
(1974) 11 AHC CK 0009

In the Allahabad High Court

Case No : Special Appeals Nos. 129, 137, 189 and 234 of 1974

State of U.P.

APPELLANT

Vs

Jai Singh Dixit and others

RESPONDENT

Date of Decision : 11-11-1974

Acts Referred:

Constitution of India, 1950 — Article 309

Uttar Pradesh Civil Services (Classification, Control and Appeal) Rules, 1930 — Rule 49A

Uttar Pradesh Punishment and Appeal Rules for Subordinate Services, 1932 — Rule 1A

Citation : (1974) 11 AHC CK 0009

Hon'ble Judges : D.S.Mathur, CJ;K.B.Asthana, J;Yashoda Nandan, J;N.D.Ojha, J and Satish Chandra, J

Final Decision : Disposed Of

Judgement

Per Mathur, C.J. and Ojha, J.

These four Special Appeals Nos. 129, 137, 189 and 234 of 1974 arise out of writ petitions under Article 226 of the Constitution, wherein order of suspension pending inquiry was challenged. Jai Singh Dixit, respondent in Special Appeal No. 129 of 1974, Rama Kant Saxena, respondent in Special Appeal No. 137 of 1974, and Ganesh Dutt Joshi, respondent in Special Appeal No. 234 of 1974, were suspended under Rule 49A of the U.P. Civil Services (Classification, Control and Appeals) Rules (to be referred hereinafter as C. C. A. Rules), while Inder Deo Tiwari, respondent in Special Appeal No. 189 of 1974, under Rule 1A of the U.P. Punishment and Appeal Rules. The order of suspension pending inquiry was quashed in the first two special appeals because the respondent was suspended before the framing of charges or completion of the preliminary inquiry, and there were no compelling or exceptional circumstances to depart from the normal rule not to place a government servant under suspension before the framing of the charges. The order of suspension was quashed in the other two Special Appeals on the basis of the Full Bench decision in the State of U. P. v. Jawahar Lal Bhargava and another 1974 A.L.J. 282. The State of Uttar Pradesh and the Heads

of Departments of authorities concerned, who were respondents in the writ petitions, have preferred these Special Appeals which came up for hearing before a Division Bench which felt that in view of the deletion of the Note to Rule 42A of the C.C.A. Rules with retrospective effect, the decision in the above Full Bench case required reconsideration. Similarly, the Division Bench felt that the observation made in the Full Bench case regarding absence of inherent power to suspend an employee required reconsideration. The Division Bench did not frame any question of law, but referred all the Special Appeals for hearing by a larger Bench. This is how the matter has come up before this Full Bench of five Judges.

The hearing of the Special Appeals on merits by all of us sitting together will result in unnecessary waste of time. We are, therefore, expressing our opinion on the question of law involved and thereafter the Special Appeals can be heard and decided by a Division Bench.

The material part of Rule 49A of the C.C.A. Rules runs as below:

"Government servant against whose conduct an inquiry is contemplated or is proceedings, may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority:

Provided that in the case of any Government servant or class of Government servants he belonging to a State service the appointing authority may delegate its power under this rule to the next lower authority.

N.B. As a rule, suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established, they may ordinarily be expected to warrant his dismissal, removal or reduction. Suspension, where deemed necessary, should as far as possible immediately precede the framing of charges and their communication to the Government servant charged:

Rule 1A of the U.P. Punishment and Appeal Rules has been similarly worded.

The note below Rule 49A of the C.C.A. Rules was deleted under Notification No. 18/III1973Apptt. (3) dated March 23, 1974, and the Note below Rule 1A of the Punishment and Appeal Rules under Notification No. 18/III1973(3) Apptt. (3) dated March 23, 1974, and in both the cases the deletion was to take effect from October 29, 1958.

In all these Special Appeals the meaning and scope of these rules is in issue.

The learned Advocate for the respondents in the Special Appeals (who shall hereinafter be referred to as Government servants) has raised two points with regard to the propriety of the Constitution of a larger Full Bench to reconsider the points recently decided by a Full Bench, not only while deciding the main Special Appeal but also an application for review of the judgment, and the nature of jurisdiction exercisable by this Full Bench. It is contended that this Full Bench is not sitting as a Court of Appeal against the judgment in the earlier Full Bench

case of the State of U. P. v. Jawahar Lal Bhargava and another 1974 A.L.J. 282 and on the principle of Stare deems the earlier precedent, namely, the decision by the Full Bench, .should not be interfered with.

The interpretation of Rule 49A of the C.C.A. Rules and Rule 1A of the Punishment and Appeal Rules has been raised in these Special Appeals also and, therefore, what this Full Bench is entertaining is not an appeal against the decision in the earlier Full Bench case but is reconsidering the correctness of all the matters arising in the Special Appeals on such appeals being referred to a larger Full Bench. It shall have to be kept in mind that the decision of a Single Judge of this Court is also a decision of the Court provided its correctness is not challenged in appeal. If challenged in appeal, the matter can be reheard exercising the same jurisdiction which the Single Judge possessed while originally entertaining the Writ Petition. See Lachmeshwar Prasad Shukut and others v. Keshwar Lal Chaudhuri and others A.I.R. 1941, F.C. 5 Sommalapure Teggina Matada Kotturuswami v. Setra Veerevva and others A.I.R. 1959 S.C. 577 and Amarjit Kaur v. Pritam Singh and others (1974) 2 S.C. Cases 363. Further, as enunciated in these decisions the appellate court is entitled to take into consideration any change in the law subsequent to the decision of the judgment appealed against. In short, while deciding the Special Appeals we can exercise the same jurisdiction as the Single Judge, based on the law as amended and in force at the time of the hearing of the Special Appeals. The fact that the impugned order was quashed by the Single Judge will make no difference. While rehearing the case we must proceed from the facts as were, in the eye of law, in existence at the time of jurisdiction of this Court under Article 296 was invoked.

At this place it may be observed that the law altered by a subsequent Amending Act, applied retrospectively, was given effect to even at the stage of the review of the judgment under order 47, rule 1, C.P.C. in the Full Bench case of Mohammad Azamat Azim Khan v. Raja Shatranji and others A.I.R. 1963 All. 541.

It cannot be denied that the Bench hearing the Special Appeals has the jurisdiction not to base its judgment on the earlier decisions if in its opinion, the view expressed therein is erroneous. However, if the earlier decision is by a concurrent or larger Bench, the case or the question of law involved must be referred to a larger Bench for reconsideration. Thus, where the earlier decision is by a Bench of lesser Number of Judges, the larger Bench hearing the case may not follow the precedent and arrive at its own findings, keeping in mind that frequent changes in the interpretation of law by the High Court can cause injustice to persons who have acquired rights or have acted in accordance with the law laid down by the Court. This principle was recognised in the TextBook of Jurisprudence by C.W. Paton, Third Edition, at page 192, as below:

"Undoubtedly, reversal of a precedent may cause injustice to those who have shaped their conduct in reliance upon it, but this is an argument for extreme care in overruling precedents rather than for a complete denial of the power."

The observations of Blackstone quoted in Law In The Making by Sri C.K. Allen, Sixth Edition, at pages 234 and 225, are similarly as below:

"It is an established rule to abide by former precedents", except when they are "Contrary to reason" or "unless flatly absurd and Unjust". " "

Similarly, the observation of Lord Tentiorden, C.J. quoted at page 184 of the Law Quarterly Review, Volume 50, is:

"The decisions of our predecessors, the judgment of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of the law."

