
(2015) 05 AHC CK 0042

In the Allahabad High Court

Case No : Service Bench Nos. 726, 505 of 1997, 2916 of 1994, 927 and 1547 of 1999

State of Uttar Pradesh and Others

APPELLANT

Vs

Rajendra Singh and Others

RESPONDENT

Date of Decision : 11-05-2015

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 21, 226, 309
Criminal Procedure Code, 1973 (CrPC) — Section 162, 173
Government of India Act, 1935 — Section 243
Police Act, 1861 — Section 12, 13, 14, 15, 16(2)

Citation : (2015) 4 ADJ 575 : (2015) 4 ALJ 403 : (2015) 113 ALR 124 : (2015) 3 ESC 1337 : (2015) LabIC 2925 : (2015) 3 LLN 66 : (2016) 1 UPLBEC 291

Hon'ble Judges : D.Y. Chandrachud, C.J.; Narayan Shukla, J.; Rajan Roy, J

Bench : Full Bench

Advocate : Sangeeta Chandra and Addl. C.S.C., for the Appellant; Sudeep Seth, Advocates for the Respondent

Judgement

Dr. Dhananjaya Yashwant Chandrachud, C.J.—The issue.

On 7 November 2012, a Division Bench referred the following question of law for resolution by the Full Bench:

"Whether a temporary police constable appointed under Section 2 of the Police Act 1861 (Police Act), who has not been placed on probation, can be terminated from service in accordance with the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 (Police Regulations) or whether the procedure provided under Para 541 of the Police Regulations dealing with the constables on probation shall be applicable"

The issue before the Full Bench, turns upon the interpretation of the provisions of the Police Act and of the Police Regulations. The issue is whether a person, who has been appointed as a police constable on a temporary basis, is entitled to the benefit of Regulation 541 of the Police Regulations. The constables who are

before this Court, contend that the services of a person who is appointed on a temporary basis, can be dispensed with only in accordance with the procedure prescribed by Regulation 541. Contrary to this, is the position which has been adopted by the State, which is that the services of a person who has been appointed on a temporary basis are not governed by Regulation 541 which applies only to probationers, and that the Rules framed by the State under Article 309 of the Constitution, called the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 (Rules of 1975) would apply.

The Police Act 1861

2. The Police Act was enacted in the aftermath of the Mutiny of 1857. The Act received the assent of the Governor-General on 22 March 1861. The long title describes it as "an Act for the regulation of police". The Preamble states that "it was expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime." The Act and the Regulations were preserved under Section 243 of the Government of India Act, 1935 and by Articles 313 and 372 of the Constitution.

3. After the enactment of the Constitution, the police is a state subject under Entry 2 of the State List to the Seventh Schedule. Entry 2, which deals with the police, including railway and village police, is subject to the provisions of Entry 2A of the Union List providing for the deployment of any armed force of the Union or any other force subject to the control of the Union.

4. Section 2 of the Police Act provides for the constitution of the force, in the following terms:

"2. Constitution of force.--The entire police establishment under a State Government shall for the purposes of this Act, be deemed to be one police force, and shall be formally enrolled and shall consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government.

Subject to the provisions of this Act the pay and all other conditions of service of members of the subordinate ranks of police force shall be such as may be determined by the State Government."

5. Section 7 provides that subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may, from time to time, make under the Act, the Director cum Inspector General may, at any time, dismiss, suspend or reduce any police officer of subordinate ranks who is thought to be remiss or negligent in the discharge of his duties or unfit for the same" or may award one of the punishments mentioned in the provision. Section 8 provides that every police officer appointed to the police force shall receive on appointment, a certificate in the form annexed to the Act by virtue of which such a person is vested with the powers, functions and privileges of a police officer. When the person named in the certificate ceases to be a police officer, the

certificate shall cease to have effect and it would have to be surrendered forthwith.

6. Section 12 confers upon the Director General-cum-Inspector General the power to make rules and is in the following terms:

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

7. Section 23 provides for the duties of police officers.

8. A rule making power is conferred upon the State Government under Section 46(2). Under clause (c) of sub-section (2) of Section 46, the following provision has been made:

"46. Scope of Act.--(1)

(2) Where the whole or any part of this Act shall have been so extended, the State Government may, from time to time, by notification in the official Gazette, make rules consistent with this Act-

a)

(c) generally, for giving effect to the provisions of this Act."

A self-contained Code

9. In *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, AIR 1961 SC 751 : (1961) CriLJ 773 : (1970) 1 LLJ 670 : (1961) 2 SCR 679 , a Constitution Bench of the Supreme Court held that:

"...the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal."

10. This position has been reiterated in subsequent decisions of the Supreme Court, specifically in the context of the Police Act. In *Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others*, AIR 2002 SC 2322 : (2002) 1 JT 159 Supp : (2002) LabIC 2168 : (2002) 4 SCALE 528 : (2002) 6 SCC 127 : (2002) 3 SCR 948 : (2002) 2 SCT 1093 : (2002) 3 SLJ 88 : (2002) AIRSCW 2457 : (2002) 4 Supreme 218 , the Supreme Court laid down the same principle in the following observations:

The aforesaid provision of Section 12 thus authorises the Inspector General of Police to make rules obviously under the Act and in the nature of administrative instructions. As a matter of fact, a perusal of the provisions of the Act, in particular that of Section 46, makes it abundantly clear that the statute (the Police Act) ought to be treated as a complete code by itself-there is thus a special statute concerning the police force and within its fold are included the appointment, dismissal, placement and all other steps required to re-organise the police and make it more efficient instrument for the prevention and detection of crime."

(emphasis supplied)

11. The Police Act, 1861 is a special statute and a complete code.

Police Regulations

12. The Police Regulations deal with matters including (i) powers and duties of officers in Part I; (ii) particular duties including lodging of reports, investigations, inquests, arrest, bail and custody, custody and disposal of property, special crimes, patrols and pickets, execution of processes and other miscellaneous provisions in Part II; (iii) internal administration in Part III; and (iv) training in Part IV.

13. Regulations 61 to 64 of the Police Regulations provide for the organisation and duties of constables. Regulations 65 to 72 provide for the organisation and duty of the Armed Police.

