

(2009) 12 AHC CK 0229
In the Allahabad High Court

Shiv Prakash Shukla & Anr.

APPELLANT

Vs

Shashank Shekhar Singh and others

RESPONDENT

Date of Decision : 24-12-2009

Acts Referred:

Citation : (2009) 12 AHC CK 0229

Hon'ble Judges : Pradeep Kant, J and Shabihul Hasnain, J

Final Decision : Allowed

Judgement

Shabihul Hasnain, J.—Heard Sri Kailash Vasudeo, Sri Prashant Chandra Senior Advocate, Sri S.N. Shukla, for the petitioners and Shri Rakesh Dwivedi Senior Advocate and Sri Jai Deep Narain Mathur, Additional Advocate General for the State.

2. These two writ petitions, are filed in the nature of public interest litigation seeking a writ in the nature of quowarranto against Sri Shashank Shekhar Singh and to explain the authority under which he is holding the office of Cabinet Secretary in the Government of U.P. The aforesaid two writ petitions involve same question of fact and law which are being taken together.

3. The main crux of the petitions is that neither the Chief Minister nor the State Government has any power to create the post of Cabinet Secretary nor such a post finds mention in the cadre of IAS and for creation of such a post that too over and above the rank of the Chief Secretary, the State government was not having competence.

4. Further, if any post of Cabinet Secretary would be created or is created, if necessary, in the cadre of IAS, such post cannot be created by the State government unless the Central government approves for the same and no such approval having been taken or has been taken by the Central Government, it cannot be taken to be a validly created post.

5. It is the case of the petitioners that creating the post of Cabinet Secretary that too by giving him higher emoluments than the Chief Secretary and also making

him the head of the Secretariat in the presence of the Chief Secretary, alongwith conferment of the rank of the Cabinet Minister, is not only abuse of the power by the State Government but is also against the constitutional scheme of All India Services and the hierarchy in the services of the State as well as that of the Central Government, wherein a non IAS officer has been placed over and above the Chief Secretary which runs contrary to the scheme of administration in the State.

6. By making such an appointment the State Government had devised a parallel scheme of administration as against the one provided in the All India Services which is detrimental to the entire administration and governance of the State.

7. Notice has been accepted on behalf of Union of India and on behalf of State Government functionaries by their respective Standing counsel who have raised a preliminary objection regarding the maintainability of the writ petitions and submitted that before issuing notice to the private respondent for explaining the authority, the said objection may be decided, as the petitions are liable to be dismissed as threshold, even without issuing notice to the private respondent.

8. Counter affidavit has been filed by the Union of India, which in fact also questions the authority of the State Government and also of the Chief Minister to create a post of Cabinet Secretary and to appoint Sri Shashank Shekhar Singh on the said post who does not belong to the cadre of Indian Administrative Service (IAS) and is a State Government employee.

9. The State, however, has made an effort to defend the creation of the post of the Cabinet Secretary in the Government and also the appointment of respondent on the said post.

10. Though, we are of the view that unless notice is issued to the private respondent, the matter could not be decided either way but looking to the insistence of the learned counsel for the State we have proceeded to consider their objections which obviously have been raised for protecting the authority of the Cabinet Secretary (private respondent) and to defend the action of the State Government.

11. It may be put on record that though Sri Rakesh Dwivedi, learned Senior Advocate, appearing for the State and Sri Jai Deep Narain Mathur, learned Additional Advocate General, during the course of arguments submitted that whatever arguments have been advanced, though they may reflect upon the merits of the case but they should be taken to mean to have been advanced only in support of the preliminary objection that the writ petition is not maintainable and that if notices are issued to the private respondents, the matter could be decided on merits thereafter.

12. The resistance was, thus, by and on behalf of the State from issuing notice to the private respondent Shashank Shekhar Singh unless the court records prima facie satisfaction about the maintainability of the writ petition, though in a

writ of quowarranto, the holder of public office is to explain the authority.