In the State of U. P. and others v. Firm Deo Dutt Lakhan Lal A.I.R. 1966 Alld. 73, it was observed by a Full Bench of this court:

"Similarly a High Court in India is not bound to follow its own earlier decision and may depart from it. The departure is done by a Bench of a larger number of Judges." With regard to the applicability of the principle of stare decision in the Supreme Court, the majority view in Bengal Immunity Co. Ltd. v. State of Bihar and others A.I.R. 1966 S.C. 661, is that in a proper case it is permissible for the Supreme Court to go back upon its previous decision, though it should not lightly dissent from a previous pronouncement of the court; and if on examination of the question it comes to the conclusion, that the previous majority decision was plainly erroneous then it will be its duty to say so.

Our attention was also drawn to Chapter V. Rule 6 of the Rules of Court to suggest that we must express our opinion on all the points raised in the Referring Order. Under this rule, either the whole case or question of law can be referred to a larger Bench. Where the whole case has been referred to a larger Bench we need not decide all the questions raised in the Referring Order. When the whole case is before us, we have to decide only these points which need be decided in the case; there can also be no objection, to save the time of the Court, to decide the questions of law involved in the case leaving it open for the Division Bench to hear the Special Appeals on merits accepting the decision of this Bench on the questions of law on which an opinion is expressed.

As already mentioned above, the Note below Rule 49A of the C.C.A. Rules and Rule 1A of the Punishment and Appeal Rules was deleted retrospectively from October 29, 1968. Both the Notifications deleting the Note were issued under the provision to Article 309 of the Constitution and, therefore, the charges made are in the conditions of Service Rules as contemplated by Article 309 of the Constitution, and not by an administrative order. It is a settled law that the conditions of service in Rules can, by virtue of the proviso to Article 309 of the Constitution, be amended retrospectively. See B. S. Vadera v. Union of India and others A.I.R. 1969 S.C. 118 and Ram Lal Wadhwa and another v. The State of Haryana and others A.I.R. 1972 S.C. 1982.

In The. State of Mysore v. Padmanadhachrya A.I.R. 1966 S.C. 602 the impugned

notification or rule was regarded as a rule not made under the proviso to Article 309, and, therefore, it was held that it could not have a retrospective effect. The case of *K. R. Krishanaswami v. The Director of Technical Education, Madras and others* 1968 Labour and Industrial Cases 1377 is of the Madras High Court, however, it can be distinguished on the ground that the rules regarding qualification for the post were amended after the Government servant had already entered the department service. They are merely the Conditions of Service Rules framed under the provision to Article 309 which can be given retrospective effect, and not the administrative instructions vide *ExMajor N. C. Singhal v. Director General, Armed Forces, Medical Services, New Delhi* and another A.I.R. 1972 S.C. 628.

It was further contended that the two Notifications deleting the Note below Rules 49A and 1A did not contain any validation clause and, therefore, the amendment cannot be given a retrospective effect. A validation clause is invariably incorporated in an enactment to upset a decree or decision which may have already been passed or taken and which has become final, in the absence of the validation clause, decrees or orders which have become final will not be effected by the amendment even though the amendment has been effected retrospectively. Nor amendment of the decree or order, the parties shall have to take other steps, if permissible under the law. In the instant cases, the orders passed by the Single Judge have not become final and while deciding the Special Appeals we can take into consideration the amended rule.

Section 6 of the U.P. General Clauses Act can be of no help as the section by itself provides that the provisions contained therein shall be applicable unless a different intention appears from the amending or repealing enactment. In the instant case, the intention to give retrospective effect has been expressed in clear words.

Another legal question which may be disposed of at this stage is the effect of the administrative instructions of the Government, whether they have the effect of reducing the scope of the conditions of Service Rules or are mere guiding principles, departure where from can be made in suitable circumstances. The law on this point can be said to be beyond controversy. In *Commissioner of Income Tax, Madras v. Srinivasan* and another A.I.R. 1963 S.C. 113 it was laid down:

"The interpretation placed by the department on these subsections cannot be considered to be a proper guide in a matter like this when the construction of a statute is involved."

similarly, as observed in *State of Haryana v. Shamsher Jang Shukla* A.I.R. 1972 S.C. 1548:

"The Government is not competent to alter the rules framed under Article 309 by means of administrative instructions."

However, the right of the Government to fill up a gap in the Conditions of Service

Rules by means of administrative instructions has been recognised, by implication in the case and directly in *Union of India v. K. P. Joseph and others* A.I.R. 1973 S.C. 303. The material observations are as below:

"Generally speaking, an administrative Order confers no justifiable right, but this rule, like all other general rules, is subject to exceptions. This court has held in *Sant Ram Sharma v. State of Rajasthan* (1968) 1 S.C.R. 111=A.I.R. 1967 S.C. 1910 that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Art. 300 of the Constitution are silent on any particular point, the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service.

..... To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because an administrative order can abridge or take away right that we have imported the principle of natural justice of *audi alteram partem* to this area.

We should not be understood as laying down any general proposition on this question. But we taking that the order in question conferred upon the first respondent the right to have his pay fixed in the manner specified in the Order and that was part of the conditions of his service. We see no reason why the Court should not enforce that right."

Briefly speaking, it can be laid down as a safe rule that no administrative instruction can override, enlarge or reduce the scope of a rule duly framed under the proviso to Article 309 of the Constitution, though the administrative instructions may be regarded as a guide for the exercise of jurisdiction under and in pursuance of the conditions of service Rules duly framed.

Rule 49A of the C.C.A. Rules and Rule 1A of the Punishment and Appeal Rules were incorporated under Notifications dated January 30, 1953, duly made in exercise of the powers conferred by the proviso to Article 309 of the Constitution, to implement the recommendations of the Disciplinary Proceedings Inquiry Committee. They were amended from time to time. To implement the recommendations contained in the Report of the Disciplinary Proceedings Inquiry Committee, the Government issued certain instructions under G.O. No. 10306/IIB1963 dated January 31, 1953. A perusal of Annexures I to III to the G.O. makes it clear that Annexures I and II were issued under the proviso to Article 309 while the instructions in Annexure III were mere executive instructions. It was provided in Clause 8 of the G.O. that

"Suspension pending inquiry" should not ordinarily be restored to unless the allegations are serious enough to warrant dismissal, removal or reduction, and should in such cases immediately precede the framing of charges and their communication to the accused Government Servant."

and in para 2(1) of Chapter IV of Annexure III that

"The charge or charges should be handed over on the date of taking the decision to start formal proceedings (at the same time a decision should be taken whether the officer should be placed under suspension pending inquiry)."

Similarly, it was reiterated in a Government Order dated July 2, 1971, Annexure "A" to the writ petition in Special Appeal No. 137 of 1974, that suspension pending inquiry should be on objective consideration and resorted to where a decision has been taken to start a formal departmental inquiry, and prior to that, if necessary, the Government servant can be transferred from the station.

Rule 49A of the C.C.A. Rules and Rule 1A of the Punishment and Appeal Rules are complete by themselves conferring jurisdiction in the appointing authority to suspend, pending inquiry a Government servant. These Rules previously contained a Note below them. There was, in substance, no gap in the rule which could be filled up by executive instructions. Consequently, none of the executive instructions can have the effect of amending the conditions of service Rules duly framed under Article 309, the maximum that can be said that the G.Os. give out the policy of the State Government, but they are not such as can be enforced in a court of law. The executive instructions contained in the two G.Os. can simply be regarded as a guide for the appointing authority, being of an advisory nature.

To avoid any controversy in the future it shall be proper to first of all consider the unamended rules and thereafter the effect of the deletion of the Note.

At this place it may, however, be observed that the Note appended to a rule or to an enactment does not, ordinarily, restrict or enlarge the scope of the main provisions it generally serves as a guide line for the officers authorised to take action under the rule. The Note has, however, to be read along with the main provision. Consequently, where the Note is directory and not mandatory, it shall in no way, restrict the powers conferred under the main provision, but if the Note has been worded in a manner which restricts the power conferred under the main provision, and is mandatory as the provision itself, it can be said that the Note is an important part of the Rule and has the effect of placing restrictions in the exercise of jurisdiction. To put it differently, if the directions contained in the Note are directory by nature, they shall not have the effect of restricting the scope of the main provision, though while exercising the jurisdiction, the guiding principle contained in the Note must be kept in mind. The difference is only this that the breach of the directory provisions of the Note will not by itself invalidate the order.

