the petitioner keeping in view the fact that the judgment in the present writ petition was reserved earlier.

Writ petition is allowed accordingly.

No order as to costs.