13. Learned counsel for the State has argued the matter at a great length raising all possible pleas on the merits of the creation of the post and the appointment of the private respondent on the said post but we would consider those arguments only for the purpose of finding whether notice should be issued to the private respondent or not, as prayed by them.

14. The writ petitions are being said to be not maintainable mainly on the grounds:

(i) the issue raised and the relief claimed in fact relate to the "service matter" for which public interest litigation cannot be filed;

(ii) no writ petition in the nature of PIL can be filed seeking issuance of a writ of quo warranto;

(iii) a person in the cadre of service either of the State Government or Central Government can be said to be an aggrieved person, who would be free to challenge the appointment of Cabinet Secretary by bringing an independent writ petition;

(iv) appointment of Cabinet Secretary, lies within the domain of the Chief Minister/ State Government, which appointment has been made under the orders of the Governor by amending the Rules of Business, and the relevant instructions;

(v) the appointment on the post of Cabinet Secretary does not mean creation of any new post as the post of "Secretary to Cabinet" already stands created under the Rules of Business, which has now been named as Cabinet Secretary, therefore, there cannot be any challenge to appointment so made;

(vi) it is only for giving higher pay scale to the Cabinet Secretary than that of the Chief Secretary, the necessity arose for creation of post which has been done by the Governor;

(vii) the appointment of private respondent as Cabinet Secretary, who has been chosen by the Chief Minister, as per the provisions of Rules of Business (Instructions 82) the said appointment cannot be challenged on the ground that he is an officer of the State Government and not an officer of the I.A.S cadre which in no way causes any grievance to the members of the IAS.

15. Corollary to the aforesaid argument is, that the Cabinet Secretary is not a post of the Cadre of the IAS and, therefore, it cannot be said that the State Government has exceeded its jurisdiction or authority or as a matter of fact made an appointment which could not have been made without approval of the Central Government, which approval is only required, if an appointment is to be made on a post which is created in the IAS Cadre or is an addition thereto.

16. The petitioner Sri Shiv Prakash Shukla, in Writ Petition No. 86 (MB) of 2008 is an Advocate, therefore, a plea has also been taken that a lawyer is not

supposed to enter into litigation in the shape of PIL, and therefore, also his petition is not maintainable.

17. The other Writ Petition No. 1713 (MB) of 2008 has been filed by an association known as Lok Prahari which is a society registered under Societies Registration Act. Most of the members of the petitioner society are retired senior civil servants and they are thus terribly concerned with the governance in general and administration, in particular, in the State and are committed to uphold the Constitution and enforcement of Rule of Law. The resolution which authorizes the petitioner Society to file the writ petition in the nature of PIL reads as under:

"The appointment of a nonCadre officer as the Cabinet Secretary and making him the official head of the state secretariat is not only against the concept and rationale of All India Services but has far reaching implications in terms of politicization of Civil Services and bringing in the American spoils system which is unthinkable in Parliament democracy in which neutrality of permanent civil services is essential. Therefore, resolved that a PIL be filed challenging the appointment of Cabinet Secretary and the illegal amendments in the Rules of Business and Secretariat Instructions."

18. A further plea has been raised that one Writ Petition No. 129 (SB) of 2008 in re: Charan Singh vs State of U.P. challenging the same appointment and asking for a issuance writ of quowarranto against the same private respondent has been dismissed summarily by a Division Bench of this Court (Hon"ble U.K. Dhaon and Hon"ble Justice Devi Prasad Singh, JJ,) on 25.1.2008, therefore, the present writ petition is also barred by principle of resjudicata and is not maintainable, on the same cause of action, as successive writ petitions are not maintainable even by different persons.

