Shri Om Prakash Gupta vs The United Provinces on 6 November, 1950

Equivalent citations: AIR1951ALL205, AIR 1951 ALLAHABAD 205

JUDGMENT

Desai, J.

1. This is an appeal by the pltf. part of whose claim has been dismissed by the Civil Judge of Allahabad.

2. The applt. was successful in the competitive examination for the Provincial Civil Executive) Service. He was taken in service as a Deputy Collector & took over charge on 26-6-1940. In due course he was confirmed. In 1948 he was transferred from Dehra Dun to Ballia & in 1944 he was transferred to Lakhimpur Kheri. He joined his duties at Lakhimpur Kheri on 20-7-1944. On 23-8-1944 he was telegraphically suspended from service pending an enquiry into certain charges On 27 8-1944, a charge-sheet Was handed over to him & he was required to appear before the Comr. at Lucknow on 28-8-1944 for explanation. He appeared before the Comr. on 28-8-1944 & protested against the procedure adopted by him for the enquiry. The Comr. completed the enquiry on 1-9-1944, & submitted his report to Govt. On 11-9-1944, the Comr. recommenced the enquiry probably under instructions from Govt. On 30-9-1944, the Comr. after completing the enquiry submitted the papers to Govt. The Govt. on 25-11-1944 dismissed the applt. from the U. P. Civil (Executive) Service, with effect from that date. This order was served upon him at Allahabad on 1-12-1944. He submitted a memorial against the order to the Governor on 7-8-1945 & the memorial was rejected on 28-5-1947. During the period of suspension he was paid subsistence allowance at the rate of one-fourth of his salary which then was Rs. 310 per month. He then gave a notice as required by Section 80, Civil P. C. & on 2-1-1948, instituted the suit which gives rise to this appeal.

3. The applt. pleaded that the order of dismissal was null & void because the enquiry conducted by the Comr. was improper & in violation of the provisions of Sub-section 55, (C. S.) Qualification Rules 1938, & no opportunity had been given to him to show cause against the proposed punishment. Originally he claimed two reliefs in the alternative. He wanted a declaration that the order of dismissal was wrongful, illegal, void & inoperative & that he still continues a member of the Civil Service entitled to full pay with all increments as & when they fall due, together with a decree for the arrears of pay from 24-8-1944 to 31-12-1947. (24-8-1944, was the date on which he was suspended). In the alternative he claimed a declaration that the order of dismissal was wrongful & a decree for damages amounting to Rs. 1,20,000 for the wrongful dismissal with interest. He paid court-fee on the higher valuation of RS. 1,20,000.

4. The suit was contested by the Provincial Govt. which denied that there was anything illegal or improper in the order of dismissal.

5. At the time of the institution of the suit the law was thought to be that a person illegally dismissed from Govt. service could sue for damages for the wrongful dismissal but during the pendency of the suit the law was interpreted by the Judicial Committee quite differently & it was held that he could only get a declaration that the order is inoperative & that he still continues to be a member of the service. The applt. thereupon applied for amendment of the plaint by deletion of the alternative relief of declaration & damages for wrongful dismissal. The amendment was allowed & the suit remained one for a declaration & a decree for arrears of pay. The applt. applied to the learned Civil Judge that as the valuation of the suit was reduced, by the amendment from Rs. 1,20,000 to Rs. 16,810-8-0 (which was the amount of the arrears of pay), the execess of court-fee paid by him should be refunded under the Ct.'s inherent powers. The learned Civil Judge by a separate order refused to refund the surplus court fee.

6. The learned Civil Judge framed nine issues. Issue 1 related to the plea of territorial jurisdiction taken by the resp., issue 2 related to the contention that a fresh opportunity should have been given to the applt. to show cause against the final proposal to dismiss him from service in consequence of the Comr.'s findings on the enquiry and issue 3 related to the question of fact whether such an opportunity was given.

7. The applt., who wanted the suit to be decided at a very early date, & the resp. made a joint statement before the Ct. to the effect that Issues 1, 2 & 3 should be decided by it as preliminary issues & that, the whole suit be decided on the basis of the findings of those issues & on the assumption that the findings on the remaining issues were all adverse to the applt. So the learned Civil Judge heard the first three issues He found that he had jurisdiction over the suit, & that a fresh opportunity as required by Section 240(8), Government of India Act was necessary to be given to the applt. to show cause against the proposed punishment but was not given. The ninth issue was about the relief to which the applt. was entitled. There was no specific issue about the applt.'s right to sue for the arrears of his salary. The learned Civil Judge dealt with this matter in issue 9 & held that he could not sue for the arrears of his salary. So in the end he partly decreed the suit, granting declaration that "the order of dismissal passed against the pltf. on 25-11-1944, was void & inoperative & that the pltf. remains a member of the U. P. Civil (Executive) Service (i. e. Deputy Collector) at the date of the institution of the suit," & refused to pass a decree for the arrears of salary. He added "any further action by the Crown that may have occurred since the raising of the action is not covered by the present, suit." He let the parties bear their costs themselves.

8. In this appeal the applt. challenges the learned Civil Judge's finding that he was not entitled to sue for the arrears of salary & also his discretion in refusing to refund the surplus court-fee. The Provincial Govt. has submitted to the decree passed against it & filed no cross objection. We were informed during the argument that after the passing of the decree by the learned Civil Judge the Govt. gave a fresh opportunity to the applt. to show cause why he should not be dismissed, passed a fresh order of dismissal & treating the applt. as in service but under suspension upto the date of the second order of dismissal paid him subsistence allowance at the same rate of one-fourth of the

salary for the whole period. The second dismissal order is not before us & we are not concerned with it. I have mentioned the facts which took place after the passing of the decree under the appeal because in case this appeal succeeds the amount that has been paid to the applt. as subsistence allowance will have to be deducted from the arrears of his pay & to this he has agreed.

9. We are not concerned with the merits of the suit & therefore, I refrain from mentioning the charges on which the applt. was dismissed from service The dismissal (of 25-11-1944) is now considered to be illegal & the applt. was rightly given the declaration that he continued be a member of the service despite the order of 25-11-1944. The sole question before us (excluding, for the time being, the minor question of refund of court-fee) is whether the applt. is entitled to a decree for the arrears of salary. The answer depends upon his having a complaint or grievance (which, when taken to Ct. becomes in legal language the "cause of action") & that complaint or grievance being of a nature which can be litigated in Ct. There is no statutory provision dealing with either of the questions; no statutory provision lays down either that a servant of the Crown has a right to enforce payment of the promised salary, or has no such right, or that he has such a right & can, or cannot, litigate it through a suit in Ct.

10. The Government of India Act of 1935, which admittedly contained the law applicable to the present case, contained the following law relating to civil services. Every person holding any civil post under the Crown in India, held the office during His Majesty's pleasure, "except as expressly provided by this Act" (Section 240, Sub-section (1)). He could not be dismissed from the service by any authority subordinate to that by which he was appointed (Sub-section (2)). Nor could the be dismissed or reduced in rank until he was given a resonable opportunity of showing cause against the action proposed to be taken in regard to him (Sub-section (3)). In certain cases a "contract" between the Crown & the civil servant could provide for payment to the civil servant of compensation if before the expiry of an agreed period he was required to vacate the ipost on any ground other than that of misconduct on his part (Sub-section (4)). Ordinarily the appointment to a civil post under the Crown, in case of services of a province, was to be made by the Governor, or any person directed by him & the conditions of his service were to be such as might be prescribed by rules made by the Governor, or some person authorised by him (Section 241, Sub-sections (1) & (2)). He had the same right of appeal from any order punishing him, as he had immediately before the commencement of Part III of the Act (Sub-section 3). The appropriate Legislatures were given the power to enact laws regulating the conditions of service of persons serving His Majesty in a civil capacity (Sub-section 4). Whether the rules made under Sub-section (2), or Acts made by the Legislatures laid down, it was always open to the Governor to deal with the case of any civil servant "in such manner as may appear to him to be just & equitable" provided that he was not to be dealt with in any manner less favourable to him than that provided by the rules or the Acts (Sub-section (5)). The rules made under sub-section (2) by the Governor of this province are contained in Financial Handbook, vol. II, Part (ii). They are the rules which govern the civil, services in this province. Rule 17 is to the effect that "the. Govt. servant shall begin to draw the pay& allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, & shall cease to draw them as soon as he ceases to discharge those duties."

The pay of a Govt. servant ceases on his dismissal or removal. When the suspension of a Govt. servant is held to have been unjustifiable, wholly or in part, or when he is reinstated after being dismissed or suspended, he may be granted for the period of his absence from duty the full pay if he was honourably acquitted, or such portion of the pay as the appropriate authority may prescribe if he was not honourably acquitted (Rule 64). The Governor made "The United Provinces Civil Service (Executive Branch) Rules 1941" to regulate the conditions of service of persons appointed to the civil service (Executive Branch). These rules deal with the recruitment, appointment & pay. Under Rule 25 the scale of pay admissible to a member of the civil service appointed after 1931 is RS. 250-20-710. It is stated in Rule 29 that except as provided in those rules, the pay, allowances & other conditions of service shall be regulated by rules made by the Governor under Section 241(2)(b), Government of India Act.

11. Section 96B, Government of India Act, 1915-1919 dealt with the civil services in India. It also laid down that every person in the civil service held office during. His Majesty's pleasure but could not be dismissed by any authority subordinate to that by which he was appointed & authorised the Secretary of State to make rules for regulating the classification of the civil services in India & their conditions of service, pay, allowances, discipline & conduct. The Secretary of State had made Civil Services (Classification, Control & appeal) Rules in exercise, of this power. Under Section 276, Government of India Act, 1935, those rules continued in force so far as they were consistent with the Act until rules were made by the appropriate authorities in exercise of the power conferred by Section 241. Consequently, the Civil Services (Classification, Control and Appeal) Rules ceased to have any effect in 1941 when the Governor of this province made the rules already referred to.

12. It will be noticed that the Government of India Act contained no provision conferring a right upon a civil servant to any salary. The salary of a civil servant of a province was governed by the rules made by the Governor, but those rules were not given statutory effect & did not become part of the Government of India Act. The rule that a by-law, or a regulation made in exercise of power conferred by an Act would be deemed to be part of the Act did not apply to the rules made by the Governor. Even the rules do not in so many words confer a right upon a civil servant to an agreed salary. To say that "such an officer will draw a pay of Rs. 250" does not mean that he has been given a right to demand that pay. The Crown, therefore, had no statutory obligation to pay to the applt. any salary, even though he might have discharged the duties.

13. The question that has given rise to a good deal of controversy is whether a civil servant has a contractual right to the salary. This question is of great importance because it affects the relations between the State & a vast multitude of civil servants. The solution of the question has become more difficult on account of sharp cleavage between the views of ' the Judicial Committee of the P. C. & the F. C. Dicey writes in his 'Law of the Constitution' 9th Edn., p. 529 that:

> "It is indeed not certain how far service with the Crown can be regarded as contractual." Stephen also shares the doubt, for he writes in his 'Commentaries on the Laws o England' vol. III, 18th Edn., p. 250 that, "such a contract (if contract it must be called) is enforceable by the Crown, but not against it." It is stated in 'Constitutional Law' by Wade & Philip, 3rd Edn., p. 264 that, "the relationship

> between the Crown. & its servants is net contractual."