14. Chapter XXIX comprises of Regulations 396 to 427 and deals with appointment. Regulation 396 provides that the police force consists of (1) Provincial Police, Civil, Armed and Mounted; (2) Government Railway Police; and (iii) Village Chaukidars. Regulation 397 provides for gazetted officers of the force. Under Regulation 398, non-gazetted officers of the force are Inspectors, Sub Inspectors, Head Constables and Constables. Regulation 409 speaks of the enlistment of constables for the Armed and Civil Police, the minimum and upper age limit being 18 and 23, subject to a relaxation of five years for candidates belonging to Scheduled Castes. Regulation 413 requires that a register of candidates for recruitment shall be kept in every district. Under Regulation 418, as soon as a person's name is entered in the register of candidates and he is passed by the Civil Surgeon or immediately after enlistment in the case of a man recruited without being first registered as a candidate, a verification of his character and antecedents has to be carried out. Regulation 423 requires that a certificate of appointment, showing the date of enrolment, is to be furnished mounted on cloth to every person enrolled in the police force under the Police Act. The certificate is liable to be surrendered on quitting the service.

Temporary appointments

15. Regulation 423 provides that these orders also apply to men temporarily appointed. Regulation 427 provides as follows:

"The men whose names are on the register of candidates for recruitment (see Paragraph 413) and who have not yet been enlisted, have a prior claim to appointment in temporary vacancies. If none of these men are available, others may be appointed. The Superintendent should insist, as far as possible, on men temporarily appointed as constables possessing the qualifications required for recruits. No man may be appointed to act temporarily as a constable in a permanent vacancy."

16. Both Regulations 423 and 427 are an indicator of the position that temporary appointments are contemplated in the rules.

17. Chapter XXXII of the Police Regulations containing Regulations 477 to 507-A have been made (as provided in Regulation 477) under Section 7 of the Police Act and apply only to officers appointed under Section 2. Chapter XXXII deals with departmental punishment and criminal prosecution of police officers.

Probation: Regulation 541

18. Chapter XXXVII containing Regulations 539 to 554 deals with the training of Head Constables and Constables. Regulation 541 provides as follows:

"541. (1) A recruit will be on probation from the date he begins to officiate in a clear vacancy. The period of probation will be two years except in the following cases:

(a) those recruited directly in the Criminal Investigation Department or District Intelligence Staff will be on probation for three years, and

(b) those transferred to the Mounted Police will be governed by the directions in paragraph 84 of the Police Regulations.

If at the end of the period of probation, conduct and work have been satisfactory and the recruit has been approved by the Deputy Inspector General of Police for service in the force, the Superintendent of Police will confirm him in his appointment.

(2) In any case in which either during or at the end of the period of probation, the Superintendent of Police is of opinion that a recruit is unlikely to make a good police officer he may dispense with his service. Before, however this is done the recruit must be supplied with specific complaints and grounds on which it is proposed to discharge him and then he should be called upon to show-cause as to why he should not be discharged. The recruit must furnish his representation in writing and it will be duly considered by the Superintendent of Police before passing the orders of discharge.

(3) Every order passed by a Superintendent under sub-paragraph (2) above shall, subject to the control of the Deputy Inspector General be final."

Are the Regulations statutory

19. In *Niranjan Singh Vs. The State of Uttar Pradesh*, AIR 1957 SC 142 : (1957)

CriLJ 294 : (1956) 1 SCR 734 , a Bench of four learned Judges of the Supreme Court had held that Rule 109 of Chapter XI of the Police Regulations dealing with the investigation of crimes which enjoins upon a police officer where an investigation is closed for the day, to note the time and place at which it is closed and to send the diary daily to the Superintendent of Police on all days on which any proceedings are taken, had no statutory force. The Supreme Court held that Rule 109 had no statutory foundation but was only an injunction of the executive Government to police officers of the manner in which they must regulate their work and conduct themselves during investigation. The Supreme Court observed as follows:

"The question, therefore, is whether the action of the Sub-Inspector amounts to a violation of a statutory duty enjoined on him. If the Uttar Pradesh Police Regulations were a set of rules framed under any statute, and as such have the force of law, then a violation of any rule thereunder, may either amount to an illegality or an irregularity which may or may not vitiate the proceedings. The Police Act, 1861 was enacted to reorganize the police and to make it a more efficient instrument for the prevention and detection of crimes, whereby the State Government is given authority to appoint police officers, such as the Inspector-General, etc. Under Section 12 of that Act, the Inspector-General of Police may, from time to time, subject to the approval of the State Government, frame such rules and orders as he shall deem expedient relative to the organization, classification and distribution of the police force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrements and other necessities to be furnished to them; the collecting and communicating by them of intelligence and information, and all such other orders and rules relative to the police force as the Inspector-General shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties. It is not as if these police regulations are rules framed by the Inspector-General in accordance with Section 12; but they are the result of the State Government laying down the mode of conduct and how the officers have to perform their duties. Rule 109 in Chapter XI dealing with the investigation of crimes enjoins upon the police officers when an investigation is closed for the day to note the time and place at which it closed and also lays down that throughout the investigation the diary must be sent daily to the Police Superintendent on all days on which any proceedings are taken. If the investigating officer is not himself in-charge of the station, the diary must be sent through the officer in-charge except when this will cause delay. It also directs the police officer to study carefully Sections 162 and 173 of the Code of Criminal Procedure. Nowhere in the rules is it stated that there is any statutory authority for the framing of Rule 109, nor is it said to form any addition to a statute, even though some other rules are expressly stated to be statutory ones. Such being the case, it is clear that Rule 109 has no statutory foundation but is only an injunction by the executive Government to the police officers as to how

they must regulate their work and conduct themselves during the course of investigation.

(emphasis supplied)

20. In *Babu Ram Upadhyaya (supra)*, the Constitution Bench of the Supreme Court observed that Regulation 477 of the Police Regulations showed that the rules in Chapter XXXII were framed under Section 7 of the Police Act. The Supreme Court observed that "presumably they were also made by the Government in exercise of its power under Section 46(2) of the Police Act" (at para 23). The Supreme Court observed as follows:

"What then is the effect of the said propositions in their application to the provisions of the Police Act and the rules made thereunder? The Police Act of 1861 continues to be good law under the Constitution. Paragraph 477 of the Police Regulations shows that the rules in Chapter XXXII thereof have been framed under S. 7 of the Police Act. Presumably, they were also made by the Government in exercise of its power under S. 46(2) of the Police Act. Under para 479(a) the Governor's power of punishment with reference to all officers is preserved; that is to say, this provision expressly saves the power of the Governor under Art. 310 of the Constitution.

Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation": see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51. The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal. It follows that where the appropriate authority takes disciplinary action under the Police Act or the rules made thereunder, it must conform to the provisions of the statute or the rules which have conferred upon it the power to take the said action. If there is any violation of the said provisions, subject to the question which we will presently consider whether the rules are directory or mandatory, the public servant would have a right to challenge the decision of that authority."

(emphasis supplied)

21. In *Kharak Singh Vs. The State of U.P. and Others*, AIR 1963 SC 1295 : (1963) CriLJ 329 : (1964) 1 SCR 332 , the Supreme Court dealt with the constitutional validity of the provision for domiciliary visits in Regulation 236(b) of Chapter XX of the Police Regulations. While dealing with the challenge on the ground that Regulation 236(b) was violative of the fundamental rights conferred by Part III of the Constitution, a Bench of six learned Judges of the Supreme Court noted that though the counsel for the State of U.P. had attempted a justification by invoking Section 12 of the Police Act, it was conceded that the Regulations contained in Chapter XX had "no such statutory basis but were

merely executive or departmental instructions framed for the guidance of the police officers" (at para 5). The Supreme Court, therefore, held that this would not be a law which the State was entitled to make under clauses 2 to 6 of Article 19 in order to regulate or curtail fundamental rights conferred by Article 19(1), nor would it be a procedure established by law within the meaning of Article 21.

22. In a later decision of two learned Judges of the Supreme Court in *Ajay Kumar Bhuyan and Others Vs. State of Orissa and Others*, the Supreme Court, while examining the provisions of the Orissa Police Manual, 1940, observed that only some of its provisions had statutory force and effect:

"We have gone through the Police Manual. The entirety of the so-called Rules contained in the Manual are called rules not because that everyone of them had statutory backing or source of its origin in a statute but were rules designed for uniform application in the Police Department at the level of DGP/IG and below even at the district level. No serious effort seems to have been made to scan through the Police Manual which contains a preface note that the Orissa Police Manual, 1940 contains the Rules made by the State Government and rules and orders framed by the IG of Police (Presently DGP/IG) with the approval of the State Government under the provisions of the Police Act, 1861 and are issued under the authority of the Government to be binding on all the police officers and that it is an authoritative guide to the officers of the Department. In some only of the Rules printed in the book, on going through the body of the Manual we find that an asterisks mark is assigned with a footnote that they were rules made under Section 12 or 45 of the Police Act, 1861. Again in respect of some of the other provisions indication of the statutory provisions of the Criminal Procedure Code or other statutory provisions under which they have been made are specifically mentioned. At the top of some of the chapters, particularly Chapter XX relating to appointments and engagement, a specific note is found printed (that rules marked with asterisks have been sanctioned under Section 7 of the Police Act, 1861). The conspicuous omission or absence of such specific indication either in the top of Chapter XXVII or in respect of anyone of the so-called rules enumerated thereunder, as to their nature and character or showing them to have any statutory origin, it has to be presumed reasonably and necessarily to be not statutory.

23. Dwelling upon the judgment of the Constitution Bench in *Babu Ram Upadhya* (supra), the Supreme Court observed that what was considered to be continued by virtue of Article 313 of the Constitution as existing law were only those statutory rules and regulations made in exercise of the powers conferred under the Police Act which stood preserved under Section 243 of the Government of India Act, 1935 and which were held to continue to be in force even after the enforcement of the Constitution. The Supreme Court observed that laws in force for the purposes of Article 313 of the Constitution were considered to be only those which were framed in the exercise of various statutory powers vested with the Government including the powers under Section 7 of the Police Act and not

upon each and every one of the "so called rules".

Article 309 of the Constitution and the Rules

24. Now, it is in this background that we must have due regard to the applicability of the rules framed under Article 309 of the Constitution to the police force. Before we do so, it is necessary to recapitulate that Section 2 of the Police Act mandates that the entire police establishment under a State Government is deemed to be one police force for the purposes of the Act. The force is to be formally enrolled and is to consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government. Moreover, the pay and all other conditions of service of the members of subordinate ranks of the police force shall be such as may be determined by the State Government subject to the provisions of the Act. Three aspects of the provision stand out. The first is that for the purposes of the Act, the entire police establishment under a State Government is deemed to be one police force. The second is that the State Government is empowered, from time to time, to order the formal enrolment of the force, the strength of the force consisting of officers and men and the manner in which the force shall be constituted. The third aspect is that the pay and all other conditions of service of members of the subordinate ranks of the police force are to be such as is determined by the State Government subject, however, to the provisions of the Act. Under Section 7, the power to dismiss, suspend or reduce any police officer of the subordinate ranks is subject to Article 311 of the Constitution and to such rules as the State Government may, from time to time, make under the provisions of the Act. A specific rule-making power is conferred upon the State Government by Section 46(2)(c) generally for giving effect to the provisions of the Act. The decision of the Constitution Bench in Babu Ram Upadhyaya (supra) holds that the Police Act and the rules framed under it constitute a self-contained Code.

25. The Uttar Pradesh Temporary Government Servants (Termination of Service) Rules of 1975 have been made by the Governor in exercise of the powers conferred by the proviso to Article 309 of the Constitution. Rule 1(3) provides that the Rules shall apply to all persons holding civil posts in connection with the affairs of the State of Uttar Pradesh and who are under the rule-making control of the Governor, but do not hold a lien on permanent posts in the Government. Temporary service in Rule 2 means officiating or substantive service on a temporary post or officiating service on a permanent post under the Uttar Pradesh Government. Under Rule 3(1), notwithstanding anything to the contrary in any existing rules or orders on the subject, the services of a Government servant in temporary service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant. Rule 3(2) stipulates that the period of notice shall be one month, and for a payment in lieu of the notice to the extent of the shortfall. Rule 5 rescinds an earlier rule dated 30 January

1953 framed by the Appointment Department.