19. So far the dismissal of the aforesaid writ petition by a Division Bench having Service Bench jurisdiction is concerned, suffice it would be to mention that the said writ petition was itself filed under the caption of the service matter and therefore, the Bench dismissed it after observing that the petitioner has no locus standi to file the writ petition as only an aggrieved person can challenge the appointment. If the writ petition was filed as a service Bench matter then of course a person filing the writ petition should have been aggrieved and therefore, the petition on his behalf was not maintainable.

20. If the argument of the learned counsel for the State that the writ petition filed by Charan Singh was dismissed, summarily, by the Service Bench, treating it as PIL, holding the appointment as correct, then prima facie the order passed by a Bench which was not entrusted or allocated the jurisdiction of entertaining PILs would be a nullity in view of Division Bench judgment of this Court in the case of M/s Gokul Dairy and others vs State of U.P. and others, reported in 2002 (20) LCD 287 decided by the Bench of (Hon"ble S.K. Sen, C.J. And Hon"ble R.K. Agarwal, J) vide order dated January 3, 2002.

21. In any case it is not known in what circumstances, the said writ petition was filed by one Charan Singh and what were his credentials. If a writ petition has been dismissed summarily, on the ground that the petitioner does not have a locus standi to file a writ petition, the writ petition filed by a person or a group of persons or association which have the locus standi to seek a writ of quowarranto cannot be dismissed on the ground that one writ petition has been dismissed earlier.

22. It is also to be taken note of that the aforesaid writ petition was filed i.e. Writ Petition No. 129(SB) of 2008 when the present petitions were already being heard and therefore, the parties to the aforesaid writ petition ought to have brought this fact, to the notice of the Bench but we do not know whether this fact was disclosed or not, nor it appears to have been disclosed, that the PIL jurisdiction was not with the said Service Bench.

23. The effect of such judgment upon the present petition may also be a matter to be considered after the notice issued to the private respondent but we are prima facie of the view that the dismissal of the earlier writ petition would not be a bar for maintaining the present petition, subject to any objection being raised by the private respondent.

24. Before we proceed, further a little chronology of events would be necessary for appreciating the controversy involved. The general elections of U.P. Legislative Assembly were held in April, 2007 and the result was declared on 11th May, 2007. The Bahujan Samaj Party was elected in absolute majority in the Assembly which formed the elected government on 13th May 2007. Soon after the formation of the present Government in the State, the State Government created a new post of Cabinet Secretary and the private respondent was appointed/posted on the said post with additional charge of Vice Chairman, State Planning Commission, U.P. on 13th May 2007 itself. The private respondent was not only appointed Vice Chairman of the Planning Commission but was also given the status of a Cabinet Minister. He was also authorized to sign and authenticate all orders and instruments on behalf of the State of U.P. All these orders were issued and action taken on one and the same day i.e. 13th May 2007 simultaneously.

25. On 16th May 2007 the private respondent issued a notification amending the Uttar Pradesh Rules of Business, 1975 and the U.P. Secretariat Instructions, 1982, as he was authorized to do so by an order of 13th May 2007. Thereafter on 21st May, 2007, under Instructions 13(1) of the U.P. Secretariat, Instructions, 1982 (Amended), the Chief Minister ordered that the Cabinet Secretary would be the Administrative Head of the Secretariat with overall control over the functioning of the Secretariat in place of the Chief Secretary.

26. During the pendency of the writ petition and the course of the argument Sri Rakesh Dwivedi for the State, informed that Sri Shashank Shekhar Singh has been denuded from the status of Cabinet Minister and he is no more the

Administrative Head of the Secretariat, which position has been restored to the Chief Secretary.

27. The petitioners, however emphasize that though because of the filing of the petitions, the status of Administrative Head of the Secretariat has been ordered to have restored to the chief Secretary but this has been done only on paper and in fact, Cabinet secretary still exercises overall powers of the Chief Secretary, for which reason, necessary amendments in Rules have not yet been made and therefore, it is not the true statement of fact, about the functioning of the Cabinet Secretary. The plea aforesaid, therefore, seeks an answer from the private respondent.