Coming to the instant case, the Note has two parts:

(1) As a rule, suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established, they may ordinarily be expected to warrant his dismissal, removal or reduction.

(2) Suspension, where deemed necessary, should, as far as possible, immediately precede the framing of charges and their communication to the Government servant charged.

It shall be noticed that the rulemaking authority has used different words in the two parts

"As a rule" in the first part and "as far as possible" in the other. Even if the first part is regarded as mandatory, the same cannot be said about the other. The second part being directory cannot restrict the scope of the main provision and in suitable circumstances suspension pending inquiry can be ordered even though informal preliminary inquiry or the fact finding inquiry is not complete and no final decision has been taken to initiate departmental proceeding against the Government servant. In other words, there can be suspension pending inquiry even before the framing of charges and the communication thereof to the Government servant charged.

The question for consideration now is what is meant by the Words "inquiry" and "contemplated" used in Rule 49A and Rule 1A? "

To avoid any confusion it may here be noted that Rule 49B of the C.C.A. Rules was deleted under Notification No. 3419/IIB19(1)58 dated September 9, 1968; even then it has been wrongly printed in the official publication of the C.C.A. Rules, Rule 49B is therefore being disregarded.

The word "inquiry" has also been used in Rules 55 and 55A of the C.C.A. Rules. Rules 55 and 55A relate to formal departmental inquiry where major punishment of dismissal, removal or reduction can be imposed. Such an inquiry is invariably preceded by framing of charges. It is of significance that in the other rules governing cases in which major punishment can be awarded the word "inquiry" has been omitted and the rules merely provide for the award of punishment. It is true that most of the minor punishment shall be awarded after some inquiry, but when the rulemaking authority intentionally avoided making a reference to this term in the other rules and used the word "inquiry" in Rule 49A and also Rules 55 and 55A the underlying intention was that the inquiry contemplated by Rule 49A is the one held under Rules 55 and 55A. It must, therefore, be held that the power under Rule 49A can be exercised only in those cases where one of the major punishment, dismissal, removal or reduction shall ordinarily be imposed.

The inquiry contemplated by Rule 49A cannot have reference to an informal preliminary inquiry or a fact finding inquiry preceding the actual disciplinary proceeding, otherwise it shall be permissible to suspend a Government servant pending such informal inquiry, but not after charges have been framed and regular departmental proceeding is pending. This shall lead to an anomalous situation. We are, therefore, of opinion that the "inquiry" contemplated by Rule 49A and Rule 1A has reference to the formal departmental inquiry and not to any informal preliminary or fact finding inquiry preceding the initiation of the formal disciplinary proceeding.

The scope of Rule 49A or 1A does not appear to have come up for consideration before the Supreme Court, but the difference between "contemplated" and "initiated" was noticed in *P. R. Navak v. Union of India* 1972 S.L.R. 219 (S.C.). This is a case governed by the All India Services (Discipline and Appeal) Rules, 1969 where suspension during disciplinary proceeding could be ordered if such proceeding had been initiated, and not, as in the present cases where such proceeding was under contemplation. It was observed in para 15 of the Report:

"It does not suggest that suspension can be ordered merely when disciplinary proceedings are contemplated

The legislative scheme is thus clearly indicative of the intention of the rulemaking authority to restrict its operation only to those cases in which the Government concerned is possessed of sufficient material whether after preliminary investigation or otherwise and the disciplinary proceedings have in fact commenced and not merely when they are contemplated Again the fact that in other rules of service and order of suspension may be made when "disciplinary proceedings were contemplated" should not lead us to take the view that a member of an all India service should be dealt with differently."

It was further observed in para 19:

"But independently of this consideration we think that the plain language of Rule 3(1) (a) and (b) which concerns us does not authorise suspension when disciplinary proceeding have not been initiated but are only contemplated."

The meaning of the word "contemplate" has been given in Shorter Oxford English Dictionary, Volume I, as

- "1. To look at with continued attention, gaze upon observe. Behold.
2. To view mentally to mediate upon ponder, study.
3. To consider in a certain aspect regard.
4. To have in view to expect take into account as a contingency; to purpose."

and in the New International Dictionary, Volume I, as:

"1. To view with sustained attention gaze at thoughtfully for a notifiable time: observed with ostensibly steady reflection.

2. To view mentally with continued thoughtfulness attention or reflections muse or ponder about 3. to view mentally in a stated or implied way with thoughtfulness and reflection; a. to think about or regard from a certain view point or in a certain light or respect; b. to have in view as a purpose anticipate doing or performing plan on Intend Plan; c. to dream of as a cherished aim; Bhvision; d. to presume or imply as a concomitant or result postulate, Presuppose 4; to view or regard (as an object of an objective fact) with detachment."

The proper meaning which can be assigned to the word "contemplate" used in Rule 49A or in Rule 1A therefore, is "to have in view to expect" take into account as a contingency. Therefore, whenever it is in the mind of the appointing authority that in due course a formal departmental inquiry shall be held or there exists a contingency for such an inquiry, one can say that a formal departmental inquiry is contemplated. It is however necessary that there should be application of mind in the eye of the law in good faith and not arbitrary.

A formal departmental inquiry is invariably preceded by an informal preliminary inquiry which itself can be in two phrases. There can be a summary investigation to find out if the allegations made against the government servant have any substance. Such investigation or inquiry is followed by a detailed preliminary or fact finding inquiry whereafter final decision is taken whether to initiate disciplinary proceeding. The first preliminary inquiry may be in the shape of secret inquiry and the other of an open inquiry. In the alternative when complaint containing serious allegations against a Government servant are received, the authority peruse the records to satisfy itself if a more detailed preliminary inquiry be made.

In many instances the appointing authority will be in a position to form an opinion after the summary investigation, secret inquiry or inspection of records that the allegation made against the Government servant have substance and in due course formal departmental action shall be taken against him. These all would be cases covered by Rule 49A, i.e. cases where formal departmental inquiry is contemplated.

In a few cases it may be possible for the appointing authority to form such an opinion at an earlier stage also, at the stage of receiving or entertaining a complaint. There also shall be cases where it can be said in good faith, that formal departmental inquiry is contemplated.

To put it in brief a departmental inquiry is contemplated when on objective consideration of the material, the appointing authority considered the case as one which would lead to a departmental inquiry, irrespective of whether any preliminary inquiry, summary or detailed has or has not been made or if made is not complete. There can therefore be suspension pending inquiry even before a final decision is taken to initiate the disciplinary proceeding, i.e. even before the framing the charge and the communication thereof to the Government servant.

This view finds support not only from the difference in the phraseology noticed in *P. R. Nayak v. Union of India* (supra) but also from the provisions contained in Rule 49A and Rule 1A a Departmental inquiry proceeds from the stage a final decision is taken to initiate such inquiry in any case when charges are framed and communicated to the Government servant. If the rulemaking authority had intended that the power to suspend under Rule 49A or Rule 1A was to accrue on taking a firm and final decision to hold an inquiry it would not have incorporated therein the expression "an inquiry is contemplated" in any case would have in its

place used the expression "an inquiry has been decided upon". No part of the rule can be regarded as superfluous. Hence the word "contemplated" must be given its ordinary meaning as already indicated above.

Naturally, it shall depend upon the fact and circumstances of each case whether, prior to the framing of the charge and communication thereof to the Government servant it can be said that a departmental inquiry is expected.