Grove J., observed in Grant v. Secretary of State for India, (1876-77) 2 C. P. D. (N. S.) p. 445 at p. 453 : (45 L. J. P. C. 581), that "the relation of an officer to the East India Company & to the Crown is not in the nature of an ordinary contract."

Pilcher J., observed in Lucas v. Lucas, 1943 P. 68 at p. 72 : (112 L. J. P. 84) that "There is some warrant for saying that the Crown does not contract with persons in its service."

All these observations do not mean that there is no contract at all between the Crown & the civil servant. The existence of some sort of a contract is a matter beyond dispute. Even Pilcher J. conceded that the contract between Lucas & the Crown could have been pleaded in a number of ways & stated at p. 73:

> "I think that it would be difficult to say that the Crown through its appropriate officer did not enter into a contract of service in the ordinary sense of the word with Mr. Lucas."

In Williamson v. The Commonwealth, 5 C.L.R. p. 174, Higgins J. applied Contract law to a case of dismissal of a civil servant from service. He stated that his remedy was either on the contract for the wrongful dismissal or to treat the contract as rescinded & sue for actual service. In Le Leu v. The Commonwealth, 29 C. L. R. 305, the case was dealt with on the footing that there was a contract of service which could not be terminated at the pleasure of the Crown (because it was governed by definite statutory provisions). In Venkata Rao v. Secretary of State, 64 I. A. 65 : (A. I. R. (24) 1937 P. c. 3l) Lord Roche, J. was not prepared to say that if R. Venkata Rao's service under the Crown was not terminable at pleasure, he would not have a remedy by suit for "breach of contract of service." The High Court of Australia, in Carey v. The Commonwealth, 30 C. L. R. 132, repelled the argument that the relation between the Crown & its servants does not involve a contract. Section 242, Government of India Act, itself referred to a "special contract" between the Crown & the civil servant under which he was entitled to compensation if he was removed in advance of the expiry of the term of employment. In Clifford B. Reilly v. Emperor, A. I. R. (21) 1984 P. C. 60 : (148 I. C. 637), the Judicial Committee found it difficult to say that there was no contractual relationship in certain offices. There is, therefore, no doubt that the relationship between the Crown & the civil servant is contractual. What are the terms of the contract is a different matter. The contract is not with the head of the department but with the Crown because when the head of the department contracts, in the public capacity the contract is deemed to be entered into by the Crown. In Gidley v. Lord Palmerston, (1822) 3 Brod & Bing 275 : (24 B. B. 668) Gidley, a clerk in the war offices was retired & put on half pay by Lord Palmerston, Secretary of State for war, & one of the reasons given for his failure to recover the arrears of half pay was that no suit lay against the Secretary of State for war because he only acted as a public agent. Mrs. Lucas also failed on similar ground in her suit against the High Comr. for India in Lucas v. Lucas, (1943 p. 68). When some authorities laid down as a proposition of law that the relationship between the Crown & its servants is not contractual, or expressed doubt in the matter, they seem to have been misled by the undoubted proposition of law that the Crown cannot hamper its future action by contract. In Rederiaktiebolaget Amphitrite v. The

King, (1921) 3 K. B. 500 : (91 L. J. K. B. 95), a ship owner in a neutral country was allowed to send his ships to England on 'assurance by the Govt. of England that they would be released from the English ports, still one ship was detained in England & the owners presented a petn. of right claiming damages for the breach of the Govt's. undertaking & the petn. was rejected. The Govt's. power to bind itself through its officers by a commercial contract was recognised & it was also recognised that the Govt. was bound, like a private individual, to perform its part of the contract on pain of being made to pay damages. But the particular contract was held to be not a commercial contract. Rowlatt J. stated at p. 503 :

> "It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Govt. to fetter its ultra executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure."

14. In Antonio, Buttigieg v. Stephen H. Sross, A. I. R. (34) 1947 P. C. 29: (229 I. C. 80), Lord Roche quoted with approval Rowlatt J.'s words:

> "It is not competent for the government to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State."

The Crown would not be bound by a contract if the safety of the realm is involved but this is only a restriction on its power to contract; it does not debar it from contracting. Generally, one finds the statement that the relationship between the Crown & its servants is not contractual in juxtaposition with the statement that the Crown cannot hamper its freedom to dismiss its servants at will in public interest (see for instance Wade, p. 264 & Grove J. in Grant's case, (1876-77) 2 C. P. D. (N.S.) 445, at p. 453), suggesting that the former emanates from the latter. But this is not the case. The Crown can enter into a contract with its servants but may not be bound by all the terms of the contract. The whole question of a Crown servant's right to sue for his salary has been discussed at length by Dr. D. W. Logan in an interesting article "A Civil Servant and His Pay" in 61 Law Quarterly Review, p. 240. The discussion of the question was provoked by the decision in Lucas v. Lucas, (1948 P. 68) which Dr. Logan considered to be correct but not for the reasons given by Pilcher J. (References to Dr. Logan in this judgment are to this articles). On p. 262 he writes that there is no reason for any difference where the capacity of the Crown to enter into a contract for services is concerned, that the correct view is as stated by Lord Loreburn in Owners of S.S. Raphael v. Brandy, (1911) A. C. 418), (Lord Loreburn said :

> "The authorities cited go no further than to say that where there is an engagement between the Crown & a military, or naval officer the Crown is always entitled to determine it at pleasure") and that the "various text-books on contract make no mention of the Crown in the chapters on incapacity." In his opinion the actual restriction imposed by substantive law on the Crown's power to contract consists in two implied conditions, (1) that any contract involving disbursement of money is subject to Parliament's making the necessary grant & (2) that it "cannot by contract fetter its future executive action."

15. Once it is found that there was some contract between the applt. & the Crown, the next question is what were its terms, particularly the terms relating to salary. I have already found that the rules framed by the Governor have no statutory force and now I shall endeavour to show that they do not also form the terms of the contract. Sir Ivor Jennings writes as follows in respect of administrative rules & orders in 'The Law and the Constitution' third edn:

> "The Cts. recognise that, apart from legislation, the relations between the King & his servants are matters within the discretion of the King. Accordingly, if he makes rules for his servants, they are not the concern of the Cts. Such rules are in fact made by Order in Council, Treasury minute, & Departmental regulations, for the Govt. & discipline of the civil service. Presumably they are not part of the laws of England, though for civil servants they have much the same effect." (p. 106) "The Cts. are not concerned with the civil service as such, because there is a (law & practice of the civil service) as there is a law & practice of Parliament" (p. 179). None of these rights is enforceable in the Cts., because the whole organisation of the civil service is regarded by the Cts. as a matter of administrative discretion which is outside their control. Indeed the civil service was created, & continues to exist, merely by reason of administrative decisions (p. 179)."... "No statute prescribes the salary & conditions of service of individuals, (there are a few special exceptions)." (p. 180)... "These rules, too, are exactly like the rules of law, except that they are not subject to interpretation or application in the Cts." (p. 182).
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> According to Wade & Phillip, p. 65 :
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> "The rules which govern the conduct of a civil servant do not often come before the Cts, since in a matter which is at the discretion of the Crown the aggrieved civil servant has no legal remedy... The enforcement of such rules is not a matter for the Cts. In many cases, as between individuals or companies or corporations, the entering a service upon rules stated by the dominant person or body would constitute a contract."

16. But in Grant's case, (1876-77-2 C. P. D. N. S. 445), Grove J. held that military service in many particulars differed from ordinary service under a contract, that many officers enter military service on the basis & faith of existing-rules & that this cannot be held to constitute a contract not to dismiss or remove them at will. In Shenton v. Smith, (1895) 72 L. T. (N.S.) p. 130: (1895 A. C. 229), their

Lordships of the Judicial Committee observed with regard to regulations :

> "They are merely directions given by the Crown to the Govts of Crown. colonies for general guidance, & that they do not constitute a contract between the Crown & its servants... They are alterable from time to time without any assent on the part of the Govt. servants, which could not be done if they were part of a contract with those servants."

17. In Venkatarao's case, (64 I. A. 55 : A. I. R. (24). 1937 P. C. 31), their Lordships again said at p. 63:

> "The rules are manifold in number & most minute in particularity, & are all capable of change. Counsel for the applt. neverthless contended with most logical consistency that on the applt's contention an action would lie for any breach of any of these rules, as for example of the rules as to leave & pensions & very many other matters. Inconvenience is not a final consideration in a matter of construction, but it is at least worthy of consideration, & it can hardly be doubted that the suggested procedure of control by the Cts. over Govt. in the most detailed work of managing its services would cause not merely inconvenience but confusion."

Venkatarao, who held office in the civil service of the Crown as a reader in the Govt. Press was charged with communicating a secret matter to another person & was dismissed. Though the procedure prescribed by the Civil Services (Classification) Rules was not followed, their Lordships could not as a matter of law hold that Venkatarao was entitled to redress from the Cts. by action. They remarked at p. 65 :

> "To give redress is the responsibility, & their Lordships can only trust will be the pleasure, of the executive Govt."

The facts in Rangachari v. Secretary of State, 64 I. A. 40 : (A. I. R. (24) 1937 p. 0. 27) were different; Rangachari, a Sub-Inspector of Police, was appointed in service by the Inspector General of Police, but was dismissed by a Deputy Inspector General of Police in contravention of the statutory provision in Section 96B. Their Lordships held the order of dismissal to be bad & inoperative & observed at p. 53 :

> "The stipulation or proviso as to dismissal is itself of statutory force & stands on a footing quite other than any matters of rule which are on infinite variety & can be changed from time to time."

My finding, threfore, is that the applt. could not treat any rule framed by the Governor as a term of the contract of his service.

18. Coming to the particular question of salary, the authorities seem to be in favour of the view that salary is a matter not of contract but of bounty. Salary is not treated as consideration, as understood in the law of contract, for the services rendered by the civil servant. In Flarty v. Odlum, (1790) 3 T.

R. 681 : 100 E. R. 801, the question arose whether the pay of an officer in the army could be assigned by him & it was answered in the negative. Lord Kenyon C. J., observed at p. 802 :

> "Emoluments of this sort are granted for the dignity of the State, & for the decent support of those persons who are engaged in the service of it."

Ashurst J., observed:

> "All voluntary donations of the Crown are for the honour & service of the State."

19. In Apthorpe v. Apthorpe, (1887) 12 P. D. 192 : (57 L. T. 518), there arose the question whether the pay of a surgeon in the Crown's navy could not be attached in execution of a decree for costs against him. Cotton J., relied upon Flarty's case, (1790) 3 T. R. 681 : 100 E. R. 801 & stated that the pay is given to an officer "to enable him to discharge his duties" (p. 193). In Mulvenna v. The Admirality, (1926) S. C. 842, cited with approval in High Commr. for India v. I. M. Lall, (A. I. R. (35) 1948 P. C. 121 : 1948 F. C. R. 44), it was stated by Lord Blackburn that "the rule based on public policy which has been enforced against military servants of the Crown, & which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown & not for contractual debts, must equally apply to every public servant." There Mrs. Mulvenna sued the Lords Comrs. of the Admirality for attachment of the wages due by the Admirality to her husband, a dockyard worker, who was in arrear of maintenance allowance decreed to her under a separation order. The Lords Comrs. objected to the attachment, contending that the wages of Mr. Mulvenna were not arrestable because they were intended for his maintenance as a public servant & were provided by the Crown for that purpose. This objection was upheld by Lord Sands & Lord Ashmore in the Ct. of session. Abdul Rahman J. with whom Harries C. J. agreed said in Rajendra Kumar v. Central Govt., A. I. R. (31) 1944 Lah. 168 : (215 I. C. 110), that "the Govt. work was bound to suffer if the pay of their employees were allowed to be attached & they were made to work without getting or hope of getting what would sustain them & the members of their family whom they are bound to support."