28. The State, however, submitted that aforesaid rank of Cabinet Minister having been withdrawn and the power of Chief Secretary having been restored, the petitions lose their effect and they should be dismissed as infructuous but the petitioners state that the very creation of the post of Cabinet Secretary that too over and above the post of Chief Secretary, that too for a State Officer of the State government, who does not belong to IAS Cadre, itself is perse illegal and without jurisdiction, which not only affects the governance in the State but also has its demoralizing effect on the Cadre Officers, who can not muster courage to come to the court and for that reason the government servant who is already in service, cannot also file a writ petition in the nature of PIL nor can challenge the appointment of his superior officer to a particular post for many more reasons, which cannot be overlooked.

29. The petitioners urged that challenge made, cannot be termed as a service matter as neither the petitioners are claiming appointment on the said post nor there is any challenge to the selection and appointment made, assailing the comparative merits of any candidate but it is a a case where the entire governance of the State is affected and where a parallel cadre of service to that of the All India Service has been created, that too by creating only one post parallel to the post of chief Secretary with higher emoluments, initially with a superior and higher status than that of the Chief Secretary, which, during the pendency of the writ petition, has been brought equal and parallel to the Chief Secretary so far as functions are concerned, but still with higher emoluments than that of chief Secretary.

30. The question, whether said post can be created by the State government and on such a post any State Officer can be appointed, who does not belong to the Cadre of IAS and who otherwise cannot be appointed as chief Secretary and could not have been given any higher post and higher emoluments to that of the chief Secretary under the existing system of administration in the State and whether raising of such issues would, mean raising a simple dispute of service matter or would be an issue in the larger public interest in the matter of governance and administration in the State, are such issues, which need consideration by the Court.

31. The amendment in the Rules of Business, 1975 and the Secretariat Instructions, 1982 have also been challenged alongwith the challenge to the creation of the post of Cabinet Secretary and the appointment of Sri Shashank Shekhar Singh on the said post.

32. So far as the locus standi of the petitioners in filing the writ petitions is concerned, suffice would be to mention that if the cause brought before the Court is genuine and requires consideration in public interest, it cannot be thrown out merely on the ground that a person coming to the Court has no locus standi or his action is not bonafide.

33. In the case of T.N. Godavarman Thirumulpad (98) v. Union of India and others, (2006) 5 SCC 28 and Vishwanath Chaturvedi (3) v Union of India and others (2007) 4 SCC 380, the aforesaid proposition has been propounded by the apex court.

34. Sri Shiv Prakash Shukla, is an Advocate, his petition cannot be thrown out unless it is found that the petition does not raise any question for consideration in public interest and does not raise any issue of public interest.

35. So far the petition filed by the Society is concerned, it has been brought to the notice of the Court that most of the members of the Society are retired Civil Servants and they have special knowledge and interest in the subject. For example, Former chief Election Commissioner and Former Governor of Gujarat Sri R.K. Trivedi is the Chief Patron of the Society. He was also Secretary Personnel, Government of India and has special knowledge and interest in the subject.

36. Two writ petitions were earlier filed by the Society in the Supreme Court relating to illegal allotment of Bungalows to Ex Chief Ministers and Trusts in U.P. and validity of Section 8(4) of the Representation of the People Act, 1951, in which the notices have been issued, which are pending for final hearing in the apex court.

37. Three other PILs have been filed by the Society against Vidhayak Nidhi, Pay and Allowances to ExMPs and for improvement in criminal justice system, which are also pending in the High Court.

38. It thus, cannot be said that the petitioners do not have any locus standi and they are simple busy body and meddlesome on inter lopers and have no interest in the subject matter.

39. Since the petitioners obviously have been espousing the cause of public interest since before, therefore, they cannot be termed as way farer, nor can be non suited on this ground.