This leads us to the consideration of earlier decisions of this court. The Full Bench case of *State of U. P. v. Jawahar Lal Bhargava and others* (supra) was summed up by Gopi Nath, J. as below:

"A Full Bench of this court in special appeal No. 214 of 1973 decided on February 25, 1974 explained the scope of Rule 49A and held that the enquiry mentioned in that rule means the departmental inquiry as envisaged by Rule 55. When the preliminary enquiry is over and a decision is reached that formal departmental proceedings should commence, the question of placing an officer under suspension arises. At any point of time prior to that stage the question of placing an officer under suspension does not arise."

As already discussed above, that is the stage for initiating the departmental inquiry and the stage contemplated by Rule 49A is much earlier when the appointing authority is satisfied that disciplinary proceeding would eventually be taken against the Government servant.

The Full Bench approved of the decision in *Rajendra Shanker Nigam v. State of U. P. and others* 1973 A.W.R. 271 and disagreed with the view of the Division Bench expressed in the special appeal arising there from that is in the *State of U. P. and others v. Rajendra Shanker Nigam and others* 1974(1) S.L.R. 333 (Alld.) while approving *Rajendra Shanker Nigam v. State of U. P. and others* (supra) the Full Bench observed as below:

Seth, J. in *Rajendra Nigam v. State* rejected an argument. He held that the inquiry referred to in Rule 49A means an "inquiry is contemplated" would mean that an inquiry under Rule 55 is expected that the appointing authority has decided that in the circumstances of the case it would proceed to hold an inquiry as provided under Rule 55, the learned Judge finally observed that:

"I am accordingly of opinion that merely because a serious complaints against a Government servant are received by his appointing authority and it decided to obtain a report with regard to it from the Vigilance or some other authority it does not necessarily follow that the appointing authority contemplates to hold an inquiry against the Government servant under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. Such a report is called for enabling the appointing authority to make up its mind whether or not to initiate regular department proceedings."

It shall be noted that in the opinion of the Full Bench also the expression an "inquiry is contemplated" means an inquiry is expected however a restricted

view was taken of the expression to mean the decision to hold an inquiry under Rule 55 of the decision to initiate regular department proceeding. Once a firm and final decision has been taken to hold a formal departmental inquiry such an inquiry is certain and not merely expected. Consequently, we are in respectful disagreement with the view expressed by the Full Bench regarding the scope of Rule 49A or Rule 1A.

The Full Bench also accepted the submission made on behalf of the Government servant that "the contents of the Note ought to be given full effect in construing the material provisions of Rule 49A" and held that an inquiry is contemplated against the conduct of the Government servant when a decision is taken by the appointing authority to start formal proceedings and at the same time it is decided whether the officer be placed under suspension pending inquiry. It was further observed that at any point of time prior to the taking of such a decision it could not be said that an inquiry under Rule 55 was contemplated. At another place it was observed:

"The Note does not permit the appointing authority to suspend a Government servant before it decides to initiate a formal inquiry under Rule 55 against the Government servant. The Note fixes the earliest point of time for the exercise of the power of suspension. The phrase "as far as possible" cannot be construed as leaving a power with the appointing authority to suspend a Government servant at a point of time earlier than the earliest point of time fixed by the Note.

Under Rule 49A suspension pending inquiry is permissible where departmental inquiry is proceeding or where the departmental inquiry is contemplated. Once the charges have been framed and communicated to the Government servant, comes into existence and is being proceeded with. Consequently, if the intention of the makers of the rule was not to permit suspension pending inquiry before the framing of the charges it was not necessary to authorise such suspension when the inquiry was contemplated.

The Full Bench interpreted the word "allegations used in the first part of the Note" as allegations having substance revealed by the "investigation of an informal nature" "and not allegations contained in the complaint received against a Government servant" when allegation are substantiated and charges are framed allegations taken the shape of charges and they are invariably called charge and not mere allegations. There is, therefore, no reason why a restricted meaning be given to the word "allegation" used in the Note.

While not accepting the view of the Division Bench in *State of U. P. and others v. Rajendra Shanker Nigam* (supra) the Full Bench observed:

"For the above reasons it is also not possible to accept the view of the Division Bench in the case of *State of U.P. v. Rajendra Shanker Nigam* (supra) that if there are compelling and exceptional circumstances the power of suspension can be exercised even before deciding to hold a departmental inquiry under Rule 55 against a Government servant for, that will again leave the matter to the

subjective satisfaction of the appointing authority and to call upon it to justify the exercise of its power by establishing the existence of "compelling and exceptional circumstances" will hardly be of any benefit to the Government servant against whom the power of suspension is exercised. Even a review by a Court of law in this regard will hardly be an adequate safeguard against discrimination as the concept of "compelling and exceptional circumstances" being conclusive in its import and come what ephemeral in its content with introduction of uncertainty in the situation which Rule 49A with the Note appended seems to avoid."

In case the matter is considered in the manner already suggested by us above, there shall always be objective satisfaction of the appointing authority before the Government servant can be suspended pending inquiry. To suspend a Government servant on receipt of complaints containing allegation of dishonesty or of misconduct, without the appointing authority being satisfied that the allegation made has any substance which would latter justify taking disciplinary proceeding shall be one subjective consideration and has to be disapproved by the courts of law. But where there exist circumstances to satisfy the appointing authority that the allegations made have substance suspension pending inquiry shall be on objective consideration and not subjective. It is a different thing that the appointing authority may like to have the matter investigated or further investigated so that the total material may come on the record and a proper departmental inquiry can be held.

While construing the Note to Rule 49A, which has since been deleted the Division Bench deciding the case of State of U. P. and others v. Rajendra Shanker Nigam and others (supra) observed at one place.

Thus use of the phrase as far as possible, leave latitude to the authority to exercise the preexisting power of suspension even before the framing and communication of the charges. But of course this is not to be done as a normal rule but in an emergent situation.

and at another place observed:

It indicates a stage where an inquiry into the conduct of a Government servant is imminently expected with a view to impose some punishment upon him.

From the observations made by the Division Bench subsequently it is clear that in using the word emergent what the Division Bench meant was that where there is to be a departure from the ordinary rule there should be an exceptional or compelling circumstance, likewise the word imminently referred to above, is to be read in the light of the observation made in the same paragraph to the effect:

"When the Government sets in motion its machinery for investigation the alleged complaint so that it may hold a formal enquiry more properly the formal enquiry is clearly contemplated and the power to suspend comes into play."

Even Seth, J., in Rajendra Shanker Nigam v. State of U. P. and others (supra) was of the view that it is permissible under Rule 49A to suspend a Government

servant pending inquiry of course in suitable circumstance, even where no informal preliminary enquiry has been conducted and the stage for framing of charges has not arisen as will be clear from the following observation made by him.

"In appropriate cases the appointing authority may make up its mind to hold a departmental enquiry even on the basis of the information contained in the complaint made against the Government servant concerned whether calling for a report or holding an informal enquiry and in such cases it will be open to it to pass order for his suspension."

In a particular case the question whether or not an order of suspension has been passed in contemplation of an enquiry under Rule 55 will depend upon its facts. Clearly it is for the appointing authority to indicate that after receipt of complaint against the Government servant and before making the suspension order it intended to hold a departmental enquiry against him.

For the reasons indicated above we are of the opinion that even the Note below Rule 49A or rule 1A was a part of the main rule it did not restrict the scope of the relevant rule. The power of suspension pending inquiry under this rule could be exercised at an early stage also, i.e. before the framing of charges and communication thereof to the Government servant, provided that on objective consideration of the material the appointing authority was satisfied that after investigation or further investigation there, shall be a formal departmental inquiry under Rules 55 and 55A. This power was to be ordinarily exercised in the manner contemplated by the Note.

While dealing the Note below Rule 49A or Rule 1A under notification dated March 24, 1974 the Government did not amend the executive instructions contained in the two G.Os. referred to the earlier part of this judgment; these instructions are still in existence but they cannot in any way affect the scope of Rule 49A or Rule 1A. They can be utilised as laying down guiding principles for the information of the appointing authority. As such they can be said at the most to be advisory in nature of course, entitling the State Government to pass a proper order on a representation being made to it by the aggrieved Government servant.