26. Article 309 of the Constitution provides as follows:

"309. Recruitment and conditions of service of persons serving the Union or a State.--Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act"

27. Under the substantive part of Article 309, the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State are to be governed by enactments of the appropriate legislature - Parliament or the State legislatures, as the case may be - subject to the provisions of the Constitution. The proviso to Article 309 enables the President in respect of services and posts in connection with the affairs of the Union, and the Governor in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts. However, the rules framed by the President or by the Governor under the proviso to Article 309 shall continue to operate until a provision is made in that behalf by or under an Act of the appropriate legislature under the Article. Hence, the rules which have been made by the President or the Governor under the proviso to Article 309 shall have effect, subject to the provisions of an enactment made by Parliament in the case of services and posts in connection with the affairs of the Union and by the State legislatures in connection with those of the affairs of the States. Once Parliament or, as the case may be, the State legislatures have enacted legislation on the subject, the rules framed by the President or the Governor under Article 309 would necessarily be subject to the enactment made by the appropriate legislature.

28. This legal position has consequences in regard to the applicability of the rules framed under Article 309, in a situation where an enactment of the central or state legislature is held to occupy the field. Where central legislation occupies the field in regard to the regulation of the conditions of service of persons employed in connection with the affairs of the Union, those conditions of service are as defined in the legislation enacted by Parliament on the subject. The rules under Article 309 would necessarily be subservient. The same position would obtain in

respect of a law enacted by a State legislature, in which event the rules framed by the Governor under the proviso to Article 309 would be subject to the State enactment.

Precedent

29. There are several decisions of the Supreme Court which settle the legal position. In *Shri A.B. Krishna and Others Vs. The State of Karnataka and Others*, (1998) 2 AD 45 : AIR 1998 SC 1050 : (1998) 1 JT 613 : (1998) 1 SCALE 496 : (1998) 3 SCC 495 : (1998) SCC(L&S) 906 : (1998) 1 SCR 157 : (1998) AIRSCW 827 : (1998) 2 Supreme 365 , the State Government in exercise of its powers under Section 39 of the Fire Force Act, 1964 framed the Mysore Fire Force (Cadre Recruitment) Rules, 1971 by which a qualifying examination was made a condition precedent for promotion. Subsequently, the State Government, in pursuance of a policy decision, amended the Karnataka Civil Services (General Recruitment) Rules, 1971 which were framed under Article 309 so as to allow promotions on the basis of selection or, as the case may be, seniority cum merit but without a qualifying examination. The issue was, whether the requirement of a qualifying examination under the Mysore Fire Force (Cadre Recruitment) Rules, 1971 was modified by the subsequent amendment to the Karnataka Civil Services (General Recruitment) Rules, 1971 framed for the civil services under Article 309. Dealing with the issue, the Supreme Court observed as follows:

"The Fire Services under the State Government were created and established under the Fire Force Act, 1964 made by the State Legislature. It was in exercise of the power conferred under Section 39 of the Act that the State Government made Service Rules regulating the conditions of Fire Services. Since the Fire Services had been specially established under an Act of the Legislature and the Government, in pursuance of the power conferred upon it under that Act, has already made Service Rules, any amendment in the Karnataka Civil Services (General Recruitment) Rules, 1977 would not affect the special provisions validly made for the Fire Services. As a matter of fact, under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of service, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the principle of "doctrine of occupied field". If, however, any matter is not touched by that enactment, it will be competent for the executive to either issue executive instructions or to make a rule under Article 309 in respect of that matter."

30. The Supreme Court observed that though the rule-making authority both under Article 309 and under Section 39 of the State Act may be the same, the jurisdictions were different and the power under Article 309 could not be exercised by the Governor if the legislature had already made a law and the field is occupied:

"It is no doubt true that the rulemaking authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to

be precise, the Governor, under Article 309 and Government under Section 39), but the two jurisdictions are different. As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, rules can be made under the law so made by the legislature and not under Article 309. It has also to be noticed that rules made in exercise of the rule-making power given under an Act constitute delegated or subordinate legislation, but the rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of "occupied field", the rules under Article 309 cannot supersede the rules made by the legislature."

31. The Supreme Court held that the amendment which was made in the General Recruitment Rules by the State Government under Article 309 of the Constitution would not have the effect of displacing or altering the rules made under Section 39 of the Fire Force Act, since an enactment of the legislature would have preference over any rule made by the executive under the proviso to Article 309. The Supreme Court held that there was no abrogation by implication and the State Government had not specifically abrogated the rules framed under the Fire Force Act 1964.

32. The judgment in A.B. Krishna (supra) was followed by another Bench of two learned Judges of the Supreme Court in Chandra Prakash Tiwari (supra). This judgment specifically dealt with the rules framed by the Governor of Uttar Pradesh under Article 309 of the Constitution and their applicability in view of an order which was made in pursuance of the Police Act. On 5 November 1965, the Governor issued a direction to the effect that promotions from the post of Sub Inspectors to Inspectors would be made on the basis of merit. Under the Uttar Pradesh Government Service (Criterion for Recruitment by Promotion) Rules, 1994 framed by the Governor under the proviso to Article 309 of the Constitution, the criterion for promotion was seniority subject to rejection of the unfit. The Supreme Court, after adverting to the earlier decision in A B Krishna, held that the Police Act was a complete Code in itself which had made special statutory provisions for appointment, dismissal, placement and all other steps required to recognise the police and to make it a more efficient instrument for the prevention and detection of crime. The Supreme Court held that unless the specific provisions contained in the Government Order dated 5 November 1961 which have been framed under the provisions of the Police Act was repealed, the general rules framed under Article 309 of the Constitution would not prevail. In that context, the Supreme Court observed as follows:

"On a conspectus of the whole issue, it is thus difficult to comprehend that the General Rule framed under Article 309 should or would also govern the existing special rules concerning the police rules. Admittedly, the guidelines as contained in the Government Order dated 5.11.1965 have been under and in terms of the provisions of the Police Act. There is special conferment of power for framing of Rules dealt with more fully herein before, which would prevail over any other

Rule. Since no other rule stands formulated and the Government Order of 1965 being taken as the existing rule pertaining to the subject-matter presently under consideration with recent guide-lines as noted above, its applicability cannot be doubted. Unless the General Rule specifically repeal the effectiveness of the special rules, question of the latter rule becoming ineffective or inoperative would not arise. In order to be effective, an express mention is required rather an imaginary repeal. It is now a well-settled principle of law for which no relation is further required that law Courts rather loath repeal by implication. The General Rule framed under Article 309 has been for all State Government officials on and since 1994. List II (State List) of the 7th Schedule specially refers to the powers of the State Legislature to frame Rules specially for the Police. In this context Item 2 thereof would be significant which reads as follows:

"List II-State List"

"2 Police (including railway and village police) subject to the provisions of entry 2A of List I."