40. It has also been urged that a writ of quo warranto would not lie in the public interest litigation. For not entertaining a PIL in such matters, reliance has also been placed by Sri Rakesh Dwivedi on the following cases:

- (1) Dutta Raj Nathuji Thaware Vs. State of Maharashtra (2005) 1 SCC 590.
- (2) Rajnit Prasad (2000) 9 SCC 313.
- (3) Dr. Duryodhan Sahu (1998) 7 SCC 273.
- (4) Ashok Kumar Pandey (2004) 3 SCC 349.
- (5) Seema Dhamdhare, Secretary vs. State of Maharashtra (2007) 14, Scale 500.
- (6) Gurpal Singh vs. State of Punjab (2005) 5 SCC 136.
- (7) Dr. B. Singh vs. UOI (2004) 3 SCC 363.
- (8) Prof. Yashpal (2005) 5 SCC 420.
- (9) B. Srinivas (2006) 11 SCC 731

41. In the case of B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association and others, AIR 2006 SC 3106, the apex court, while considering a PIL challenging the appointment of Managing Director of the Board under section 4(2) of the Act (direct appointment) by the Employees' Union, allowed the appeal against the judgment passed by the High Court and observed as under:

"This court, in many judgments, held that the Union has locus standi in the facts and circumstances of that case, however, cautioning that if a citizen is no more than a wayfarer or officious intervener without any interest or concern that what belongs to anyone of the 660 million people of this country. Fertilizer Corporation Kamgar Union (Regd.), Sindri and others vs. Union of India and others, (1981) 1 SCC 568. The doors of the Court will not ajar for him."

42. It was a case where the court also considered whether a writ of quowarranto lies to challenge an appointment made on the ground that it is not a regular appointment and while holding that in such situation the High Court erred in law in issuing a writ of quo warranto, further observed:

"This court in R,K, Jain vs. Union of India, (1993) 4 SCC 119 was pleased to hold that the evaluation of the comparative merits of the candidates would not be gone into a public interest litigation and only in a proceeding initiated by an aggrieved person, it may be open to be considered. It was also held that in service jurisprudence it is settled law that it is for the aggrieved person that is the nonappointee to assail the legality or correctness of the action and that third party has no locus standi to canvass the legality or correctness of the action. Further, it was declared that only public law declaration would be made at the behest of public spirited person coming before the Court as a petitioner having regard to the fact that the neither of respondent Nos. 1 and 2 were or could have been candidates for the post of Managing Director of the Board and the High Court could not have gone beyond the limits of Quo Warranto so very well delineated by a catena of decisions of this Court and applied the test which could not have been applied even in a certiorari proceedings brought before the Court

by an aggrieved party who was a candidate for the post."

43. The writ jurisdiction is purely discretionary and though under Article 226 writ can be enforced only on an action being brought by an aggrieved person except in the case where the writ prayed for is for habeas corpus or quo warranto, for which it is not necessary that the person should himself be aggrieved. The Supreme Court in the aforesaid case observed about the right of a public spirited person to pray for a writ of quo warranto and also held that it is no doubt true that the strict rules of locus standi is relaxed to an extent in a quo warranto proceedings, nonetheless an imposter coming before the court invoking public law remedy at the hands of a Constitutional Court suppressing material facts has to be dealt with firmly.

44. The apex court in the aforesaid case further observed:

"This court in *Dr.B.Singh vs.Union of India and others* (2004) 3 SCC 363, held that only a person who comes to the Court with bona fides and public interest can have locus. Coming down heavily on busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, this Court at para 14 of the report held as under:

"The Court has to be satisfied about: (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; and (c) the information being vague and indefinite. The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interests: (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions."

45. The Court further held that that in other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or by reason of its apathy.

46. In *Ghulam Qadir vs Special Tribunal and others*, (2002) 1 SCC 33, the apex court observed as under:

" The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid Article. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a seachange with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a

litigant merely on hyper technical grounds."