For purposes of these special appeals it is not necessary for us to express a final opinion on the question whether a Government servant can be suspended pending inquiry in exercise of the inherent or implied power of suspension vesting in the appointing authority. The inherent power of suspension recognised in the case of *V. B. Gindrapiya v. State of Madhya Pradesh and others* A.I.R. 1970 S.C. 1994 is the power to suspend the Government servant from performing the duties of his office without adversely affecting his rights and privileges. Such suspension is not covered by the conditions of service Rules, which contemplate suspension accompanied by reduction of emoluments.

To conclude suspension pending inquiry under Rule 49A of the U.P. Civil Services (Classification, Control and Appeal) Rules or Rule 1A of the U.P. Punishment and

Appeal Rules can be ordered at any stage prior to or after the framing of charges, when on objective consideration the authority concerned is of the view that a formal departmental inquiry under Rules 55 and 55A of the C.C.A. Rules or Rules 5 and 5A of the U.P. Punishment and Appeal Rules is expected or such an inquiry is proceeding. At what stage the power under the above rules can be exercised shall always depend on the facts and circumstances of each case.

The records of the special appeals shall now be sent to the Division Bench concerned with our opinion on the question of law involved.

D.S.M., J.I agree.

Per Satish Chandra and Yashodanandan, JJ.I have read the opinion of My Lord the Chief Justice, I would like to add a few words.

By a notification dated January 30, 1953, the Governor added Rules 49A and 49B to the U.P. Civil Services (Classification, Control and Appeal) Rules. The material part of Rule 49A stated:

49A(1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority:

Provided

Note.As a rule, suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established, they may ordinarily be expected to warrant his dismissal, removal or reduction. Suspension, where deemed necessary, should as, far as possible, immediately precede the framing of charges and their communication to the Government servant charged."

By the same notification of January 31, 1953, the Governor issued administrative instructions to the "appointing authorities. One of them was resorted to unless the charges are serious not enough to warrant dismissal, removal or reduction and the same should proceed the framing of charges and their communication to the accused Government servant.

Another instruction provided that the charge or charges should be handed over to the charged officer within 15 days from the date of taking the decision to start formal proceedings (At the same time a decision should be taken whether the officer should be placed under suspension pending inquiry). These administrative instructions were virtually identical with the note appended to Rule 49A.

Rule 49A came up for consideration in Rajendra Shanker Nigam v. State of U. P. (supra). The learned Single Judge held that the inquiry referred to in Rule 49A means an inquiry under Rule 56. The expression an "inquiry is contemplated occurring in Rule 49A" would mean that the appointing authority has decided to hold an inquiry under Rule 53. It was observed:

"Merely because serious complaints against a Government servant are received by his appointing authority and it decides to obtain a report with regard to it from the Vigilance or some other authority it does not necessarily follow that the appointing authority contemplates to hold an inquiry against the Government servant under Rule 58. Such a report is called for the appointing authority to make up its mind whether or not to initiate regular departmental proceedings."

Thus, the word "contemplated" was equated with decided or initiated.

This decision was taken up in Special Appeal in State of U. P. v. Rajendra Shanker Nigam (supra). The Division Bench held that the term inquiry under Rule 49A is not confined to an inquiry held under Rule 55. It also includes an inquiry which may ultimately result in a lesser punishment being awarded. It was held that the word contemplated means "to have in view", "expected", "to take into account as a contingency". When the Government sets in motion its machinery for investigating the alleged complaints so that it may hold a formal inquiry more properly, the formal inquiry is clearly contemplated. In support reliance was placed upon S. C. Kharbanda v. State of U. P. (Special Appeal No. 441 of 1972, decided on July 21, 1972). It was further held that the Note appended to Rule 49A was a part of the Rule and had statutory force. It imposed a limitation upon the exercise of power. The phrase "as far as possible" occurring in the Note suggests that normally the power shall be exercised at the mentioned point of time namely after framing of charges and its communication. But in an exceptional situation the power can be exercised at an earlier point of time also, if the Government exercises the power at an earlier point of time. It has to establish that it was not possible to comply with the condition of the Note because of some compelling reason or circumstance.

The matter was reconsidered by a Full Bench of this Court in State of U. P. v. J. L. Bhargava (1974 A.L.J. 283). The Full Bench dissented from the Division Bench decision in R. S. Nigam's case. It held that the words "allegations" used in the first part of the Note did not mean the allegations contained in the complaint received against a Government servant, but would mean the allegations having substance received by the investigation of an informal nature. It was also held that the phrase "as far as possible" occurring in the Note does not permit an appointing authority to suspend before it decides to initiate an inquiry under Rule 55. It only authorises the authority to refer the decision to suspend to a date after the framing and communication of the charges. It was held that the term "inquiry" refers to an inquiry under Rule 55 only and that the phrase "inquiry is contemplated" can only mean an inquiry is initiated. This stage is reached when a decision has been taken on the basis of the material collected on preliminary investigation and the appointing authority is prima facie satisfied that they were substance and the starting of the formal proceedings would be justified. At any point of time prior to the taking of such a decision, it cannot be said that the inquiry under Rule 55 was contemplated.

The Full Bench rendered its decision on February 25, 1974. Within a month,

namely, on March 23, 1974, the Governor issued a notification under the proviso to Article 309 of the Constitution, repealing the Note appended to Rule 49A as well as Rule 1A of the Punishment and Appeal Rules retrospectively with effect from October 29, 1968, the position is that with effect from October 29, 1968 Rules 49A and 1A are to be deemed not on the statute book without the Note. Evidently this retrospective amendment was brought about because the Governor cannot accept the theory of compelling circumstances enunciated by the Division Bench in R. S. Nigam's case because of the term "as far as possible" occurring in the Note. It is also apparent that the Governor did not accept the construction placed upon the Rule by the Full Bench.

Though, after the repeal of the Note it is academic to say any thing about its correct construction or its impact upon the main part of the Rule, but agreeing with My Lord the Chief Justice that the word "allegations" occurring in the Note mean the allegations contained in the complaint; because after it is decided to hold a formal inquiry those allegations became charges.

We also agree with My Lord the Chief Justice as to the interpretation of the terms "as far as possible" Rule 49A confers discretionary power to suspend while an inquiry was contemplated as also when an inquiry was proceeding. The power to suspend could be exercised at any time after the inquiry has been commenced or was proceeding. In this view the phrase "as far as possible" was superfluous if it was intended to give discretion to order of suspension at any time after the framing of charges. The term "as far as possible" operated as an exception to the general Rule that the power of suspension should be exercised at any time when the charges have been framed and communicated, with the result that in special circumstances it could be exercised at an earlier point of time also.

After the repeal of the Note the position is that Rule 49A as well as Rule 1A conferred discretionary power to place an officer under suspension when an inquiry is contemplated or is proceeding. The power has not been confined on the appointing authority to his subjective satisfaction. It is exercisable only if on an objective consideration the appointing authority takes the view that an Inquiry is contemplated or is proceeding. This position being based on an objective consideration is open to judicial review.

Rule 49A as well as Rule 1A refer to an inquiry. A perusal of the various Rules in the both sets of Rules shows that Rules 55 and 55A use the term inquiry. An inquiry is to be held under them in order to impose the major punishment of dismissal, removal or reduction in the other Rules laying down the procedure for imposing minor punishments do not characterise the proceeding as an inquiry. This suggests that the inquiry referred to in Rule 49A is the departmental inquiry contemplated under Rules 55 and 55A. The power of suspension is hence available in relation to an inquiry under Rule 55 or Rule 55A held with a view to impose the major punishments of dismissal, removal or reduction in rank. The administrative instruction saying that suspension pending inquiry should not be resorted to unless the charges are serious enough to warrant dismissal, removal

or reduction in rank, only makes explicit what is implicit in Rule 49A and Rule 1A. The power accrues when such an inquiry is either contemplated or is proceeding. It is immaterial as to what punishment is imposed as a result of the inquiry.