Police force admittedly has a special significance in the administration of the State and the intent of the framers of our Constitution to empower the State Government to make rules there-for has its due significance rather than being governed under a general omnibus rule framed under the provisions under Article 309. When there is a specific provision unless there is a specific repeal of the existing law, question of an implied repeal would not arise..."

The Full Bench decisions

33. Now, it is in this background that it would be necessary to advert to two decisions of the Full Bench of this Court, namely (i) Nanak Chand v. State of U.P., 1971 All 724; and (ii) Vijay Singh v. State of U.P., 2005 (23) LCD 1696.

In Nanak Chand (supra), orders had been passed terminating the services of Sub Inspectors of police or, as the case may be, police Constables treating them as temporary employees. The orders of termination were sought to be challenged on the ground that though the advertisements under which the petitioners were appointed, were for temporary appointments and they were appointed in a purely temporary capacity, they would be deemed to hold permanent posts because there was no provision for the creation of temporary posts in the Act or the Rules. The Full Bench held that there was no provision in the Police Act or in the Regulations which was incompatible with the existence of temporary posts. The Full Bench observed as follows:

"We are unable to see, however, how the provisions in the Police Act and in the Police Regulations to which our attention has been drawn can be said to support the argument put forward by learned counsel for the petitioners. No section of the Police Act and no Paragraph of the Police Regulations has been brought to our notice that is incompatible with the existence of temporary posts in the police force. Section 2 of the Police Act lays down that the police establishment under a

State Government "shall be constituted in such manner as shall from time to time be ordered by the State Government"; and this power to constitute the police force clearly includes the power to create all kinds of posts in that force, both permanent and temporary. The mere fact that when a police officer joins the police force, he is formally enrolled therein by being given a certificate in accordance with Section 8, investing him with all the powers, functions and privileges of the police officer, in no way implies that he must be a permanent officer, for there seems to be no reason why a temporary employee should not also be invested with all these powers. And even assuming that Sections 13, 14, 15 and 17 of the Act relate to temporary appointments (which is decidedly doubtful in the case of the first three sections), there is nothing to suggest that these are the only temporary appointments that can be made under the Police Act. Ample material has been produced on behalf of the State Government in the counter-affidavits that have been filed in reply to these petitions to show that police officers have been regularly recruited on a temporary basis each year for a considerable number of years; and we can see nothing illegal or incompatible with the provisions of the Police Act in such recruitment. The misapprehension that temporary posts in the Police Force are not contemplated by the Police Act and the Police Regulations seems to have arisen on account of the complete absence from the Police Regulations of any rules or instructions in respect of temporary police officers. But this is probably due to the fact that the Regulations in question were framed long ago, at a time when it was not considered necessary to have any temporary posts."

(emphasis supplied)

34. Reliance was sought to be placed, inter alia, on the provisions contained in Regulation 541 of the Police Regulations dealing with probation. The Full Bench held that Chapters XXXVI and XXXVII of the Police Regulations, which dealt with the training of Sub Inspectors and Constables respectively, were never meant to apply to temporary recruits. The Full Bench observed that Regulations 534, 535, 537 and 541 on which reliance had been placed, were not shown to have statutory force and merely embodied administrative instructions on what was necessary by way training and experience before a police officer can be fit for permanent appointment. The Full Bench held:

"We are fully satisfied, however, that Chapters XXXVI and XXXVII were never meant to apply to temporary recruits. Moreover the paragraphs on which reliances have been placed have not been shown to have statutory force; and to us it appears that they merely embody administrative directions as to what is necessary by way of training and experience before a police officer can be considered fit for permanent appointment. It has been explained in the supplementary counter-affidavits filed on behalf of the State that the procedure now followed by the police administration is to keep all recruits in temporary posts until the Head of the Department decided to bring them into the permanent strength, whereupon those who are found suitable are absorbed in

clear vacancies, the last two years of temporary service being then counted as a probationary period."

35. The next submission before the Full Bench was that the orders of termination were invalid because there was no specific provision in the Police Act or the Regulations for the termination of services of temporary employees. In order to justify the termination of appointees, the Full Bench observed as follows:

"It has been argued that the impugned orders of termination are bad because there is no specific provision in the Police Act or Police Regulations for such termination of services. But temporary police officers, like other temporary Government servants, are obviously covered by the Notification dated 30-1-1953 that has been reproduced in Appendix II to the Civil Services (Classification, Control and Appeal) Rules and their services are terminable on one month's notice or one month's pay in lieu of notice. Learned counsel for the petitioners points out that this Notification was issued in exercise of the powers conferred by the proviso to Article 309 of the Constitution and contends that it cannot apply to members of the Police Force, since they are governed solely by the provisions of the Police Act and the rules issued thereunder. But even it is correct to say that only the Police Act and its rules can regulate the conditions of service of police officer, we see no difficulty in applying the Notification in question to the petitioners, since it can be treated as having been issued, as regards police officers, in exercise of the rule making power conferred on the State Government by Section 16(2) of the Police Act."

36. At this stage, it is necessary for the Court to dwell on two aspects of the decision in Nanak Chand (supra) : (i) the observation that Regulations 534, 535, 537 and 541 of the Police Regulations had no statutory force but merely embodied administrative instructions or directions; and (ii) the termination of services of temporary police officers could be brought about in terms of the notification dated 30 January 1953 issued under Article 309 of the Constitution and that the notification, in any event, could be treated as having been issued as regards the police officers, in exercise of the rule making power conferred by Section 46(2) on the State Government.