47. In *B. Srinivasa Reddy (supra)*, while dealing with the question of PIL, their Lordships observed that a petition praying for a Writ of Quo Warranto being in the nature of public interest litigation, is not maintainable at the instance of a person who is not unbiased. In the said case, the second respondent was the President of the first respondent Union. He had chosen this forum to settle personal scores against his erstwhile superior officer after his retirement. Their Lordships, therefore, observed that the proceedings, in their view, were not meant to settle personal scores by an employee of the department. The High Court, therefore, ought to have dismissed the writ petition filed by respondent no.1 at the threshold.

48. In the instant case, there appears to be no bias on the part of the petitioners one being an Advocate and the other being the Association of retired IAS officers, who have no personal grudge against the present incumbent nor there is allegation of misfeasance or corruption but simply legal pleas have been raised requiring the private respondent to show his authority under which he is holding the post of Cabinet Secretary, a post which itself could not have been created mainly relying upon the constitutional provisions, Rules of Business, 1975 and Secretariat Instructions, 1982 and the pleas raised by the respondents.

49. We, therefore, *prima facie*, do not find that a writ of quo warranto cannot be prayed for against the holder of a public office, particularly when it cannot be disputed that the private respondent is holding a public office and is answerable to the issues raised.

50. The matter relates to the appointment of a non-Cadre IAS Officer on the post of Cabinet Secretary, which post has not been created with the approval of the Central Government nor is being taken as an addition to the cadre of service of IAS, but has been given higher pay scale than the Chief Secretary with enormous powers to intermeddle with every file or decision taken in Secretariat at different levels.

51. The appointment of Cabinet Secretary, directly effects the governance in the State and the general administration, which necessarily has an impact upon the public in general and the employees and officers of the State Government as well as the Central Government, an All India Service, which service has been created for a nonpoliticalised, impartial, better and effective governance in the State under the constitutional scheme and any infringement of such streamlined and defined system of administration and governance cannot be allowed to be bypassed by adopting measures, which are not permissible in law and for which, the State does not have any authority.

52. How the State is to be governed, administered and looked after apparently has a direct nexus upon the subjects of the State, for whose benefit the entire system has been carved out and well defined. If any deviation is made, which is not authorised by law, that would not only create discontentment amongst the

employees and officers of the state as well as in the cadre of IAS, but would also have adverse effect and impact upon the general administration and in the matter of carrying on administration affecting the public in general. This is also a plea, which requires consideration after notice to the private respondent.

53. It is the specific case of the petitioners that Sri Shashank Shekhar Singh, being a noncadre IAS officer, could not be appointed on the post of Cabinet Secretary nor he could be given postings on different cadre posts of IAS, which he enjoyed for the last several years. It has been stated in the writ petition that despite the fact that he could not be appointed to any cadre post, he has been given these postings in flagrant violations of Service Rules and IAS Cadre Rules, 1974.

54. It has been stated in the writ petition that Sri Shashank Shekhar Singh, a helicopter pilot, was initially appointed in the Directorate of Civil Aviation and prior to his appointment on IAS cadre posts, he was Director, Civil Aviation. He was appointed as Secretary, Civil Aviation Department in March 1988 and was later given additional charge of the post of Secretary to Chief Minister and Secretary, Technical Education and NonConventional Energy Departments. In October, 1990 he was appointed as Principal Secretary, Civil Aviation and was given additional charge of other departments from time to time. He was confirmed on the post of Principal Secretary, Civil Aviation Department in July, 2001 and was later appointed in May, 2002 as Industrial Development Commissioner.

55. The argument is that no approval of the Central Government and Union Public Service Commission was ever taken for appointing him even on the posts of Secretary/Principal Secretary. His posting as Secretary/Principal Secretary was thus illegal and against the mandatory statutory Rules.

56. We may put on record that since the appointment and posting of Sri Shashank Shekhar Singh on these various cadre posts of IAS is not an issue in the writ petition, therefore, we refrain ourselves from expressing our view in that regard even prima facie but confine ourselves to his appointment and posting as Cabinet Secretary.