The next question is as to the correct connection and significance of the term contemplated in the phrase "inquiry is contemplated or is proceeding". It is obvious that "contemplated" cannot mean the same thing as "proceeding" in relation to the inquiry, else the term "contemplated" would be superfluous. In this context the word "contemplated" refers to a stage of the inquiry different than when it is proceeding. From the moment the inquiry has been commenced, it can be said to be proceeding. In my opinion an inquiry commences when it is set in motion or is initiated. Formal departmental proceedings start when a decision to hold them is taken; because the decision directly leads to and sets in motion the various ministerial steps of the proceedings, like framing and communication of charges, calling for an explanation, hearing witness, etc. etc. The decision to hold a formal departmental inquiry sets it in motion or initiates it. From this point of time onwards the inquiry proceeds.

In this view, the word "contemplated" occurring in the phrase "inquiry is contemplated or is proceeding" must refer to a stage earlier than whence the inquiry is proceeding. The term "contemplated" means to have in view, "expected", "to take into account as a contingency". A person can have an inquiry in view, or expect an inquiry before he decides to hold, it. This also corroborates the interpretation that the word "contemplated" occurring in the phrase "inquiry is contemplated or is proceeding" points to a stage when the inquiry is expected; that is, prior to the taking of the decision to hold the inquiry, we are unable to share the view expressed by the Full Bench in J. L. Bhargava's case (supra) that the word "contemplated" is equivalent to decided.

The question as to when is an inquiry in view or expected, is a question of fact dependant on the circumstances of each case. In law such an expectation can happen on receipt of information of commission of misconduct or during or after a preliminary inquiry.

The existence of power which should not be confused its abuses. In case of abuse, the particular exercise of the power will be bad and will be quashed. But that has no bearing on the question of law as to when, on a proper construction of the Rule, does the power arise.

Though by the notification dated March 23, 1974 the Note appended to Rule 49A was repealed, the Government did not amend, the executive instructions, that suspension pending inquiry should immediately precede the framing of the charges and their communication to the accused Government servant and that the decision to place an officer under suspension should be taken at the time when the charges are framed and served. The question is what is the effect of this instruction ?

In Sant Ram Sharma v. State of Rajasthan (supra) the Supreme Court rules that

the Statutory rules cannot be superseded by administrative instructions made by the Government. In *Union of India v. K. P. Joseph* (supra) the Supreme Court reiterated the above principle but pointed out that if the Rules framed under Article 309 of the Constitution are silent on any particular point the Government can fill up gaps and supplement the Rules and issue instructions not inconsistent with the Rules.

It is thus clear that in law administrative instructions cannot supersede or amend the Rules or whittle down or enlarge their ambit and scope. In the present case, the instruction, when it says that suspension should immediately precede the framing and service of the charges, has the effect of repealing or nullifying the phrase "inquiry is contemplated" occurring in the Rules. It is clearly inconsistent with the Rules. It does not fill up any gaps in the Rules. It will hence be ineffective. If in a particular case the power of suspension is exercised prior to the framing of charges, the order of suspension cannot be held illegal and quashed on the ground that it was passed in contravention of the administrative instruction. In other words, the administrative instruction being inconsistent with the statutory rule, is void and unenforceable.

Reliance was placed on *K. P. Joseph's* case for the proposition that an administrative order which confers a right is enforceable by Courts. It was submitted that the aforesaid administrative instruction confers a right upon the Government servant not to be placed under suspension till the service of charges. In *K. P. Joseph's* case it was declared that generally speaking an administrative order confers no justiciable right, but this general rule has exceptions. If an administrative order abridges or takes away rights, then the principles of natural justice become applicable to it and their violation will be enforceable in a court. This is not a case of enforcing the administrative order, but nullifying the violation of the principles of natural justice. In the next place, it was held that if an administrative order confers a right which becomes part of the service conditions, such an order will be enforceable in Courts. It will be seen that an administrative order should not merely confer a right but should become part of the conditions of service. This is a question of fact not amenable to any presumption. In the present appeals it has not even been alleged by the Government servants that the executive instruction in question had become part of their service conditions.

In *K. P. Joseph's* case the Supreme Court was considering the effect of an administrative order dated July 15, 1960 laying down the manner of fixation of pay. The fixation of pay was not governed by any statutory rules. The only available literature on the topic was the aforesaid order. It was in this context that the Court held that the order conferred a benefit or right upon the Government servant to have his pay fixed in accordance with it.

The fact that the court specifically referred to its decision in *Sant Ram Sharma's* case and reaffirmed the principle that administrative instructions cannot supersede statutory Rules and that if they are inconsistent with the Rules they

would be ineffective, shows that the principle that an administrative order which confers a right and is part of service conditions, is enforceable has no application to a situation where the particular condition of service is covered by statutory Rules. The statutory Rule will have its full play. Its ambit could not validly be affected by an administrative instruction. If there is inconsistency between a statutory Rule and administrative instruction, the instruction would be void. The statutory Rule alone will be enforceable in Courts.

The remedy for breach of such an administrative instruction is not judicial. It lies on the executive side. Under the Manual of Government orders the Government has a right to interfere with all administrative orders by way of an appeal or a representation. If an order of suspension, is passed in breach of administrative instructions the Government can look into the matter and set things right. Further if an appointing authority passes an order in breach of the Government for committing misconduct.

With respect we agree with My Lord the Chief Justice that this Full Bench is competent to reconsider the decision of a smaller Full Bench and that the principle of stare decision is not applicable to the present case; that it is open to this Bench to decide the controversial questions of law and leave the disposal of the appeal to the Division Bench; and that the Rules framed under Article 309 can be amended retrospectively. What has been said above in respect of Rule 49A applies equally to Rule 1A of the U.P. Punishment and Appeal Rules for Subordinate Services.

To conclude, the power of suspension arises when on an objective consideration the appointing authority is of the view that a formal disciplinary enquiry is expected or is proceeding.

Per Asthana, J.I have the benefit and advantage of reading the opinions prepared by the learned Chief Justice and brother Satish Chandra. While agreeing with their conclusion that the word "inquiry" occurring in Rule 49A(1) of the U.P. Civil Services (Classification, Control and Appeal) Rules, hereinafter referred to as the "Rules", means the formal inquiry under Rule 55 of the Rules as also with their conclusion that the order of suspension in the exercise of power under Rule 43A of the Rules can be passed only on objective considerations, with respect, I find myself in disagreement in regard to the observations made by them in elaboration of the various aspects and facts of the problems or the problems arising while considering the scope, the extent and the timing of the order of suspension. I would, therefore, like to add some words of my own.

A Full Bench of this court in the case of State of U.P. v. Jawahar Lal Bhargava (supra) approved of the decision of Seth, J. in Rajendra Shanker Nigam v. State of U. P. (supra) and held that if the material which comes to light after the completion of the informal inquiry on the basis of which a decision could be taken as to the seriousness of the allegations deserving of major punishment of dismissal, removal or reduction in rank in the ordinary course was not before the

appointing authority when the order of suspension was passed, the order would violate Rule 43A of the Rules and would be void ab initio. After the decision of Full Bench in Jawahar Lal Bhargava's case (supra) the Governor of Uttar Pradesh issued a Notification purporting to be under Art. 309 of the Constitution deleting the note below Rule 49A of the Rules with retrospective effect, which note was an integral part of that rule. The said note was as follows:

N.B."As a rule, suspension not to be resorted to unless the allegations against the Government servant are so serious that in the event of their being established, they may ordinarily be expected to warrant his dismissal, removal or reduction. Suspension, where deemed necessary, should, as far as possible, immediately proceed to the framing of charges and their communication to the Government servant charged."