The notion of a public servant's salary being a matter of the bounty of the Crown was discarded by the P. C. in the Punjab Province v. Tarachand, A. I. R. (34) 1947 P. 0. 23 : (49 Bom. L. R. 697).

> "Salaries, if not expressly provided by statute, as in the case of a few of the higher appointments, are regulated by the Treasury or fixed by Order in Council." (See Wade & Phillips, p. 158).
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> It is stated by Anson in the 'Law and Custom of the Constitution' 4th Edn., Vol. II, p. 335 :
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> "A further limitation of the liability of the Crown, & a vital one in practice, is the fact that no servant of the Crown, military, air or civil, 'has any rights enforceable against the Crown in respect of a contract of service, e. g., as regards salary or pension. It is an essential character of all Crown Service that, apart from statutory provision, the

> Crown has an absolute right to dispense with any officer's services & that it lies with it to pay its servants at its pleasure."

20. There are a number of decisions laying down that no suit lies at the instance of a civil servant for arrears of salary. An important case is Leaman v. The King, (1920) 3 K. B. 663: (89 L. J. K. B. 1073). Leaman was enlisted as a soldier on terms, & rate of pay, advertised in papers, subsequently it was discovered that the correct rate of pay was less & with effect from the date of discovery he was paid at the smaller rate, & on discharge from service he filed a petn. of right claiming the balance of pay at the advertised rate. The petn. was rejected as incompetent. Acton J. quoted the following observation of Lord Esher in Mitchell v. The Queen, (1896) 1 Q. B. 121 (n):

> "All engagements between those in the military service of the Crown & the Crown are voluntary only on the part of the Crown, & give no occasion for an action in respect of any alleged contract." He referred to illustrations of "contracts which might be entered into between subjects, which would be enforceable on the one side & not on the other," & observed at p. 668 :
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> "It may be that, as stated in the Manual of Military Law at p. 189. 'The enlistment of the soldier is a species of contract between the sovereign & the soldier' but it by no means follows that it vests in the soldier the right to enforce by proceedings in a Ct. of law the payment of the sums to which he claims to be entitled in respect of his services."

Wade & Phillip accept the law laid down by Acton J. & write at p. 265 :

> "Members of the armed forces (& possibly civil servants) cannot sue for arrears of pay, for no engagement between the Crown & members of the armed forces can be enforced by a Ct. of law."

M, a pensioner of the E. I. Company became bankrupt & his assignee claimed the right to recover the pension due to him from the company. The claim was rejected. See Gibson v. East India Co., (1838-39) 5 Bing (N. C.) 262 : (8 L. J. (N. S.) C. P. 193). Tindal C. J. explained how the East India Company was formed for trading only in the beginning & how as the result of conquest, all territories in India, under the common law belonged to the Crown, & it acquired powers & privileges of two-fold nature, (1) to carry on trade as merchants, & (2) to acquire, retain & govern territory, to raise aimed forces by sea & land & to make peace or war with the native powers of India. The directors' resolution allowing the pension to M had no connection with the company's powers as traders. If the allowing of the pension was to be treated as a contract, it was a contract made by the company in their political character as governors & not in their trading character. Tindal C. J. observed at p. 274 :

> "It is clear that no action could be supported against any one to recover the arrears of half pay granted by the Crown, at least unless the money has been specifically appropriated by the govt. & placed in the hands of the pay-master or agent to the

account of the particular officer. The grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations ; obligations which want the 'vinculm juris', although binding in moral equity & conscience; to be a grant which the East India Company, as governors, are bound in foro conscientiae to make good, but of which the performance is to be sought for by petn., memorial, or remonstrance, not by action in a Ct. of law."

21. In Mulvenna's case, (1926 S. C. 842), Lord Blackburn said that there is an implied condition in every contract between the Crown & the public servant with effect that, "In terms of their contract, they have no right to their remuneration which can be enforced in a Civil Ct. of Justice & that their only remedy under their contract lies in an appeal of an official or political kind."

This view was adopted in the cases of Lucas, (1943 P. 68) & I. M. Lall, (A. I. R. (35) 1948 P. C. 121 : 1948 P. 0. B. 44). Pilcher J. conceded that it would be competent for the Legislature to confer on a public servant a right of action against the Crown, but this would have to be provided for in the most explicit terms. On a study of the material sections of the Government of India Act he found that a civil servant in India was not placed in a better position than a civil servant in England in the matter of his right of action against the Crown. Lucas was an Indian Civil Servant serving in Bihar. In 1937 his wife obtained a decree of judicial separation against him & he was ordered to pay to her alimony at a certain rate. He fell into arrears with payments under the order & was made bankrupt by his wife or at her instance. He was receiving sterling overseas pay which was paid to him through the High Commr. for India. Mrs. Lucas, who was in England, sought to attach this overseas pay under R. S. C. Order 45, R. I, & obtained a garnishee order against the High Commr. One month's instalment was due, but the High Commr. objected to the attachment of not only the future instalments but also that instalment. The objection was sustained & the garnishee order was set aside. The ratio decidendi was that when Mr. Lucas himself was prevented from successfully prosecuting any claim in respect of unpaid salary against the Crown, there was no debt owing or accruing from the Crown to him which could be attached by his wife under Order 45.

22. Recently Cornelius J., following the cases of Mulvenna, (1926 S. C. 842) & I. M. Lall, (A.I.R. (85) 1948 P. C. 121: 1948 P. C. B. 44), refused to pass a decree for arrears of salary in favour of a dismissed Inspector of Civil Supplies ; vide Yusuf Ali Khan v. Province of Punjab, A.I.R. (37) 1950 Lah. 59 : (Pak. L. R. (1949) Lah. 608). The facts in I. M. Lall's case, (A. I. R. (35) 1948 P. C. 121 : 1948 F. C. R. 44), were these: I. M. Lall, an Indian Civil Servant, was dismissed from service without being given an opportunity to show cause against the action proposed to be taken against him. He sued for a declaration that the order of dismissal was void & for any other relief to which he was entitled. The suit was tried by the H. C. of Lahore on its original side. The H. C. decreed the suit for the declaration that the order of dismissal was void & that he continued to be a member of the Indian Civil Service. The Crown filed an appeal to the F. C. which upheld the finding that the dismissal was void. The F. C. was of the view that I. M. Lall should have sought the relief of damages for wrongful dismissal & not merely the declaration. Since I. M. Lall was under the impression that he could not seek the relief of damages, the F. C. acting as the first appellate Ct., remanded the case to the H. C. to assess the damages. (It was this decision of the F. C. which led the applt. before us to seek the relief of damages for wrongful dismissal in the plaint as originally drafted.) The Crown went

up in appeal from the decision of the F. C. to the P. C. Their Lordships upheld the finding that the dismissal was void. I. M. Lall's counsel did not support the F. C.'s order of remit to the H. C. but maintained that he was entitled to recover by action arrears of pay from the date of the purported order of dismissal to the date of the action. This submission was rejected by their Lordships through these words :

> "It is unnecessary to cite authority to establish that no action in tort can lie against the Crown & therefore any right of action must either be based on contract or conferred by statute. It is sufficient to refer to the judgment of Lord Blackburn in the Scottish pass in Mulvenna v. The Admirality, (1926) S.C. 842, in which the learned Judge, after reviewing the various authorities, states : 'These authorities deal only with the power of the Crown, etc.' Their Lordships are of opinion that this is a correct statement of the law."

Their Lordships relied upon Gibson's case, (1838-39-5 Bing. (N. C.) 262 : 8 L. J. (N. S.) C. P. 193) also & held that I. M. Lall failed in his claim to arrears of pay. Accordingly, the declaration was maintained but the order to remit was set aside.

23. "The King can do no wrong" is a common law maxim. No proceedings can be brought against the King for the Cts. are his Cts., they act in his name & their powers were originally derived from his own authority (Jennings, p. 199). Some mitigation of the hardship caused by the rule has been effected in England by the procedure of petn. of right, which lies generally for breach of contract & recovery of property, but does not enable a civil servant to sue to enforce the terms of his employment. Nor does it provide a remedy for tortious injury. (Dr. Wade's Introduction to Dicey's 'Law of the Constitution' 9th Edn., p. CXLVII). According to Lord Dunedin in Attorney-General v. De Keyser's Royal Hotel, Ltd., (1920) A. C. 508 : (89 L. J. Ch. 417) a petn. of right "will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The petn. of right does no more & no less than to allow the subject in such cases to sue the Crown" (p. 530).

But the remedy even by petn. of right or any such proceeding to enforce the payment even of half pay is not available to a Crown servant: see In re Tufnell, (1876) 3 ch. D. 164 : (45 L. J. Ch. 731). Tufnell was placed on half pay, though he claimed to be fit to perform his duties, & he filed a petition of right claiming compensation against the Crown. The petn. was rejected by Vise-Chancellor Malins who relied upon the case of Gibson, (1838-89-5 Bing. (N. C.) 262 : 8 L. J. (N.S.) C. P. 193) as deciding that money could not be recovered even when it had been paid into the hands of Secretary of State for the purpose of paying half pay & appropriated to that particular object. Stephen also writes at p. 741 that no petition of right can be filed against the Crown for pay, though it can be filed for certain other wrong claims, such as claims to the pension, to the personal estate of an intestate & to the repayment of death duties & other dues which have been wrongly executed or overpaid.