57. The Central Government has also filed a short counter affidavit and Dr. Ashok Nigam, learned Additional Solicitor General supported the pleas raised by the petitioners and submitted that the Government of U.P. treats the newly created post of Cabinet Secretary of the State as equivalent to or at least in all respects similar to the Cabinet Secretary of the Central Government and that the importance and functions of the post of Chief Secretary in the State have been marginalised.

58. This gives rise to the question as to whether the creation of the noncadre post of "Cabinet Secretary" in the State is legally valid and within the constitutional framework of the system of governance of the States.

59. Giving the system of governance, as put into place by the makers of the Constitution, Sri Ashok Nigam has referred to the history and rationale of the All India Services, especially the Indian Administrative Service.

60. For understanding the implications of the decision of the Uttar Pradesh Government to create and appoint the Cabinet Secretary, it has been urged that in the Premiers' Conference held in October, 1946 under the Chairmanship of Sardar Vallabhbhai Patel, it was decided that two All India Services, viz. Indian Administrative Service and Indian Police Service should be created to replace for the former Indian Civil Service and Indian Police Service, and that the recruitment to these two Services should be made through the Federal Public Service Commission on the basis of annual Competitive Examination of a very high standard and that the members of these Services should be free from political control, be contented and have sense of security. It was held that by adopting this method, the Provincial Governments would find the surest means of having an efficient Service and maintaining the integrity and impartiality of the members of the Services. It was also decided that only a maximum of 25% of superior posts (cadre posts) should be thrown open to the State Civil/Police Service Officers of outstanding merit as against the maximum of 25% of the superior posts in the I.C.S./I.P.

61. In pursuance of the above mentioned decision, the two All India Services were formed and they were put on statutory basis under the Indian Civil Administrative Service Cadre Rules, 1950, the IP (Cadre) Rules, 1950 and the Indian Administrative and Police Service (Pay) Rules, 1950. Article 312 of the Constitution dealing with the All India Services provided that these services shall be deemed to be created by Parliament under this Article 312. Subsequently, the All India Services Act, 1951, was passed by the Parliament empowering the Government of India to make Rules for the regulation of recruitment and conditions of service of the persons appointed to All India Services.

62. Learned counsel for the State has, however, submitted that private respondent has been holding very important posts in the State Government and is having more experience than the Chief Secretary in the service to which the counsel for the petitioners submitted that it is of no relevance as no approval of the Central Government or Public Service Commission was ever taken for the creation of the post of Cabinet Secretary and the very posting of the Cabinet Secretary is wholly illegal, arbitrary and without authority.

63. In support of plea of creation of post, though very serious arguments have been advanced but since we refrain ourselves from expressing our views in the matter in the absence of private respondent, we will only refer the said pleas.

64. It has been submitted that the post of Cabinet Secretary was already in existence, though in the name of "Secretary to the Cabinet" for which reliance has been placed on instruction no. 5 under Chapter IV of the U.P. Secretariat Instructions, 1982, which provides that "Secretary to the Cabinet", shall be the

Chief Secretary or "such other officer" as the Chief Minister may appoint. Submission is that the Chief Minister is vested with the power to appoint any officer apart from the Chief Secretary, as Secretary to the Cabinet and, therefore, the present appointment of Sri Shashank Shekhar Singh is within the sole authority of the Chief Minister and therefore, there is no illegality or irregularity in his appointment.

65. It has further been submitted that Rule 11 of the Rules of Business, 1975 also gives power to the Chief Minister to permit any departure from these rules. The argument is that these provisions make it clear that departure from the said rules and Secretariat Instructions have been made to have a person as a Cabinet Secretary who is best suited to the governance of the State.