37. On the first aspect, it would be necessary for the Court to advert to a decision of the Supreme Court in Chandra Prakash Shahi Vs. State of U.P. and Others, AIR 2000 SC 1706 : (2000) 5 JT 181 : (2000) 4 SCALE 209 : (2000) 5 SCC 152 : (2000) SCC(L&S) 613 : (2000) 2 UPLBEC 1661 : (2000) AIRSCW 1816 : (2000) 4 Supreme 510 . In that case, the appellant was recruited as Constable in the Provincial Armed Constabulary (PAC) and was placed on probation for two years. His services were sought to be terminated by issuing a simple notice under Rule 3 of the Rules of 1975. The Supreme Court observed, firstly, that the foundation of the order of termination was that the appellant had been found guilty of indiscipline and misbehaviour in a preliminary enquiry, during the course of a camp in which a quarrel resulting in physical abuse had taken place. The Supreme Court held that it was open to the Court to lift the veil

of an innocuously worded order to determine as to whether it was punitive in nature. The Supreme Court came to the conclusion that the order of termination was founded on misconduct and was, hence, punitive. The second aspect of the matter to which the judgment of the Supreme Court made a reference, was that the termination of services of the probationer had taken place in violation of Regulation 541 of the Police Regulations. The Supreme Court, in the following observations, held that Regulation 541 was mandatory in nature:

"Where, therefore, the services of a probationer are proposed to be terminated and a particular procedure is prescribed by the Regulations for that purpose, then the termination has to be brought about in that manner. The probationer-constable has to be informed of the grounds on which his services are proposed to be terminated and he is required to explain his position. The reply is to be considered by the Superintendent of Police so that if the reply is found to be convincing, he may not be deprived of his services.

If this procedure is followed and the services are terminated thereafter, it would not amount to a punitive action. The rule being mandatory in nature, compliance thereof would not alter the nature of the order passed against the probationer."

(emphasis supplied)

The Supreme Court also observed that there was a non-compliance with the provisions of Regulation 541 since the services of the appellant were terminated without issuing a notice intimating the grounds for termination and without calling for an explanation. The Supreme Court held that the termination was unlawful.

38. In view of the decision of the Supreme Court in Chandra Prakash Shahi's case, the observation of the Full Bench in Nanak Chand (supra) would, to that extent, have to give way to the law laid down by the Supreme Court. The Supreme Court specifically held that compliance with the provisions of Regulation 541 was mandatory before the services of a probationer could be dispensed with. However, it must also be noted that Chandra Prakash Shahi's case dealt with a case of a probationer (not a temporary appointee) because, admittedly, the appellant in that case was placed on probation for a period of two years and his services were sought to be dispensed with without following the procedure prescribed by Regulation 541. In Chandra Prakash Shahi, the appellant was not a temporary employee.

39. The second aspect of the decision in Nanak Chand which needs some clarification, is the observation that even if it is correct to say that only the Police Act and its rules can regulate the conditions of service of a police officer, the notification issued on 30 January 1953 can be treated as having been issued in exercise of the rule-making power under Section 46(2). Evidently, this observation in the judgment of the Full Bench is not a conclusive finding which is evident from the use of words but even if it is correct to say that only the Police Act and its rules can regulate the conditions of service of police officers..." The

decision in Nanak Chand did not consider the question whether it was legally and constitutionally permissible to apply the rules framed under Article 309 of the Constitution to a police force governed by the Police Act. Every observation in a judgment does not constitute a part of the ratio of the decision. These observations in Nanak Chand did not constitute the ratio of the judgment.

40. The other judgment of the Full Bench to which a reference must be made at this stage, is in Vijay Singh (supra). In the case before the Full Bench, the Governor had made the Uttar Pradesh Recruitment of Service (Age Limits) Rules 1972 in exercise of the powers conferred by Article 309 of the Constitution. The issue before the Full Bench was, whether an order issued by the State Government in exercise of its powers under Section 2 of the Police Act, had statutory force and occupied the field as a result of which there would be no scope for application of the rules framed under the proviso to Article 309. The Rules framed under the proviso to Article 309 provided for a maximum age limit of 32 years for all posts to be filled up by the Rules and the eligibility criteria fixed by the State Government for the recruitment of police personnel was sought to be challenged on the ground that it was in violation of the Rules of 1972. The Full Bench held, after adverting to the decisions of the Supreme Court in A.B. Krishna (supra) and Chandra Prakash Tiwari (supra), among other decisions, as follows:

"48. Thus, it is evident that doctrine of implied repeal cannot be resorted to unless the latter enactment expressly repeals or it is crystal clear that legislature intended to repeal the earlier statutory provisions.

49. Thus, in view of the above, as the State Government has never adopted the Rules 1972 for filling up the vacancies of the subordinate police services, the question of implied repeal does not arise.

50. As the State Government has not adopted the Rules 1972 for filling up the vacancies of subordinate police officials, it cannot be assumed that statutory provisions of Act, 1861 stood repealed. Thus, provisions of Act 1861 (Special Act) will prevail over Rules 1972 general law."

(emphasis supplied)

The conclusion which was arrived at by the Full Bench was in the following terms:

"63. In view of the above, we reach the inescapable conclusion that statutory rules cannot be set at naught by issuing executive instructions. But the facts of the instant case do not make the said proposition of law applicable at all. As herein the field is already occupied by the provisions of Act 1861 which is in operation by virtue of the provisions of Article 313 of the Constitution, thus Rules 1972 could not be attracted at all. The Government Orders issued for fixing the maximum age for recruitment on subordinate police posts operate in an entirely different field and are not in conflict with the Rules 1972. The case stands squarely covered by the Apex Court judgment in Chandra Prakash Tiwari (supra)

and, thus, it is not possible for us to take any other view. The submissions made by Mr. Chaudhary that pre-constitutional law stands abrogated altogether by commencement of the Rules, 1972, is devoid of any merit. Therefore, our answer to question No. 1 is that the field stood occupied on account of the provisions of Section 2 of the Act 1961. The Legislature while enacting the provisions of Section 2 of Act 1961 itself delegated the power to the statutory authorities to fix the eligibility including the age etc. The statutory authorities had performed their duties in exercise of the delegated powers from time to time without any deviation there-from."

emphasis supplied)

The principles of law

41. Insofar as the present controversy is concerned, it would now be necessary for the Court to formulate the basic principles which have emerged on the subject:

(i) The Police Act 1861 and the Rules framed under it constitute a self-contained Code and by virtue of the provisions of Article 313 of the Constitution, the Act and the Rules continue to remain in force, under Article 313 of the Constitution;

(ii) Rules and Government Orders referable to a specific source of power under the Police Act 1861 such as Section 2 or, as the case may be, Section 46(2)(c) would continue to hold the field and would not be abrogated merely by the exercise of the general rule-making power conferred by the proviso to Article 309 of the Constitution;