24. I would examine cases in which it has been held that a suit lies for the recovery of pay. In Abdul Vakil v. Secretary of State, A. I. R. (30) 1943 Oudh 368, a Sub-Inspector of Police sued for damages for wrongful dismissal, reinstatement & arrears of pay. The dismissal was found to be illegal & the

Govt. were held to be under statutory obligation to pay the salary of members of the police force. The statutory obligation is that contained in Section 2 of the Police Act. No decree actually was passed for the arrears of salary, but this is immaterial. There was no discussion in that case about the nature of salary & the right of a civil servant to sue for it when it is not the subject of statutory obligation. I have found that in the present case there was no statutory obligation, so that case is of no assistance to us. In Abdul Majid v. Province of Bihar, A. I. R. (37) 1950 Pat. 17 : (28 Pat. 562) was another case of a Sub-Inspector of Police who was wrongfully dismissed by an authority subordinate to that which had appointed him & was granted a decree for arrears of salary upto the date of the institution of the suit. The learned Judges followed the F.C. decision in the Punjab Province v. Tarachand, A. I. R. (34) 1947 P. C. 23 : (49 Bom. L. R. 697). They had I. M. Lall's case, (A.I.R. (35) 1948 P. C. 121 : 1948 F. C. R. 44) also before them but did not give any reasons for preferring the F. C. view to the Judicial Committee view. They remarked at p. 18 :

> "It is true that their Lordships" (of the Judicial Committee in I. M. Lall's case, (A.I.R. (38) 1948 P.C. 121 : 1948 F. C. R. 44)) "made these observations at p. 244 that 'it has been settled ever since Gibson v. East India Co., (1838-39-5 Bing. (N. C.) 262 : 8 L. J. (N.S.) C. P. 198) that pay could not be recovered by action against the Company but only by petn., memorial or remonstrance.' But those observations were considered by the P. C. in the case, referred to above, as not being applicable to a case like the present pltf."
>
> "Those observations" can only mean the observations of their Lordships of the Judicial Committee in I. M. Lall's case, (A. I. R. (35) 1948 P. C. 121 : 1948 F. C. R. 44) but they could not possibly have been, & indeed were not, considered by the F. C. in Tarachand's case, A.I.R. (34) 1947 P. C. 23: (49 Bom. L. R. 697) which was of a much earlier date. Even Gibson's case, (1838-39-5 Bing. (N. C.) 262) was not considered. So "those observations" cannot refer even to any observation in Gibson's case, (1838-39-5 Bing. (N.C.) 262). Further, if Abdul Majid had a statutory right to demand the arrears of his salary from the Crown, as Abdul Vakil had, the suit was rightly decreed whatever might have been the reasons. The facts in Provincial Government, C.P. v. Shamshul Hussain, A. I. R. (36) 1949 Nag. 118 : (I. L. R. (1948) Nag. 576) were similar to those in Abdul Majid's (A. I. R. (37) 1950 Pat. 17 : 28 Pat. 562) except that it was decided before I.M. Lall's case, (A.i.r. (35) 1948 P. C. 121 : 1948 P. C. R. 44) was decided by the Judicial Cammittee. Naturally it followed Tarachand's case, (A.i.r. (34) 1947 F. C. 23: 49 Bom. L. R. 697) & Shamshul Hussain's suit for arrears of salary was decreed. There is no discussion of the law relating to a Crown servant's salary. The H.C. of Australia gave a decree to a Crown. servant for arrears of salary in Carey's case, (30 C. L. R. 132). Carey, who was appointed for a term of three years as a director of the Northern territory on a certain salary plus travelling allowance, was relieved of his duties without being suspended & later his appointment was terminated even before the expiry of three years. Though it was held that the Crown. could terminate the contract even before the expiry of three years, Carey was held entitled to a decree for salary & travelling allowance. He was given the decree on the footing of the express contract. It was observed that if the

> payment of certain salary is the term of a contract it can be demanded through an action. Dr. Logan is of the view that the assumption that a civil servant has no enforceable right to salary for services rendered is contrary to principle & against the weight of authority; (p. 258). The reason given by him is that "if a civil servant has an enforceable right to salary for services rendered, such a right constitutes a 'debt' within R. S. C. O. 45, & can be garnished if the Crown is liable to proceedings under that order."

Counsel for Lucas contended that Mr. Lucas was entitled to sue the Crown for his salary: he did not attempt to argue he could have enforced his claim to arrears of salary by petition of right. But Pilcher J. did consider the question whether petition of right proceedings lay & answered it in the negative. Dr. Logan questions the correctness of this view of Pilcher J. though he concedes it has a good deal of support. Dr. Logan has confined the above quoted observation to salary for services already rendered; he was not concerned with any claim for future salaries. To Dr. Logan's observation at p. 259 that "to the ordinary person there seems to be no reason of State why the Crown should not pay for what it has received," the Crown's reply would be "we should pay & we will pay but we cannot be compelled to pay because we have no statutory or contractual liability." It is also true that in the matter of payment of salary there arises no question of limiting the Crown's right to dismiss or of fettering its future action. But the Crown does not claim immunity from being sued for arrears of salary on such a ground; it does not concede at all that any contract existed. The question of the Crown's not being hampered in its future action arises only when there is a contract. Referring to the view of Anson quoted above, Dr. Logan remarks that the authorities on which the text book writers rely all relate to claims made by members of armed forces against the Crown.. He has taken great pains to show that members of armed forces & civil servants are not equally servants of the Crown & that "it does not follow that what ia sauce for the soldier is sauce for the civil servant." Dr. Logan's view is entitled to weight but it is not possible for me to prefer it to the views of the Judicial Committee treating members of armed services & civil servants on the same footing. Dr. Logan writes at p. 263:

> "If there is a contract, no difficulty can arise in cases such as Lacas v. Lucas, (1943 P. 68) from the first implied condition that contracts are subject to proviso that Parliament must vote the necessary money, for the payment of the money has already been sanctioned by Parliament & the question is simply to whom the money shall be paid. So far as the second implied condition is concerned, it could not be argued that to pay over a sum of money already voted by Parliament might fetter the future executive action of the Crown."

There can be no quarrel with this statement; the whole question is whether there is a contract to pay salary or not. Dr. Logan then refers to Chitty's 'The Prerogatives of the 'Crown' published in 1820 & Robertson's 'Civil Proceedings by & against the Crown.' published in 1908, complains that the latter book was not brought to the notice of the Ct. in Lucas v. Lucas, (1943 P. 68) & claims that a civil servant has a right to file petition of right for salary in respect of services rendered. Even if that be true, it would not advance the applt's. case before us because in India there is no such thing as petition of right proceeding. He cannot contend that what is allowed through petition, of right

proceeding in England should be allowed through a suit in India. There remains to be considered Tara Chand's case, A.I.R. (34) 1947 F. C. 23 : (49 Bom. L. R. 697). It is unfortunate & somewhat strange that it was not referred to at all before the Judicial Committee dealing with I.M. Lall's case, (A. I. R. (85) 1948 P.c. 121 : 1948 F. C. R. 44). Tarachand, a Sub-Inspector, was dismissed by an authority subordinate to that which had appointed him & sued for a declaration that the order of dismissal was void & ineffective & arrears of pay from the date of the order of dismissal to the date on which he would have normally retired. The Crown. contested his right to sue for arrears of pay. Zafrulla Khan J. observed at p. 27 that if the Crown. contravenes the limitation placed upon its power to dismiss at its will & pleasure, "the public servant concerned has a right to maintain an action against the Crown. for appropriate relief." "There is in our judgment no warrant for the proposition that the relief must be limited to a declaration & should not go beyond it." If the public servant has an enforceable right to salary he can certainly get a decree for it. It was urged on behalf of the Punjab Province that the Crown. had a prerogative that no action can lie against it for arrears of pay even for services rendered. But this argument was repelled by the learned Judge on the ground that it must be presumed that the prerogative had been abandoned in India. In my view, no question of prerogative arises at all. Even the Crown's right to dismiss at its will & pleasure is not based on any prerogative. In India there was the statutory provision in Section 240, Government of India Act, but even in England a civil servant holds office durante bene placito not on account of any prerogative but on account of an implied term in the contract of service. In Shenton v. Smith, 1895-72 L. T. (N.S.) 130 : (1895 A. C. 229), Lord Hobhouse observed at p. 132 :

> "Unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown. -- not by virtue of any special prerogative of the Crown., but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly his remedy is not by a law suit, but by an appeal of an official or political bind."

This observation was relied upon by Kania J. as he then was, in Tarachand's case, (A. I. R. (34) 1947 F. C. 23 : 49 Bom. L. R. 697). In Gould v. Stuart, (1896) A. C. 575 : (65 L. J. P. C. 82), their Lordships again observed :

> "In a contract for service under the Crown civil as well as military, there is, except in certain cases where it is otherwise provided by law, Imported in to the contract a condition that the Crown has the power to dismiss at its pleasure : Dunn v. Reg, (1896) 1 Q. B. 116 : (65 L. J. Q. B. 279) & De Dohse v. Reg, 1896) 1 Q. B. 117n."

This implied term is to be read in every contract, including a contract for a specific period, unless it definitely prescribes a term & expressly provides for dismissal for cause; see Clifford B. Ralley v. Reg, 25 W. R. 848 & Grant v. Secretary of State, (1876 77-2 C. P. D. (N.S.) 445). It is stated in Stephen's Commentaries, vol. III, p. 250 :

> "Almost every servant of the Crown, whether in the civil, naval, military, or air service, is liable to be dismissed at the pleasure of the Crown, even though he be

> engaged for a definite term of years. As a matter of law, the Crown is incapable of entering into a contract of service binding upon it. Such a contract (if contract it must be called) is enforceable by the Crown, but not against it;.. This rule is said to be dictated by considerations public policy and convenience."

So the Crown.'s plea of prerogative in Tarachand's case, (A. I. R. (34) 1947 F. C. 23: 49 Bom. L. B. 697) was ill-founded in fact. Zafrulla Khan J. then considered the decision in the case of Lucas (1948 P. 68) & pointed out that the provision of Section 60, C. P. C. was not brought to the Ct's. notice & that in India.

> "the salary of a public servant, once it has become payable has always been treated as a debt to him which is liable to attachment in satisfaction of a decree against him.... This section treats all salaries including salaries of servants of the Crown as debts & as such liable to attachment... The attachable portion of this salary of the servant of the Crown may be attached before or after it becomes actually payable" (p. 28).
>
> His conclusion was:
>
> "Surely all this is utterly inconsistent with any notion of a public servant's salary being a matter of the bounty of the Crown" (p. 29).
>
> Kania, J. who delivered a separate but concur, ring judgment also relied upon the provision of Section 60, C. P. C. & observed at p. 32:
>
> "The provisions of Section 60 C. P. C. give a right to the creditor to attach the salary of a servant of the Crown. There can be no dispute about that. If the contention of the applt. was accepted, the result will be that while the civil servant cannot recover the money in a suit against the Crown, his creditor can recover the same in execution of a decree against the civil servant. This right of the creditor to receive money in that manner has been recognised in innumerable decisions of all the High Courts."

25. I now proceed to examine how far the provisions of Section 60 & Order 21, Rule 48 & other rules dealing with garnishee proceedings show that a civil servant has an enforceable claim to his salary.

26. Section 60, C. P. C. lays down: "The following property is liable to attachment & sale in execution of decree, namely, lands... debts... and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit: ... Provided that the following particulars shall not be liable to such attachment or sale, namely:

* * * *

(h) the wages of labourers and domestic servants;...

(i) the salary to the extent of the first hundred rupees and one-half of the remainder:

> (j) the pay and allowances of persons to whom the Indian Army Act... applies...;" The method of attaching salary or allowances of public officers is stated in Order 21, Rule 48 which reads as follows: "The Ct. . .. may order that the amount shall, subject to the provisions of Section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Ct. may direct, & upon notice of the order to such officer as the Govt. may ...appoint.....
>
> (a) the officer or other person whose duty it is to disburse the same shall withhold & remit to the Ct. the amount due under the order or monthly instalments." (Sub-rule (1)).

If the attachable proportion of such salary or allowance is already being withheld & remitted to a Ct. in pursuance of a previous & unsatisfied order of attachment, the officer is required by the same rule to return the subsequent order to the suing Ct.: Sub-rule (2). It is stated in sub-rule (3) that:

> "Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the appropriate Government... and the appropriate Government shall be liable for any sum paid in contravention of this rule."