Then an application for review was filed by the State Government on the ground that the note having been deleted with retrospective effect, the decision of the Full Bench in Jawahar Lal Bhargava's case limiting the exercise of power of suspension under rule 49A when the informal inquiry has been completed revealing the material on the basis of which a decision could be taken as to the seriousness of the allegations deserving of major punishment of dismissal, removal or reduction in rank in the ordinary course, was rendered nugatory thus the order of suspension passed prior to that stage could not in law be held as void ab initio. This application for review was again listed before the same Full Bench, which decided Jawahar Lal Bhargava's case, and the application was rejected. The latter Full Bench observed:

"Now coming to the merits, we must point out that the learned Chief Standing Counsel assumes that our judgment is based on the Note to Rule 49A. That is not so. We have in our judgment analysed the main clauses of Rule 49A and construed them according to our wisdom. Even if the Note to Rule 49A were not there our conclusion would not have been different. Mere deletion of Note even with retrospective effect, therefore, does not bring about any substantial alteration or change in law."

When another set of petitions questioning the validity of the order of suspension passed against the petitioners in those petitions were heard before another Division Bench of the Court in the form of Special Appeals, it appears to have been urged on behalf of the State that with the retrospective repeal of the Note the view taken by the Full Bench in Jawahar Lal Bhargava's case was no longer operative and that the appointing authority had an inherent power to suspend a Government servant even beyond Rule 49A of the Rules. The learned Judges constituting the Division Bench held that the matter required reconsideration and the questions involved being of general importance and frequent occurrence, the Special Appeal be referred to a larger Full Bench.

It may be noted here that in one of the Special Appeals similar questions in regard to the construction of Rule 1A of the U.P. Punishment and Appeal Rules for

subordinate services were also involved and the Note below that Rule in terms similar to the Note below Rule 49A of the Rules had also been deleted with retrospective effect.

It appears to me on a reading of the order of reference of the Division Bench that in the operative portion of the order though it referred the Special Appeals but what really it intended was to refer two questions, viz.:

- (1) Whether the retrospective repeal of the Note under Rule 49A of the Rules rendered the Full Bench decision in Jawahar Lal Bhargava's case inoperative? and
- (2) Whether the appointing authority has inherent power to suspend an employee in the sense that it has unfettered discretion to require a Government servant not to attend to his work provided he was paid the emoluments according to the rate of pay admissible to him?

With respect to the learned Chief Justice and brother Satish Chandra, I find that the opinions prepared by them do not answer finally the second question called out by me from the order of reference. As regards the first question, their opinions elaborate the various aspects of the controversy involved and they have approached the matter as if the referring order doubted the correctness of the Full Bench decision in Jawahar Lal Bhargava's case in all its implications and ramifications.

On the question "whether the appointing authority is vested with any inherent power of suspending a Government servant, I will stick to our view taken in Jawahar Lal Bhargava's case that there is no such power. The power of suspending a Government servant can only be conferred by law. The Chief Standing Counsel neither in Jawahar Lal Bhargava's case nor in the instant reference canvassed before us for an inherent power in the sense as contemplated by the learned Judges in their referring order. Asking the Government servant not to work or perform his duties and at the same time permitting him to draw his salary is not a suspension from service. The right of the master not to take work from his servant is an implied right flowing from the contract of employment. It is not an inherent right. In the case of *V. P. Gindroniya v. State of Madhya Pradesh* (supra) in paragraph at page 1495 of the reported judgment the Supreme Court observed as follows:

"It is now well settled that the power to suspend, in the sense of a right to forbid an employee to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract itself. Ordinarily, therefore, the absence of such a power either as an express term in the contract or in the rules framed under some Statute would mean that an employer would have no power to suspend an employee of his and even if he does so in the sense that he forbids the employee to work, he will have to pay the employee's wages during the period of suspension The distinction between suspending the contract of service of a servant and suspending him from performing the duties of his office on the basis

that the contract is subsisting is important. The suspension in the latter case is always an implied term in every term of contract of service. When an employee is suspended in this sense, it means that the employer merely issue a direction to him that he should not do the service required of him during a particular period. In other words the employer is regarded as issuing an order to the employee which because the contract is subsisting, the employee must obey."

As I read the above observations extracted out from the judgment of the Supreme Court, the said observations, to my mind, negative any inherent right of the master to suspend a servant when the master intends to suspend the contract of service. When it is not intended to suspend the contract but it is intended to keep it subsisting, then in directing the servant not to do service required of him will only mean that the employer is issuing an order to the employee which because the contract is subsisting, the employee must obey. It is clear from the declaration of law by the Supreme Court that the power to suspend a Government servant pending an inquiry into his misconduct can only be conferred by statute. There is no inherent right. The only answer, therefore, to question No. 2 can be that there is no inherent power. The kind of suspension contemplated in the question is nothing but issuing an order to the Government servant not to do the service required of him during a particular period which because of the relationship of master and servant subsisting, the Government servant is bound to obey. This would be nothing but a part of the condition of his service. In case the service was contractual, it would be nothing but an implied term of the contract of service.

What is the effect of the retrospective deletion of the Note below Rule 49A may now be considered. As already observed above, the Full Bench while rejecting the application for review in Jawahar Lal Bhargava's case held that even if the Note to Rule 49A were not there, the conclusion arrived at on the substantive part of the Rule would not have been different. This would be sufficient answer to the question but in difference to the opinions recorded by the learned Chief Justice and brother Satish Chandra, I will assume that it is not only a question or questions that have been referred to us but the special appeal have been referred and this Bench constituted of larger number of Judges is free to come to its own conclusions on the interpretation and construction of Rule 49A of the Rules. In this view of the matter, it is not necessary for me to advert to the arguments advanced before us to the effect that the rule of stare decision should prevent us from reconsidering the decision of Full Bench in Jawahar Lal Bhargava's case.

The basic question that arises on the interpretation and construction of Rule 49A when elaborating upon the extent of power of suspension and the time of passing the order will turn on what meaning is to be given to the words "an inquiry is contemplated", occurring in Rule 49A. The material text of the Rule may be quoted here with profit:

"A Government servant against whose conduct an inquiry is contemplated, or is

proceeding, may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority."

It is unnecessary to quote Rule 1A of the U.P. Punishment and Appeal Rules as it is similar in terms and the considerations which will apply to the interpretation of Rule 49A of the Rules would equally apply to the interpretation of Rule 1A of the Punishment and Appeal Rules.

It cannot be denied that for different classes of Government servants there are numerous appointing authorities, both of high rank and lower rank, depending upon the class of a Government servant to be suspended. To my mind, it is duty of the interpreter of the rule to give certainty to it so that the appointing authority, high or lower in rank, varying in responsibility and intelligence should be able to apply the Rule uniformly and not indiscriminately or arbitrarily as the rule confers an unfettered discretion on the appointing authority to place a Government servant under suspension against whose conduct an inquiry is contemplated or is proceeding. It would be seen that the power to suspend operates upto the conclusion of the inquiry. We all agree that the inquiry that is meant in this rule is a formal departmental inquiry and not a fact finding preliminary inquiry, which usually proceeds the formal inquiry. This is a pointer towards a legitimate inference that when the inquiry has begun or is about to begin. We also agree that it is on an objective consideration that the appointing authority forms the opinion that a formal inquiry is to be initiated. The rule does not permit forming an opinion on subjective considerations that the formal inquiry is likely to be held. It is only when a formal inquiry is to begin that the discretion of the appointing authority comes into play to suspend or not to suspend a Government servant. When a formal inquiry is proceeding and the appointing authority in its discretion suspends a Government servant pending conclusion of that inquiry, no problem arises. The Rule is clear on this score. The problem arises only when the formal inquiry has not begun or initiated. The Rulemakers have used the words "'against whose conduct an inquiry is contemplated, or is proceeding". The word "contemplate" that has somewhat a vague import. Various meanings of this word have been reproduced from standard dictionaries by the learned Chief Justice in his opinion. "Contemplation", the noun of the verb "contemplate", is always a mental process. The process of mind or mental process can work subjectively as well as objectively. The objectivity of the mental process is occasioned by thinking or contemplating on something which can be physically observed or perceived. The subjectivity of the mental process is occasioned by something which is imagined and which cannot be physically observed or perceived by senses. It follows that when we may say that a formal disciplinary inquiry is, in view of the meaning which is sought to be given to the words "an enquiry is contemplated" and the view is to be based on objective considerations, it follows that there must be material which can be physically observed and perceived to," for the basis of the formal inquiry. Since subjective consideration is eliminated, the more hope or a more the artificial formation of opinion that a formal inquiry will be held without