(iii) Under the proviso to Article 309, rules regulating the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the Union and of the States can be made until a provision in that behalf is made by or under legislative enactment of the appropriate legislature. Any rule so made will have effect subject to the provisions of the Act;

(iv) When there is a specific provision, unless there is a specific repeal of the existing law, the question of an implied repeal would not arise;

(v) The rules framed under the proviso to Article 309 of the Constitution would apply, generally speaking to Government servants appointed in connection with the affairs of the Union or, as the case may be, the States but the police force would be governed by the provisions of the Police Act 1861 and by the rules and administrative determinations referable to a specific source of power under the Police Act 1861;

(vi) Under Section 2 of the Police Act 1861, the State Government has been vested with power to determine the pay and all other conditions of service of members of the subordinate ranks of the police force. The determination within the meaning of Section 2 may be both by means of the exercise of the rule-making power as well as by an administrative direction. The Police Act 1861,

being a complete Code as enunciated by the Constitution Bench of the Supreme Court, it occupies the entire field of the determination of service conditions. The power to determine all the conditions of service of members of the subordinate ranks of the police force is vested with the state Government. The state Government has the rule making power under Section 46(2)(c) to carry out the purposes of the Act by framing rules;

(vii) Once a self-contained Code in the form of the Police Act has been enacted by the legislature and its continuance after the adoption of the Constitution is ensured by Article 313 and Article 372 of the Constitution, the field relating to recruitment and conditions of service of members of the police force in the State stands occupied by the legislation. Any rule or order relating to the determination of the conditions of service of the police force can be made only under the provisions of the Police Act or by the legislation enacted by the State legislature governing the service conditions of the police force. Section 2, Section 7 and Section 46 of the Police Act clearly evince an intent of the legislature to occupy the whole of the field relating to conditions of service of the police force;

(viii) The ratio of the decision of the Supreme Court in A B Krishna's case is that if the legislature has already made a law and the field is occupied, in such a situation, rules can be made under the law enacted by the legislature and not under Article 309;

(ix) The rules framed under a legislative enactment constitute delegated or subordinate legislation. The rules made under Article 309 are not of that nature. The rules which have been framed under Article 309 and the rules under an enactment of the state legislature are referable to two distinct sources of power. The rules made under the proviso to Article 309 are intended to deal with a situation where the President or the Governor, as the case may be, may regulate the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the Union or, as the case may be, of the States until a provision in that behalf is made under an Act of the appropriate legislature under the Article. Though, the authority to frame rules in Article 309 vests with the Governor while the authority to frame subordinate legislation under the state enactment is vested with the State Government, the two jurisdictions are entirely different. One is referable to a transitional power which is vested in the President or the Governor, as the case may be, under the proviso to Article 309 while the other is traceable to the substantive power to frame subordinate legislation which is delegated to the State Government under a legislative enactment. Once a law has been enacted by the competent legislature and particularly in a situation where legislation, such as the Police Act is construed as a complete Code, it constitutes special statute governing the police force incorporating within its field, matters relating to appointment, dismissal, placement and all other steps required to reorganise the police and make it a more effective instrument for the prevention and detection of crime, as was held in Chandra Prakash Tiwari's case by the Supreme Court;

(x) In Chandra Prakash Tiwari, the Supreme Court after considering the consistent position of the State Department of Home, held that "by reasons of the provisions of a special statute, namely, the Police Act read with the authorization contained therein by way of executive order, the Governor of Uttar Pradesh obviously did not in fact intend to apply the general law to all and sundry" (at para 29, page 145). In this background, it has been held that unless the general rules which are framed under Article 309 of the Constitution specifically repeal the special rules and unless there is a specific repeal of the existing law, the question of an implied repeal would not arise (Paras 36 and 37 at p. 149 and 150). The rules framed under Article 309 are for Government servants in general while the police force would be guided by the provisions of the Police Act. This interpretation which has been placed by the Supreme Court has been held to be consistent with the position adopted in inter-ministerial correspondence of the State Government; and

(xi) The decision in Chandra Prakash Tiwari's case specifically deals with the Police Act and the applicability of the Rules framed under the proviso to Article 309 to members of the police force in the State of Uttar Pradesh. This decision of the Supreme Court has been duly followed by the Full Bench of this Court in Vijai Singh (supra) while holding that since the field of regulation of service conditions of members of the police force is occupied by the provisions of the Police Act and it continues to be in operation under Article 313, the Rules framed under Article 309 would not be attracted.

42. There are observations in the concluding sentence of paragraph 8 of the decision in AB Krishna's case to the effect that if any matter is not touched by an enactment made by the legislature, it would be competent for the executive to either issue an executive instruction or to make a rule under Article 309 in respect of that matter. This observation cannot be pressed in aid of the operation of the rules framed under the proviso to Article 309 and their applicability to the police force. The exception which has been carved out in those observations may apply in a situation where a particular matter is not touched by the legislation enacted by the competent legislature. This, for instance, may be a situation where the statute by itself lays down the conditions of service but does not touch or regulate upon some matter relating to conditions of service nor does it contain a provision for delegated or subordinate legislation. That is not the situation in the case of the Police Act. The Police Act empowers the State Government to determine under Section 2, the pay and all other conditions of service of the members of the subordinate ranks of the police force subject to the provisions of the Act. The expression "all other conditions of service" would encompass every condition of service of the members of the police force. Section 7 which deals with the appointment, dismissal and reduction in rank of officers of the subordinate ranks again refers to the rules framed by the State Government. Section 46(2) empowers the State Government to frame rules generally for giving effect to the provisions of the Act. These are clear legislative indicia of the intent of the legislature to enact a self-contained Code regulating the police

service and of the conferment of both administrative and rule-making authority upon the State Government to regulate all service conditions. In such a situation and in the face of a clear legislative intent evidenced both by the provisions of the Act and by the decisions of the Supreme Court, it would be manifestly erroneous for the Court to subscribe to the theory that the rules under Article 309 of the Constitution framed by the Governor would apply. Such a construction cannot be accepted on the basis of a plain textual interpretation of the provisions of the Police Act. Such a construction, as the Supreme Court observed in Chandra Prakash Tiwari's case, would be contrary to the grain of the inter-ministerial position adopted by the State Government. Finally, such a construction would run contrary to the interpretation placed by the Supreme Court on the Police Act as constituting a self-contained Code. The Police Act occupies the field of the regulation of service conditions of the police force.