I do not see anything in these provisions to indicate that the civil servant has an enforceable right to his salary, whether earned or not. The argument of Mr. K.L. Misra is that the exception in respect of "salary to the extent of the first hundred rupees & one half remainder" suggests that the salary comes within the meaning of words "debts, all other saleable property etc." My answer is that it is a non-sequitur. It must be remembered that the C. P. C., is concerned with laying down rules of procedure & does not purport to affect substantial rights. If the payment of salary to civil servant was not the Crown's legal liability, nothing in the C. P. C., could have made it a legal liability. If whether to pay the salary or not was at the sweet will of the Crown, there is nothing in Section 60 or any other provision of the Code to convert that matter of sweet will into one of legal obligation. Mr. Misra was conscious of this position & when questioned by me denied that Section 60 of the Code has the effect of converting a matter of bounty into a matter of legal obligation & was forced to contend that it was never a matter of bounty at all. He treats Section 60 as supporting his argument that the payment of salary by the Crown was always its enforceable liability. But he has not cited any law under which it was so. If there was a law oven before the enactment of the Code in 1908 to the effect that a Crown servant has an enforceable claim to his accrued salary, that law should have been cited. The above discussion shows that there was no such law. In the circumstances Section 60 cannot be availed of to prove the previous existence of any such law. Unpaid salary is not property belonging to the civil servant; even if he has an enforceable claim to it, it does not become his property. If he has an enforceable claim, all that he possesses is a right to sue for it; but so long as it is not paid it remains the Crown's property. What is mentioned in Section 60 proviso (1), is "salary to the extent of..." & not "a right to sue for salary to the extent of..." The latter might have been a property belonging to the civil servant but the former is not. Thus salary, as property, cannot be

disposed of or assigned by the civil servant. Consequently, if salary is liable to attachment & sale under Section 60 it is only on the ground of its being included in the word "debts". In Flarty's case, (1790-3 T. R. 681 : 100 E. R. 801) it was held that the pay of an officer in the army is not assignable. Buller J. said:

> "If the question had been whether or not the pay which was actually due might be assigned, I should have thought it, like any other existing debt, assignable ; but that does not extend to future accruing: payments."

27. In Barwick v. Reads, (1791) 1 H. Bl. 627 : (2 R. R. 808), the assignment by a lieutenant in the navy of his full pay to another man in trust for payment of debts etc. was held to be "illegal, it being contrary to the policy of the law that a stipend given to one man for future services, should be transferred to another who could not perform them". In Hussain Bhamjee v. Hicks, 18 W. R. 124, it is laid down that a claim for earned salary is a debt. A claim for unearned salary was held to be not a debt in Ayyavayyar v. Vira Sami Mudali, 21 Mad. 393. In the case of Apthorpe, (1887) 12 P. D. 192 : (57 L. T. 518), the pay of a civil surgeon in the Crown's navy was held to be not attachable in execution of a decree for costs against him; it was held to be "protected by the general law". In Grenfell v. The Dean and Canons of Windsor, (1840) 2 Beav. 544 : (48 E. R. 1292), it vas held that the doctrine of non-assignability of salary did not apply to sinecure offices. In that case M was appointed by Letters Patent one of the canons of the Collegiate Church in Windsor Castle ; the appointment produced a certain annual income. Being in want of money M assigned the canonry with its income. No spiritual duties were assigned to his office but under various statutes & ordinances he had to reside in a house within the Castle & to attend the Divine Service in the Chapel on a certain number of days in a year. As these duties were to be performed by M for his own benefit & as the appointment did not involve the performance of any public duties, the appointment together with its income was held assignable. It was stated that if the duties to be performed by M had been public duties, the assignment of the applt. would have been declared null & void. Dr. Logan is of the view that the doctrine, which can apply only to future instalments of salary, either is no longer good law or should be repealed by statute; see p. 240. In his opinion "the guiding motive behind the doctrine was not so much 'the maintenance of the dignity of the office' as the provision of an effective remedy if 'the due discharge of its duties' did not take place". Officials were liable to payment of damages for acts done in their official character but in excess of their lawful authority. The result of forbidding an officer to assign or charge his emoluments made it unlikely that he would be unable to satisfy any judgment against him for wrongs committed by himself or his deputies in the course of their official activities. Whatever might have been the reason for the non-assignability of salary, the fact remains that salary for future services is not assignable or attachable & does not amount to debt. When under Order 21, Rule 48, C. P. C., the Ct. issues one order in respect of future instalments of salary, it is only for the sake of convenience; the order has the effect of a succession of orders month by month. This is clear from the fact that it has effect at one time only in respect of the salary for the previous month. The Crown is required to pay only the salary of the previous month to the Ct.; it is not required to send the entire attached amount at once to the Ct. Thus the order itself treats only the accrued salary as a debt. Before the C. P. C., was enacted in 1908 the attachable portion of salary was held to be attachable not in advance but on its falling due; see Tejram Jagrupoji v. Pusaji, 7 Bom. H. C. A. C. 110, Tuffuzzool Hussein v.

Rughoonath Prasad, 14 M. I. A. 40: (7 Beng. L. R. 186 P. C.), Hussain Bhamjee v. Hicks, 18 W. R. 124 etc. Section 60 in the Code of 1908 does not, & could not, make any change in the law; the future salary is still not a debt but Cts. are permitted to issue one order for continual attachment of salary of a Crown servant instead of having to issue month after month orders of attachment of the accrued salary. It has to be noted that an order of attachment of future salary can be issued only when the judgment-debtor is a Crown servant & not when he is a private servant. Certainly the law could not have placed a Crown servant in a worse position than a private servant. Now though the accrued salary is attachable as a debt there is nothing in Section 60 or Rule 48 to indicate that the Crown is bound to pay the salary to the Ct. & cannot claim that it is not bound & that the matter is one of bounty. What Section 60 means is simply this that if the Crown elects to pay the salary then after it has been attached it must be paid into the Ct. & not to the civil servant. Once it pays the salary, it has exercised its will & the matter ceases to be one of sweet will. The payment of salary then assumes the character of payment of a debt. Under Rule 46 of Order 21 attachment of a debt not secured by a negotiable instrument is effected by an injunction to the creditor from recovering the debt & to the debtor from making payment thereof until further orders of the Ct. No mandatory injunctions can be issued to the debtor to pay the amount of the debt in Ct. It is open to the debtor to do so, but the attachment of the debt is not a decree against him. If he wants to contest his liability to pay the debt he is within his power not to pay it into Ct.; all that he cannot do is to pay it to his creditor, the judgment-debtor. The judgment-debtor could not recover the debt from his creditor through a simple warrant of attachment; he would have to file a suit against, him, obtain a decree & execute it. The attachment of the debt would only transfer this right-to his judgment-creditor or the Ct., but would not place them in a better position than him. This is the position in respect of judgment debtors who are private servants. Rule 48 deals with judgment-debtors who are Crown servants; there the Crown, as the supposed debtor of the Crown servant, is required to remit to the Ct. the attached salary month by month. Though the words used are "shall withhold & remit to the Court" they must mean "shall withhold and remit to the Court, if he" (the disbursing officer) "elects to pay the salary". The disbursing officer cannot remit the attached salary to the Crown servant or to somebody else & if he does so the Crown will be liable. But so long as he does not do so, neither he nor the Crown is in any way liable. There is no provision to deal with a case in which the disbursing officer does not remit to the Ct. the attached salary and does not pay it also to any one. The Ct. cannot issue a warrant of attachment against him or the Crown to recover the salary which he has refrained from remitting to it. The attachment order is binding on the Crown, unless it is returned in accordance with the provision of Sub-rule (2). Sub-rule (2) deals with the return of the order when the salary had already been attached under a previous order of a Ct. There is no express provision authorising the return of the order on the ground that the Crown has not decided to pay the salary to the Crown servant & that consequently it is not payable to him or into Ct. Still the general power of the Crown to object to the attachment on the ground that it does not wish to pay the salary to the Crown servant is not taken away by anything contained in Rule 48. In the case of Rajindra Kumar, A. I. R. (31) 1944 Lah. 168 : (215 I. C. 110), it was decided that it is open to the Crown to bring to the Ct's. notice the illegality of its attachment order. In the same way it can inform the Ct. that it has not yet decided to pay this salary to its servant & that it cannot be remitted so long as such a decision has not been formed. I see no justification for crediting the Legislature with the intention of making a distinction between a Crown servant against whom a decree has been passed & another against whom no decree has been passed & converting a matter of pleasure into one of liability enforceable

in Ct. in the former case.

28. If the effect of Rule 48 of Order 21, Civil P. C., were to make it absolutely binding upon the Crown to remit the attached salary to the Ct. month after month & to preclude it from pleading its pleasuse, the appelt. would be in a stronger position, though I do not see how still he could get a decree. As the Crown is mentioned in the rule, it must be held bound by the Code. If the payment of salary was merely a question of the Crown's prerogative, it could be argued that the Crown had abandoned the prerogative when the rule was enacted. But the ground on which I find the Crown not liable to pay the salary is not that of prerogative but of non-existence of any contract by the Crown to pay the salary. Rule 48 does not bring a contract into existence where none existed. If there was no contract by the Crown for the payment of the salary, there are no words in the rule which create such a contract. There are words which create a liability to pay the salary but in that case it would be a statutory liability & not a contractual one. Further the statutory liability would be only to pay the salary into Ct. That would be different from the statutory liability to pay the salary to the servant & one would not give rise to the other.

29. I am of the opinion that there was no contract, within the meaning of the Contract Act, by the Crown to pay any salary to the applt. There was a contract of service but it contained terms enforceable against the applt. & not against the Crown. The United Provinces Civil Service (Executive Branch) Rules, 1941, are only for the guidance & do not form the terms of the contract between the Crown & the applt. The promise by the Crown. to pay salary at a certain rate to the applt. is no more a contract enforceale in a Ct. of law than a promise to dine with a friend.

30. Thus the applt. has no right either under a statute or under a contract to demand the arrears of his salary. Their Lordships laid down in I.M. Lall's case, (A. I. R. (35) 1948 P. C. 121 : 1948 F. C. R. 44) that :

> "No action in tort can lie against the Crown, & therefore any right of action must either be based on contract or conferred by statute" (p. 243). The applt's suit is not based on tort or, as shown above, on contract. Nor has he been granted by statute any right to sue for the arrears of his salary. I.M. Lall could not point out any statute which conferred on him the right to sue for the arrears of salary & the applt. does not stand in a better position in this respect. Mr. K.L. Misra thought that "a right of action conferred by the statute" means a right of action based on breach of a statutory provision. Even so, the applt's. claim for the arrears of salary is not based on any breach of a statutory provision by the Crown. Moreover, it cannot be said that every breach of a statutory provision gives rise to a cause of action. Take the case of Section 103, Cr. P. C., if a sub-Inspector makes a search without taking two respectable witnesses of the locality, can anyone say that the Crown, or the com. plainant whose case suffers on account of the breach of the statutory provision, file a suit against him for the breach ? What their Lordships meant is that unless the case is covered by Section 9, Civil P. C., the statute must in so many words lay down that a suit would be instituted in certain circumstances. Under Section 9, Civil P. C., civil Cts. have jurisdiction to try "all suits of a civil nature". A suit for the specific performance of a

contract or based on breach of a contract is a suit of a civil nature which can be filed in a civil Ct. on the authority of Section 9, Had the applt's right to the arrears of salary been based on a contract, Section 9 would have authorised his filing a suit for the same. There is no analogy between his suit for a declaration that his dismissal was void & inoperative & his suit for the arrears of salary. Because he can file one suit it cannot be said that he must be able to file the other suit. What is the nature of a suit that a civil servant, who has been wrongfully dismissed from service, can file ? He cannot sue for a mandatory injunction against the Crown to reinstate him in service nor can he sue for damages for the wrongful dismissal. All that he can sue for it a declaration that the order of his dismissal was null & void. The declaration only means this that though he could have been dismissed only after a certain procedure had been gone through, he was dismissed without that procedure having been gone through. The Crown's "prerogative" to dismiss at its will & pleasure is made subject to the condition that a certain procedure should be followed. If that procedure is not followed, the "prerogative" does not exist & the Crown has no power to dismiss at its will & pleasure. No such consideration arises in a claim for arrears of salary. The applt. certainly does not derive any right to sue from the order of wrongful dismissal. He has a right only if he had a right to sue for arrears of salary even when he was in service. If he had no right, he has no right after his dismissal, whether rightful or wrongful. In the absence of a statutory provision his right depends solely upon the terms of his contract of service:

" The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all Courts in British India" (see Section 212, Government of India Act, 1935).