66. The argument of the petitioners is that firstly the post of "Secretary to the Cabinet" is not the post which is now named as "Cabinet Secretary" as if it was, so then there was no occasion for the Governor to create such post vide separate order dated 30th May 2007 nor the "Secretary to Cabinet" could have been given the pay/remuneration more than that of the Chief Secretary.

67. Further in view of the own argument of the State counsel that a cadre officer (I.A.S) cannot be posted on a noncadre post requires an explanation by them that under what authority the Chief Secretary being a cadre officer, all through in the past, till the present respondent, has been appointed, was required to function on a "non cadre post" of "Secretary, to the Cabinet" if the said post was not to be manned by an IAS officer.

68. It has further been urged that if, this liberty is given to the State Government to appoint any officer of the State Government to function as Secretary to Cabinet then it means unguided and uncannalised power to appoint any person on the said post irrespective of his qualification and experience and would amount politicising of the post. In fact the argument is that creation of post of Cabinet Secretary, is not only politicising the post but also the entire administration in the State.

69. This again gives rise to the question as to whether the creation of the noncadre post of "Cabinet Secretary" in the State is legally valid and within the constitutional framework of the system of governance of the States, in the country.

70. The petitioners also urged that for the appointment of Cabinet Secretary, neither any procedure nor any qualification has been prescribed nor he has been made answerable to any superior authority in service and though such a post, if any could be created, the same would be within the purview of the Public Service Commission U.P. But no such procedure has been made for making appointment on the said post nor the private respondent has been so appointed.

71. We need not discuss the plea raised by the Union of India, at this stage, but it will be sufficient to mention that the Central Government has taken a definite

stand that such post of Cabinet Secretary could not be created by the State Government for the reasons detailed by the Central Government in the counter affidavit.

72. Furthering the argument, it has been submitted that the post of Chief Secretary is the Senior Duty Post in terms of Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 and the said post has always been filled up by a senior officer of the cadre whereas the post of Cabinet Secretary created by the Government of U.P. is not a cadre post and at the same time the State Government has created the post which is higher than that of Chief Secretary with higher pay than the Chief Secretary, though a State Officer cannot be given the status nor the salary over and above the cadre officer viz; Chief Secretary.

73. The plea made by Sri Rakesh Dwivedi on behalf of the State that Secretary to the Cabinet and Cabinet Secretary, both are in essence, one and the same post is not *prima facie* sustainable.

74. Apparently, this creates a parallel cadre of service in the hierarchy of administration, where the Cabinet Secretary has been given higher salary/emoluments than that of the Chief Secretary. The provision that the "Chief Minister shall appoint Chief Secretary or any such other officer as Secretary to the Cabinet" vests power in the Chief Minister to appoint the Chief Secretary as "Secretary to the Cabinet" or such other officer, requires adjudication by the Court, after notice to private respondent but *prima facie*, it appears, that it will not include any officer of the service, to which the Chief Secretary does not belong. Such officer would be taken to mean the officer, who belongs to the same service as that of the Chief Secretary.

75. On the pleas raised from both the sides we are *prima facie* satisfied that the questions raised require consideration by the Court, which cannot be done in absence of private respondent.

76. There is no dispute that the private respondent is holding the public office and that the petitions do not suffer from bias or any personal interest but raise issues in larger public interest and that *prima facie* it can also not be said to be a controversy regarding the appointment to a post so as to term it as a service matter for making it not amenable to writ jurisdiction in a PIL.

77. On *prima facie* being satisfied that the petitions raise question of public interest and importance, we "admit" the writ petitions.

78. Let notice be issued to the private respondent Sri Shashank Shekhar Singh, Cabinet Secretary, to the Government of U.P. in both the writ petitions, to explain his authority under which he is holding the post of Cabinet Secretary, and why the relief prayed for be not granted.

79. List in the month of February 2010 for hearing. The respondents including the present respondent may file Counter Affidavit within four weeks, Rejoinder

Affidavit may be filed within next two weeks.