43. The provisions of the Police Act and the rules, regulations and orders issued thereunder also apply to the officers of the PAC in view of the provisions of Section 5 of the U.P. Pradeshik Armed Constabulary Act, 1948 which reads as follows:

"5. Members of P.A.C. to be deemed Police officers.--Subject always to the provisions of Sections 6 to 8 every member of the Pradeshik Armed Constabulary shall upon his appointment and as long as he continues to be a member thereof, be deemed to be a Police officer, and, subject to any terms, conditions and restrictions, as may be prescribed, to have and be subject to, insofar as they are not inconsistent with this Act or any rules made thereunder, all the powers, privileges, liabilities, penalties, punishments and protection as a Police officer duly enrolled has or is subject to by virtue of the Police Act, 1861, or any other law for the time being in force, or any rules or regulations made thereunder."

44. Under Section 5, every member of the PAC upon his appointment and subject to continuance as a member of the force is deemed to be a police officer. As a police officer, a member of the PAC is subject to any terms, conditions and restrictions as may be prescribed and is subject to all powers, privileges, liabilities, penalties, punishments and protection as a police officer duly enrolled by virtue of the Police Act or any other law for the time being in force including rules and regulations made thereunder.

45. The Rules of 1975 framed under Article 309 have not been adopted or applied by the State Government specifically for the members of the police force by issuing an order under Section 2 or by framing a rule under Section 46(2)(c) of the Police Act. The Rules of 1975 are hence not ipso facto applicable to temporary members of the police force. However, this does not mean that the services of such temporary employees cannot be terminated until rules or orders regulating them are made under Section 2 or Section 46(2)(c) of the Police Act. The services of such a person being purely temporary are terminable by an action simplicitor when they are not required or where the person appointed is unsuitable for being continued in service. The power to appoint necessarily

inheres within it the power to terminate services. To hold that the State Government which has the power to appoint a member of the police force on a temporary basis does not have the power to terminate such a person from service would be an absurdity. Nor can a person who has been appointed on a temporary basis, claim the protection of Regulation 541 which, on its plain terms, applies only to probationers. A person who is appointed on a temporary basis or in a temporary capacity is not a probationer. Chandra Prakash Shahi clearly was a case relating to a probationer whose services were sought to be terminated under the Rules of 1975 framed under the proviso to Article 309 of the Constitution which apply to Government servants generally. The appellant in Chandra Prakash Shahi's case was not appointed on a temporary basis but was a probationer.

46. In *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, AIR 2006 SC 1806 : (2006) 6 CompLJ 1 : (2006) 4 JT 420 : (2006) 2 LLJ 722 : (2006) 4 SCALE 197 : (2006) 4 SCC 1 : (2006) 3 SLJ 1 : (2006) AIRSCW 1991 : (2006) 3 Supreme 415 , a Constitution Bench of the Supreme Court has recognised the right of the Union or State Governments to make temporary appointments and has held that there is nothing in the Constitution to prohibit the engagement of persons temporarily or on daily wages, to meet the needs of the situation, at para 12, page 22:

"In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognised and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a Court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme."

Moreover, it has also been held that a temporary employee cannot claim to be made permanent on the expiry of the term of appointment and it is not open to the Court to prevent regular recruitment at the instance of temporary employees

whose period of employment has come to an end at para 43 page 36.

47. We may briefly deal with some of the decisions of this Court on the subject. In Subhash Chandra Sharma Vs. State of U.P. and others, (2000) 3 AWC 2367 : (2000) AWC 2367 , a Division Bench of this Court held as follows:

"... The constitution of a force necessarily implies the act of making appointment to various categories of posts in the police force. Provisions in this regard have been made in the U.P. Police Regulations or in the Government Orders issued from time to time on the subject relating to recruitment. Therefore, the field relating to recruitment of subordinate ranks of the police force is already covered by the pro-visions of the Police Act. Consequently, a Rule made by the Governor in exercise of power conferred by proviso to Article 309, like the 1972 Rules, which is very general in terms and does not make any reference to the police force, can have no application to the matter governing the upper age limit of the candidates seeking recruitment to the posts of constables or sub-inspectors of police."

48. The judgment of the Division Bench in Subhash Chandra Sharma's case was affirmed by the Full Bench in Vijay Singh (supra).

49. In Vijay Shanker Tripathi Vs. State Public Services Tribunal and Others, (2006) 5 AWC 4769 , a Division Bench of this Court held that the provisions of the Rules of 1975 are not applicable in view of the judgment of the Full Bench in Vijay Singh's case.

50. In Praveen Tyagi Vs. State of U.P. and Others, (2010) 1 AWC 340 , a learned Judge of this Court followed the decision of the Supreme Court in Chandra Prakash Tiwari and of the Full Bench in Vijay Singh, holding that Rules of 1975 made under the proviso to Article 309 of the Constitution were not applicable and quashed the termination.

51. In State of U.P. v. Chandra Bhal Singh, (1981) 1 SLR 579, a Division Bench of this Court, while relying upon the judgment of the Full Bench in Nanak Chandra, held Regulation 541 to be inapplicable to temporary employees who could not be treated as having been appointed on probation.

52. A Division Bench of this Court in State of U.P. v. Sageer Hussain, 2010 (28) LCD 505, held that Regulation 541 was not applicable to temporary police officers. The Division Bench also held that there was no error in an order of termination passed under the Rules of 1975 without considering the applicability of those Rules to police officers.

53. We have briefly adverted to these decisions for the sake of completeness of the record. However, we have already dealt with the issue that has been raised before the Full Bench.

Conclusion

54. Hence, the issue which has been framed for decision of the Full Bench would

have to be answered by holding that a person who is appointed as a temporary police constable and who has not been placed on probation, can be terminated from service. Such a person is not governed by the provisions of Regulation 541 which applies to probationers. The rules which have been framed under the proviso to Article 309 of the Constitution, to wit, the Rules of 1975 would not be applicable to members of the police force. However, the power to terminate the services of a person who has been appointed on a temporary basis inheres in the power to appoint. The mere mention of the Rules of 1975 will not invalidate an order of termination. The question which has been referred to the Full Bench for adjudication shall, accordingly, stand answered in these terms. All the petitions shall now be listed before the appropriate Bench in accordance with the roster of work for disposal in the light of the present decision.