This was the law when the learned Civil Judge disposed of the applt.'s suit. There was conflict between the view of the F. C. & the view of the P. C. As the P. C. was the higher Ct. & as its judgment was of a later date, the learned Civil Judge was right in following the view of the P. C. The view of the F. C. could not prevail against that of the P. C. Under the present Constitution "the law declared by the S. C. shall be binding on all Cts." (Article 141). The Article refers to "law declared by the S. C." & not to "law declared by the P. C." The Constitution has no retrospective effect & in deciding this appeal we must consider the law that existed on the date on which the learned Civil Judge passed his decree. An appellate Ct. can take notice of a change in circumstances after the passing o the decree by the lower Ct., but cannot take notice of a law passed subsequently which is not retrospective in effect. This Ct. may not be bound at present by either the P. C.'s view or the F. C.'s view but the learned Civil Judge Was certainly bound by the P. C.'s view. His judgment was correct on the date on which it was pronounced & did not become incorrect owing to the passing of prospective law. The applt.'s responsibility is to satisfy us that the judgment was incorrect on the date on which it was passed.

31. The Crown contested the applt.'s claim to salary after the date of the wrongful order of dismissal. The position taken by it is that when the order of dismissal was declared to be void & inoperative the suspension of the applt. was revived & that he could not claim anything more than the subsistence allowance that had been granted to him. As I find that the applt. cannot sue at all for arrears of salary it is not necessary to consider whether he could claim his full salary for the period between the date of the purported order of his dismissal & the date of institution of the suit. I may state, however, that as advised aft present I think that the applt. should not be treated to be on suspension & should expect full salary.

32. There remains the small matter of the refund of court-fee. It is conceded that there is no provision in the Court-fees Act under which the refund can be ordered. The applts. sought the refund under the inherent powers of the Ct. The learned Civil Judge refused to exercise his inherent powers Mr. Gopalji Mehrotra challenged his right to raise the question of refund in this appeal from the decree. The applt. did not appeal from the order refusing the refund. Section 105, under which, "Where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal", does not apply because the supposed wrongful refusal to refund is not a "defect or irregularity affecting the decision of the case"; the question of refund had absolutely no concern with the final judgment in the suit. The final judgment would have been the same whether the surplus court-fee was refunded or not. But the applt. does not seek relief from us under any statutory provision. Ho invokes our inherent powers. He cannot appeal from the learned Civil Judge's refusal to exercise his inherent powers, but he can certainly ask us to exercise ours & if we grant the refund, it would be in the exercise of our inherent powers & not in exercise of our power, as an appellate Ct., of setting aside the learned Civil Judge's order of refusing to exercise his inherent powers.

33. Two questions arise, (1) whether the refund can be granted under our inherent powers, & (2) whether we should exercise our inherent powers. There are many authorities including some of this Ct., stating that a Ct. can refund court-fee under its inherent powers in a case not covered by the Court-fees Act. The Court-fees Act contains provisions for the refund of court-fee in certain circumstances. The present case admittedly is not covered by those provisions. I have my own doubt about the correctness of the view that a Ct. can refund the court-fee in exercise of its inherent powers. This doubt arises from the facts that the court-fee is paid not to the Ct. but to the State & not after the jurisdiction of a Ct. has been invoked, but before. A Ct., the jurisdiction of which is invoked by a person, has to satisfy itself that the person has paid the required court-fee on the plaint, appeal, or appln., but it has no other concern with the payment of the court-fee. The payment is only a condition precedent to its jurisdiction being invoked. If a person has been compelled to pay more court-fee than he was required to pay under the law, it may be said that he was compelled by the Ct., & the Ct.'s inherent powers may be invoked for its refund. But in the present case the applt. paid the court-fee not under any compulsion from the Ct. but voluntarily & even before he invoked the jurisdiction of the learned Civil Judge. He cannot invoke the inherent powers of the learned Civil Judge to get undone what he himself had done of his own accord & before invoking the jurisdiction of the learned Civil Judge. Some authorities have laid down that a Ct., in exercise of its inherent powers, cannot direct the Collector to refund the court-fee but can only issue a certificate. I do not know of what use it would be to issue a certificate if it were open to the Collector to disregard it. If a

Ct. passes an order, it must be an order which shall be enforced; otherwise it should not pass it at all. I leave the matter at this without giving a definite opinion on the question, because I find that even if we could, order a refund on our inherent powers, the present is not a case in which we should exercise them. I have already mentioned that the court-fee was paid voluntarily & not under compulsion. Moreover, there was no mistake in computing the amount of the court-fee; there was no overpayment. The applt. sought a certain relief & paid the correct amount of court-fee on it. Later on he got that relief deleted. He was not bound to seek that relief, even if he thought that according to the view of the F. C. he was entitled to that relief. He did not fully act in accordance with the judgment of the F. C. because he also asked for the alternative relief of a declaration that he still continued a member of the civil service. He cannot contend that he was misled by the judgment of the F. C. And if he was not misled, he cannot base his right to the refund on the fact that the judgment of the F. C. was reversed on appeal by the Judicial Committee of the P. C.

34. The main question in this appeal was full of doubt & has given rise to a serious conflict between the Judicial Committee & the F. C. In Collier v. King, (1862) 132 R. R. 626 : (11 C. B. N. S 478), the successful resp. was not allowed costs of the appeal because the case was a reasonably fit one for argument. I would, therefore, dismiss the appeal but without costs.

Dayal, J.

35.I agree that the applt. cannot sue the Govt. for the recovery of arrears of pay.

36. The facts of the case & reasons for the view that the applt. could not sue for recovery of arrears of pay are fully discussed in the judgment of my learned brother. The question is an important one, & in view of different views expressed by the F. C. & the P. C. in this matter, I express my views on this question very briefly.

37. The F. C. held in Punjab Province v. Tara Chand, A.I.R. (34) 1947 F. C. 23 : (49 Bom. L. B. 697) that a servant of the Crown in India has the right to maintain a suit for recovery of arrears of pay which have become due to him. It accordingly dismissed the appeal against the decree of the H. C.; decreeing the Govt. servant's suit for the arrears of pay.

38. The P. C. held in High Commissioner for India v. I.M. Lal, A. I. R. (35) 1948 P. C. 121 : (1948 F. C. R. 44) that no action in tort can lie against the Crown & that any right of action must either be based on contract or conferred by statute, & further laid down:

> (1) that the terms of service of a public servant are subject to certain qualifications which are to be implied in the engagement of a public servant, no matter whether they had been referred to in the engagement or not;
>
> (2) that the rule based on public policy which has been enforced against military servants of the Crown, & which prevents such servants from suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown & not for a contractual debt, must equally apply to every public servant;

> (3) this qualification must be read as an implied condition into every contract between the Crown & a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a civil Ct. of justice, & that their only remedy under their contract lies in an appeal of an official or political kind.

39. They further held that the various sections of the Government of India Act 1935 to which they were referred did not confer any statutory right to recover arrears of pay by action.

40. Their Lordships of the Judicial Committee do not appear to have been referred to the judgment of the F. C. There is no reference to it in their judgment. The learned Civil Judge was bound to follow this ruling when he decided this case on 4-12-1948, & accordingly dismissed the pltf.'s suit for the recovery of arrears of pay.

41. It has been strenuously argued before us that we are not now bound by the decision of their Lordships of the P. C., that we are bound by the decision of the F. C. & that even if we were not bound by it the view taken by the F. C. is the correct view.

42. Firstly, I am of opinion that in deciding an appeal the appellate Ct. has to see whether the order of the Ct. below was wrong & naturally this means whether the order appealed against was correct on the date it was pronounced. Further, no change in law has taken place since the passing of the decree by the Ct. below. It may be that due to constitutional changes, the decisions of the P. C. are not binding on the Cts. now; but the judgments of their Lordships of the Judicial Committee are to be treated with the greatest respect possible & are, in my opinion, not to be departed from unless very good reasons exist. Otherwise much of the settled law will become unsettled.

43. Just as the judgments of the Judicial Committee be not binding on the Cts. now on account of the constitutional changes, the decisions of the F. C. also are not binding. Learned counsel for the applt. referred us to Articles 141 & 374(2) of the Constitution. Article 141 is:

> "the law declared by the Supreme Court shall be binding on all Courts within the territory of India."

Article 372, Sub-section (2) is:

> "All suits, appeals and proceedings, civil or criminal pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court."

It is argued for the applt. that according to the latter portion of this provision of the statute the F. C. judgment has the same force & effect as if it had been delivered or made by the S. C. I do not think

that this provision means that all the judgments pronounced by the F. C. before the commencement of this Constitution will have the same force & effect as if they had been delivered & made by the S. C. I understand this provision to mean that, in cases which were pending before the F. C at the commencement of the Constitution & which cases would stand removed to the S. C. at the commencement of the Constitution, the judgments & orders which had been passed in those cases before the commencement of the Constitution would be deemed to be judgments of the S. C. & would have effect as such. I, therefore, do not agree that the judgments of the F. C. continue to be in any way more effective & binding on the Cts. in this country than the judgment of the P. C.

44. On the merits of the question I am inclined to disagree with the view in the case reported in The Punjab Province v. Tara Chand, A.I.R. (34) 1947 F. C. 23 : (49 Bom. L. R. 697). In this case a Sub-Inspector of Police was dismissed by the Deputy Inspector General of Police who had no power to dismiss him in view of Section 240, Sub-section (2), Government of India Act, 1935. The question for decision in the case was whether he could obtain a decree for the arrears of pay for the period between the date of the wrongful dismissal & the institution of the suit subject to the Law of Limitation. Zafrulla Khan J. delivered the leading judgment & his reasons for the view that such a decree could be passed depended on these conclusions : (1) When the dismissal of a public servant is in contravention of the limitation imposed on the power of dismissal by Sub-sections (2) & (3) of Section 240, Government of India Act, 1935, the public servant concerned had a right to maintain an action against the Crown for appropriate relief. (2) There was no warrant for the proposition that the relief must be limited to a declaration & should not go beyond it. (3) That if the Crown had the prerogative that no servant of the Crown could maintain an action against the Crown to recover arrears of pay after it had been earned & had become due, it must be presumed that the prerogative had been abandoned in the case of India. (4) In view of Section 60 & Order 21, Rule 48, C. P. C., a creditor of a servant of the Crown was entitled as of right to compel the Crown to pay to him a substantial portion of the salary of such servant in satisfaction of a decree obtained against him. To hold, therefore, that the servant himself had no right to sue the Crown for recovery of arrears of pay would be an absurd proposition. (5) If the disbursing officer fails to remit the' attached salary to the Ct. concerned & the amount is paid to the judgment-debtor, Govt. is liable to make the amount good to the decree-holder & that it was utterly inconsistent with any notion of a public servant's salary being a matter of the bounty of the Crown. (6) The Government of India Act, 1935, in view of Section 292, confirms the provisions of the G. P. C. & therefore, Section 240 Sub-section (1) must be read not only with the sub-sections following but also with the relevant provisions of the C. P. G.