any material basis for it being available is ruled out. One can say that when a mariner starts his journey on the high seas for a fixed destination somewhere in the middle of high sea, no doubt he is contemplating a journey to the Island of his intended destination. He can be said to be contemplating to reach the Island, which is his destination. One can also express it in different words, that the journey is with a view to reach his destination on the high seas. The land of destination would only come in view when the mariner physically sees it or perceives its outline when he reaches near the Island. It is in this sense that the formal inquiry would be in view of the appointing authority as he will have before him the outline furnished by the material which physically can be observed. There is no doubt in my mind that the process which words in the mind of the appointing authority based on the objective material before him can be said to be contemplation. When a person takes a decision, the taking of that decision is also a mental process. To my mind, there is nothing wrong in holding, as Seth, J. held in Nigam's case (supra), that an enquiry is contemplated when the mental process of the appointing authority has worked and he formed an opinion that formal inquiry is to be held. This is nothing but saying that the appointing authority decides that a formal inquiry be held. I do not think the interpreter strains the language of Rule 49A or misinterpretes, or misconstrues it when he holds "an inquiry is contemplated" as synonymous with "an inquiry is decided upon". The decision to hold an inquiry will not amount to initiation of the inquiry. While the decision is a mental process, the initiation is a physical process, that is when the decision is put into practice. It is in that sense that I conceive the Supreme Court in P.R. Nayak v. Union of India (supra) distinguished the phrase "an inquiry is initiated" from "an inquiry is contemplated". I again repeat what we held in Jawahar Lal Bhargava's case that the Supreme Court in P. R. Nayak's case (supra) having observed that they did not agree with the decision in Tarak Nath Ghosh's case (supra), it is clear that in P. R. Nayak's case they were not defining what was meant by "an enquiry is contemplated". Neither their disagreement with the decision in Tarak Nath Ghosh's case (supra) militates against the view that an inquiry can be contemplated at a stage prior to the collection of the appropriate material which would warrant a punishment of dismissal, removal or reduction in rank of a Government servant, when the evidence furnished by that material was established to be true at a formal inquiry. I am unable to read anything in P. R. Nayak's case (supra), decided by the Supreme Court which would amount to a declaration of law as to the meaning of the words "an inquiry is contemplated".

If at all, the deletion of the Note retrospectively has any effect, then it has affected the decision of the Special Appeal Bench in Rajendra Shanker Nigam's case (supra) as the learned Judges constituting the Special Appeal Bench heavily leaned on the phraseology of the Note in coming to the conclusion that the Note was a pointer that the rulemakers intended to confer power of suspension on the appointing authority in exceptional and compelling circumstances even before the material was collected furnishing evidence that the conduct of the

Government servant was such that it warranted the punishment of dismissal, removal or reduction in rank. The Note having been deleted the basis for the said conclusion vanishes.

Any procedure prescribed, regulating the exercise of power for suspension by Rules or by departmental instructions will, in my opinion, be binding on the appointing authority. The argument put forward on behalf of the State that the appointing authority will be justified in ignoring the procedure prescribed by the departmental instructions if otherwise it has acted within the scope of the Rule which confers a discretion on it of the widest amplitude has hardly any tenability. Any departmental rule or instruction in the nature of regulation of the said amplitude of discretion cannot be said to be repugnant to the Rule. To regulate the exercise of discretionary powers by departmental instructions issued by the highest authority of the State cannot be construed as derogating from the rule "and the disregarded of it by the lower authorities ought not to be counteracted by the Court and should always be discouraged. I think it is the essence of the power of judicial review of administrative action by Courts to see to it that a discretion vesting in any instrumentality of the State be exercised in accordance with settled practice or principle and if that principle is prescribed by the highest authority of the State such as the Governor, the Court in the exercise of its power of judicial review ought to be able to control the administrative action which runs counter to that regulation. The appointing authority is to be kept under discipline. In my way of thinking the matter is not to be approached from the point of view that the Government servant has no right to enforce a departmental instruction. In all the cases cited of the Supreme Court or of the High Courts in which a view has been taken that mere departmental instructions do not amount to a binding rule of law, it would be seen that it was the Government servant who was claiming a right under the Rules which right was being whittled down by departmental instructions. A right conferred by Statute cannot be curtailed by mere departmental instructions or executive order but a power administrative in nature conferred on an authority can certainly be regulated by departmental instructions. Rule 49A does not confer any right on the Government servant or on the appointing authority. It confers a disciplinary power. Any instruction issued by the Government as to when the appointing authority will exercise the power does not curtail the right of any person. What is claimed by the State Government before us, is that even if the order of suspension is passed ignoring the instructions of the Governor that would not be invalid and ought to be respected by the Court as not being amenable to the judicial review by the Court. I can only, in despair, observe that it is a said commentary on the administrative process of the Government when it pleads before the Court of law to ignore the directive of the Governor. The learned Chief Justice, in his opinion, has referred to the instructions given by the Governor, contained in Appendix IV to the Rules. G.O. No. O1923/II6414 dated January 30, 1953 says that the Governor has accepted all the recommendations made by the Disciplinary Inquiry Proceeding Committee in their report and based on that

approval executive instructions, contained in Appendix IV to the Rules, were issued. Though the said instructions may not have the status of a statutory rule in the sense of having been made under some statute or under Article 309 of the Constitution, yet they will govern the conditions of service not being inconsistent with Rule 49A and being meant to regulate the plenitude of discretionary power by laying down a time table, so to say, with a view to bring uniformity in application of the rule and keeping the appointing authorities under discipline. I am supported in this view of mine by a decision of the Supreme Court in *Union of India v. K. P. Joseph* (supra).

Assuming the instructions do not become a condition of service even so they are indicative of what the view of the Government was as to the scope extent and the timing of the exercise of power of suspension under Rule 49A of the Rules. The interpretation of the Phrase "an inquiry is contemplated" as given in *Jawahar Lal Bhargava's* case is supported by the intention as expressed by the Government in the instruction contained in Appendix IV.

My conclusion, therefore, is that the deletion of the Note of Rule 49A does not render the decision of the Full Bench in *Jawahar Lal Bhargava's* case as inoperative.

D.S. Mathur, C.J.

In view of the majority opinions, the answer to the question of law involved is as below:

Suspension pending inquiry under Rule 49A of the U.P. Civil Service (Classification, Control and Appeal) Rules or Rule 1A of the U.P. Punishment and Appeal Rules can be ordered to any stage prior to or after the framing of charges. When on objective consideration, the authority concerned is of the view that a formal departmental inquiry under Rules 55 and 55A of the C.C.A. Rules or Rules 5 and 6A of the U.P. Punishment and Appeal Rules is expected, or such an inquiry is proceeding. At what stage the power under the above rules can be exercised shall always depend on the facts and circumstances of each case.

The records of the Special Appeals shall now be sent to the Division Bench concerned with our opinion on the question of law involved.