45. It was conceded before the F. C. that a suit to enforce the recovery of the amount of compensation agreed upon between the parties in cases under Section 240, Sub-section (4), Government of India Act would lie. But allowing the maintenance of such suit does not mean that the suit for the recovery of arrears of pay must also lie.

46. The mere fact that a public servant can go to Ct. for seeking redress against his dismissal in contravention of the statutory provisions of Section 240, Sub-sections (2) & (3) does not mean that he can obtain reliefs with respect to all possible claims against the Govt. Primarily, he would be given relief against the illegal order, & that relief will be that his dismissal would be declared void. The Ct. cannot reinstate him. Of course, it is expected that the Govt., which is not supposed to act in

a carpricious manner, though it may act wrongly at times, would abide by the order of the Ct. correct the wrong done & act in a manner which would be just & proper. The relief for arrears of pay is not directly concerned with the order of dismissal passed in an improper manner. If the order of dismissal be arbitrary & capricious, but it is not passed in contravention of the provisions of Section 240, Sub-sections (2) & (3), the Gt. cannot give the public servant any relief either against the dismissal or against non-recovery of pay. It appears to me, therefore, that the only relief that the Ct. can give in a suit by a public servant dismissed in contravention of the provisions of these sub-sections is to declare that his dismissal order was against the provisions of the Constitution & was, therefore, void & inoperative. In cases of wrongful dismissal relief for the arrears of pay as a consequential relief may be claimed if it be held that during his service a Govt. servant can sue the Govt. for his pay. In considering such a case the plf's. right to go to Ct. will be the primary point for decision. It appears to me that such suits by public servants would be highly detrimental to public policy. Apart from the feelings which such suits might create between the Govt. & its public servants, they will affect the confidence of the public in the Govt. Such suits must necessarily indicate to the public that the Govt. is either bankrupt or is inefficient or is dishonest. Such a feeling in the mind of the public cannot redound to the credit of the State & the Govt. & be in their interests. Such suits will be deemed to be impliedly barred from the cognizance of civil Cts. in view of Section 9, C. P. C.

47. Section 60 & Order 21, Rule 48, C. P. C. do not create rights. They give no rights to sue. The mere fact that a portion of the salary of the public servant can be attached in certain circumstances & that the disbursing officer can be asked by Cts. to remit the attached amounts to Cts. concerned every month, does not mean that the Govt. is bound to send that amount to Ct. & cannot object that it was not liable to pay that amount. There is nothing in this provision of the C. P. C. which says that the Govt. cannot question its liability. Of course, the order of the Ct. is binding on the Govt. in this sense that the Govt. would be liable for such sums if paid to the public servant in contravention of the directions of the Ct. If these sums are not paid to the public servant, the Ct. cannot force or take any action against the Govt. for its not remitting the amount to the Ct. In the case of such orders against persons owing debts to the judgment-debtors, those persons are asked to show cause why they be not ordered to pay those amounts to the decree-holder. Surely the Govt. cannot be in a worse position. The Govt. would not be interested in denying its liability to pay the amount to its servant who once served the Govt. & thus earned the pay. But this fact does not mean that the Govt. is liable to the public servant for the payment of the pay in such a way that a public servant can force it to pay the amount by action in a Gt. of law. It appears to me, therefore, that it cannot be said that a creditor can force the Govt. to pay to him the attached portion of the salary of a public servant in satisfaction of a decree obtained against him, when the Govt. does not admit its liability to pay that amount to the public servant, & that, therefore, nothing absurd is bound to result by holding that a public servant cannot sue the Crown for pay.

48. Section 292, Government of India Act simply makes the law in force immediately before the commencement of Part III of the Act to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. This does not mean that all the Acts which were in force in British India prior to the commencement of Part III became part & parcel of the statutory provisions of the Constitution. Rules framed under the provisions of the Constitution have not been considered to have the same force as the detailed provisions of the Constitution. In this

very judgment of the F. C. Zafrulla Khan J. referred to the observations of their Lordships of the Judicial Committee in Rangachari v. Secy. of State, 64 I. A. 40 at p. 63 : (A.I.R. (24) 1937 P. C. 27) :

> ".....It is manifest that the stipulation to dismissal is itself of statutory force & stands on a footing quite other than any matters of rule which are of infinite variety & can be changed from time to time."

When the rules framed under the provisions of the Constitution have not the same statutory force as the statutory provisions themselves, laws which were in force before the commencement of Part III of the Act & continued in force on account of the special provisions of Section 292, will not have the same force as the statutory provisions of Section 240, Government of India Act, 1935.

49. Kania J., as he then was, observes at p. 32 that the word 'salary' as defined in Expln. 2 of Section 60, C. P. C., means an enforceable right to receive the periodical payments mentioned in the explanation & is not used in the sense of a bounty. This explanation speaks of salary as total monthly emoluments derived by persons from his employment whether on duty or on leave. It confines itself to that sum which is to be treated as salary & has no bearing on the question of the servant's right to receive that amount or to the liability of the master to pay that amount by action in a Ct. of law.

50. It may further be noted in this connection that Tara Chand, the dismissed servant in this case, was a Sub-Inspector of Police. Section 2, Police Act, provides that subject to the provisions of that Act the pay & all other conditions of service of members of the subordinate ranks of any policy force shall be such as may be determined by the Provincial Govt. In Abdul Vakil v. The Secretary of State, 19 Luck. 163 at p. 181 : (A.I.R. (30) 1943 Oudh 368), it is observed:

> "It is clear, therefore, that the (Provincial) Govt. is under a statutory obligation under Section 2, Police Act, to pay to the members of the Police Force in its employment such salary as has been determined by it."

In view of this statutory provision, Tara Chand could have had a claim for arrears of pay. The Chief Ct. held that it could grant a decree for the arrears of pay, but did not actually pass a decree for the same. The F. C. decision is thus distinguishable from the decision of the P. C.

51. In view of these considerations, I am inclined not to agree with the view expressed in the Punjab Province v. Tara Chand, A.I.R. (34) 1947 F. C. 23: (49 Bom. L. R. 687).

52. In High Comr. for India v. I.M. Lall, A.I.R. (38) 1948 P. 0. 121: (1948 F.C.R. 44), it has been held that the right of action against the Crown must either be based on contract or conferred by statute. Learned counsel for the applt. argued that both statute & the terms of contract allow the pltf. such a right of action. I do not agree.

53. No contract was pleaded in the plaint. There was thus no denial by the deft. of there being any contract between the pltf. & the deft. Learned counsel for the applt. referred to para. 81 of the written statement & submitted that the deft. contested the pltf's right to arrears of pay on the mere

ground that he had ceased to be a member of the Provincial Civil Executive Service, U. P. This para, is:

> "That the pltf. had ceased to be a member of the Provincial Executive Civil Service, U. P., & is not at all entitled to any pay."

It does not follow from this para, that the deft. admitted that if the pltf. was held to have not ceased to be a member of the Provincial Civil Service, he would be entitled to pay, his right being based on the terms of the contract & would have the right to sue for it.

54. There being no pleadings about the existence of a contract between the pltf. & the deft. & there being no material about it on the record, a claim for arrears of pay on the basis of contract cannot be tenable.

55. Learned counsel has referred to the rules for recruitment to the Provincial Executive Civil Service, U. P., & to the rules in the Financial Handbook for the proposition that there was a contract between the parties. The fact that the rules provided that the scale of pay admissible to a member of the Service shall be so & so & that a member of the Service will draw such pay does not mean that the member joining the service enters into a contract with the Govt. & that the terms of the contract consist of the numerous rules contained in the Service Rules & in the Financial Handbook. Nowhere these rules provide that the Govt. will be bound to pay such & such salary to a member of the Service.

56. Even if it be possible to hold that there was contract between the Govt. & the pltf. I am of opinion that in view of public policy the contract should be deemed to have an implied term that the pltf. will not have a right to sue in a Ct. of law for the recovery of pay.

57. The statutory provisions about the Civil Services are in Ch. II, Part 10, Government of India Act, 1938. This Chapter contains Sections 240 to 263. Section 241(2)(b) is:

> "Except as expressly provided by this Act, the conditions of service of persons serving His Majesty in a civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed :
>
> (b) in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province or by some person or persons authorised by the Governor to make rules for the purpose.

Provided that it shall not be necessary to make rules regulating the conditions of service of persons employed temporarily on the terms that their employment may be terminated on one month's notice or less, & nothing in this sub-section shall be construed as requiring the rules regulating the conditions of service of any class of persons to extend to any matter which appears to the rule-making authority to be a matter not suitable for regulation by rule in the case of that class."

Sub-section (3) of Section 241 places certain limitations on the framing of the rules & Sub-section (4) is:

> "Notwithstanding anything in this section but subject to any other provision of this Act, Acts of the appropriate Legislature in India may regulate the conditions of service of persons serving His Majesty in a civil capacity in India, and any rules made under this section shall have effect subject to the provisions of any such Act : Provided that nothing in any such Act shall have effect so as to deprive any person of any rights required to be given to him by the provisions of the last preceding sub-section."

58. Sub-section (5) is :

> "No rules made under this section and no Act of any Legislature in India shall be construed to limit or abridge the power of the Governor-General or a Governor to deal with the case of any person serving His Majesty in a civil capacity in India in such manner as may appear to him to be just and equitable.
>
> Provided that, where any such rule or Act is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by that rule or Act."

59. It is clear that ultimately the power of the Governor-General or the Governor to deal with a public servant in any manner as may appear to him to be just & equitable is not limited by these rules except to this extent that he cannot deal with the public servant in a less favourable manner than is positively provided by any of the rules.

60. Section 247(4) is that the salary & allowances of any such person as mentioned in that section shall be charged on the revenue of the federation or of the province, as the case may be. This only means from which funds these amounts would be met.

61. If any rule is contravened, the aggrieved public servant has to approach the Governor. General or the Governor. Section 248 deals with the right of a public servant in respect of complaints, etc. Its provisions, however, are without prejudice to any other mode of obtaining redress. It is to be noticed that in Sub-section (2) of Section 248 reference is made to "emoluments or rights in respect of pensions," & the expression is not "rights in respect of emoluments or pension."

62. There is nothing in any of these provisions which says that a public servant can sue for his pay or for the breach of any conditions of his service. The provisions of Sub-sections (2) & (5) of Section 96B, Government of India Act, 1915, practically correspond to those of Section 241, Sub-sections (2) & (3) & Sub-section (5) respectively. In the case of Rangachari v Secretary of State, 64 I. A. 40 : (A. I. R. (24) 1937 P. C. 27), the dismissal of a Sub-Inspector of Police was held to be in contravention of the rules, & it was held that he had suffered a wrong. It was then considered whether the wrong was actionable. At p. 52 their Lordships of the Judicial Committee observed:

> "The main force of the argument for the applt. was directed to the support of a proposition which may be shortly stated as follows : By the terms of Section 96B, Government of India Act the pensions rules are made statutory & of the same force as if they were set out in the statute itself : also by the terms of the section, persons in the Civil Service of the Crown in India hold office not simply at pleasure but on the terms set out both in the section & in all the rules made thereunder, including the pensions rules : further it was said that since a statutory right is thus created between the Crown & the servant it is necessarily to be implied that any provisions in any antecedent statute repugnant to the terms of the statute creating' such right are repealed or rendered inapplicable to such a case, With regard to the first part of this argument, namely, as to the effect of the Government of India Act, & in particular as to whether it confers a right of action to enforce the rules made thereunder, their Lordships, in giving their advice to his Majesty in App. No. 15 of 1936 Venkata Rav v. Secretary of State, (64 I. A. 55 : A. I. R. (24) 1937 P. C. 31), which was argued at the same time as this appeal, will have to enter more at length into their reasons for rejecting such an argument. It is sufficient to say here that in their Lordships' opinion it is untenable."

63. In the case of Venkata Rao v. Secretary of State, 64 I. A. 55 : (A. I. R. (24) 1937 P. C. 31), the case referred to in the above quotation, their Lordships observed at p. 63 :

> "The rules are manifold in number & most minute in particularity, & are all capable of change. Counsel for the applt. nevertheless contended with most logical consistency that on the applt's contention an action would lie for any breach of any of these rules, as for example of the rules as to leave & pensions & very many other matters."

Their Lordships then held against such a contention on the grounds of inconvenience & on account of Section 96B & the rules making careful provision for the redress of grievances by administrative process, & remarked:

> "The considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the applt. exists."

They further remarked at p. 65 :

> "In these individual cases mistakes of a serious kind have been made & wrongs have been done which call for redress. But while thus holding on the clear facts of this case, as they now appear from the evidence, as they similarly held in Rangachari's case, 64 I. A. 40 : (A. I. R. (24) 1937 P. C. 27), their Lordships are unable as a matter of law to hold that repress is obtainable from the Cts. by action."

64. It is clear, therefore, that no right of action for the breach of any rule which is in connection with the pay admissible to the applt. is actionable in a Ct. of law. In view of my opinion about the pltf.

having no right to sue for arrears of pay, it is not necessary to consider the point which was considered by the Ct. below with respect to the status of the pltf. as a member of the service in view of the decree of the Ct. subsequent to the date of wrongful dismissal. I need not express any opinion on that point. I simply wish to note that we have not been shown any provision authorising the Govt. to suspend a member of the Provincial Civil Executive Service, U. P. Section 16, General Clauses Act of 1887, does not apply as the power to make a appointment to this service is not conferred by any Central Act or regulation. Rule 49, Civil Service (Classification) Rules authorises the punishing of a civil servant by suspension. Suspension as a punishment should follow the proof of the misconduct of the public servant & the suspension of the public servant during the pendency of an inquiry, it appears, will not be covered by the suspension mentioned there.

65. I now deal with the question that the Ct. below erred in not allowing the refund of the court-fee paid in view of the deletion of the claim for a relief to the effect that a declaration be given that the order of dismissal was wrongful & the pltf. be awarded a decree for wrongful dismissal amounting to Rs. 1,20,000 with pendente lite & future interest.

66. The Ct. is asked to refund court-fees in the exercise of its inherent powers, as the various provisions in the Court-fees Act for the refund of court-fees do not cover the present case.

67. The Cts. have, however, held that they possess inherent power to order refund of court-fees in cases not covered by the various provisions for the refund of court-fees in the Court-fees Act. There is, however, no unanimity on this point.

68. There seems to be practical unanimity in the decisions of the various High Courts with respect to the power of the Ct. to order refund of such court-fee which has been paid in excess of the amount due on the plaint or memorandum of appeal. The excess payment in such cases has been either due to the miscalculation by the party, or due to different views being held by the first Ct. & the superior Ct. Even in such oases what the majority of Cts. did was to grant a certificate stating the fact that the party concerned had paid court-fee which was not required to be paid by him under the law & left it open to the proper authority to order refund on the basis of such certificate or not to order such refund. I need not dispute the power of the Ct. to issue such a certificate which merely states a fact & contains no order or direction for the refund of the court-fee. Personally I am inclined to the view that the Ct. cannot do anything more, that is, the Ct. cannot pass order directing the proper authority to refund the amount of excess court-fee.

69. I am of opinion that the court-fees paid in excess of the legal requirements is not really ordered to be refunded in the exercise of inherent jurisdiction of the Ct. but is ordered to be refunded because it was never realised as court fees & the party paying it was not required to pay it under the Court-fees Act. Its payment amounted to just a voluntary passing of the money from one person to another who had no right to it, & therefore what had been obtained without right had to be returned. The Ct. cannot return, & it would be no use to the party concerned to receive back, the cancelled stamps, & therefore the Ct. returns the amount in the form of a certificate which is to be honoured by the revenue authority responsible for the refund of the court-fees. This finds support from the observations made in Ramakant v. Murlidhar, 1937 A. L. J. 481 at p. 482: (A.I.R. (24) 1937 ALL.

505). They are :

> "When a Ct. refunds an excess payment, it is refunding really not an amount of court fees but an amount mistakenly paid under the guise of court-fees."

In Indu Bhutan v. Secretary of State, A.I.R. (22) 1935 Cal 707 : (159 I. 0. 443), Nasim Ali J. observed at p. 709 :

> "If the litigant is made to pay fees in excess of what he is liable to pay under the statute, the statute does not stand in the way of refunding such excess fees as it never authorised the receipt of such excess. In such cases the litigant has got the right to get a refund because the excess is his money and has by mistake or inadvertance passed into the hands of Govt."

70. In the case reported in In re Narayana Reddiar, A. I. R. (29) 1942 Mad. 316 : (202 I. C. 122), court fee paid along with an appln. for review of an order dismissing the plaint as insufficiently stamped & which appln. for review was rejected, was ordered to be refunded in the exercise of inherent power. The reason for the order was that such court-fee was not meant to be utilised until the petn. for review was accepted by the Ct. This order for refund of court-fee was justified on the same principle which justifies the refund of court-fee paid in excess of the legal requirements.

71. There is, however, no unanimity of opinion with respect to the inherent power to order the refund of court-fees in other cases.

72. In connection with the refund of court-fees when an appellate Ct. remands the case in the exercise of its inherent powers, refund of court-fees was simply ordered in Mohammadi Husain v. Mt. Chandra, 1937 A. L. J. 174 : (A. I. R. (24) 1937 ALL. 284), without any discussion on the existence of such a right. Different views were expressed by Nasim Ali J. in Indu Bhusan v. Secretary of State, A. I. R. (22) 1935 Cal. 707 : (159 I. C. 443) & by a F. B. of the Rangoon H. C. in Chohkalingam Ambalam v. Maung Tin, A.I.R. (23) 1936 Bang. 208 : (14 Bang. 173 F. B.) & by a Bench in Ramballabh Jasraj v. Dharamsi Jetha & Co., A.I.R. (24) 1937 Nag. 268: (I.L.R. (1937) Nag. 519).

73. I need not refer to other cases in which Cts. ordered refund of court-fees in the exercise of inherent power. I simply refer the D. B. case of Mohammad Sadiq Ali v. Ali Abbas, 7 Luck. 588 : (A. I. R. (20) 1933 Oudh 170). In this case an appeal was withdrawn after it had been admitted. The Ct. ordered the refund of court-fee in the exercise of its inherent powers as it considered that the filing of the appeal was wholly unnecessary. Reliance was placed without any discussion on the oases In the matter of Mr. G. H. Grant, 14 W. R. 47, C. T. A. M. Chettyar Firm v. Ko Yin Gyi, 7 Rang. 88 : (A. I. R. (16) 1929 Rang. 158), Visweswara v. Dr. T.M. Nair, 35 Mad. 567 : (10 I. C. 201), Harihar v. Ananda, 40 Cal. 365 : (20 I. C. 498), Prabhakarbhat v. Vishwambhar, 8 Bom. 313 (F. B.) and Swami Dayal v. Mohammad Sher Khan, 11 O.L.J. 148: (A. I. R. (12) 1925 Oudh 39). The case reported in In the matter of G. H. Grant, 14 W. R. 147 and Harihar v. Ananda, 40 cal. 365 : (20 I. C. 498) were cases of court-fees paid in excess of legal requirements. The cases reported in Prabhakarbhat v.

Vishwambhar, 8 Bom. 313 & Visweswara v. Dr. T.M. Nair, 35 Mad. 567 : 10 I. C. 201) related to the return of plaint & held that though the court-fee paid on the plaint in the Ct. which had no jurisdiction, could not be refunded, the plaint was to be accepted in the proper Ct. without the payment of any further court-fee. This is something different from saying that the Ct. had inherent power to order a refund of court-fee. The facts of the case reported in G. T. A. M. Chettyar Firm v. Ko Yin Gyi, 7 Rang. 88 : (A. I. R. (16) 1929 Rang. 158) were considered by the learned Judges to be analogous to cases coming under Section 15, Court- fees Act. Thus the cases relied upon could not be authority for the Cts. ordering a refund of court-fee, which was paid rightly on the memorandum of appeal which was filed by a party & admitted by the Ct.

74. I am not inclined to agree with the view that the Ct. has inherent power to refund court-fees & would have referred the matter to a larger Bench if it was necessary to give a definite finding on this point. I may, however, indicate my reasons for my view.

75. The court-fee is paid in view of the provisions of the Court-fees Act (Act VII [7] of 1870). Section 6(1), Court-fees Act is::

> "Except in Courts hereinbefore mentioned, no document of any kinds specified as chargeable in the first or second schedules to this Act annexed shall be filed, exhibited, or recorded in any Court of justice, or shall be received or furnished by any public officer, unless in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document:
>
> Provided .....
>
> Provided....."

I have not quoted the two provisos. They are not material.

> "(2) Notwithstanding the provisions of Sub-section (1), a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid, but no such plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant, as the case may be, makes good the deficiency in court-fee within such time as may from time to time be fixed by the Court."

76. It will appear from these provisions that a Ct. is not to receive any document which is not properly stamped with the necessary court-fee as laid down in the first or second schedule of this Act. Sub-section (2) allows the receiving of a plaint or memorandum of appeal which is insufficiently stamped, but prohibits the Ct. from taking any action on such plaint or memorandum of appeal till the deficiency in court-fee is made good. It is clear, therefore, that the payment of court-fee is a condition precedent for the Ct's. taking cognizance of a plaint, or taking notice of any other document; & is not dependent on what action is taken in the case. In this view of the matter, no question for the refund of any court-fee paid & utilised can arise in any circumstance.

77. Even if the Ct. has inherent power to order refund of court-fees in suitable cases though not covered by the provisions of the court-fees Act, I am of opinion that the present case is not a fit one for refund of court-fees.

78. The sole ground for the claim to refund is that the pltf. claimed a relief for damages in view of the decision of the P. C. which decision operated as the law of the land by virtue of Section 212, Government of India Act, 1935, & as now that decision had been set aside & that law was not held to be the law, the pltf. should in justice be refunded the amount of court-fee which he had paid on account of the alternative relief of damages. The contention does not appeal to me.

79. There has not been any change in statute law which affected the right of the pltf. to the alternative relief of damages. The decisions of the F. C. & the P. C. could interpret the law & could not make law. The making of laws is within the jurisdiction of the Legislature. Courts interpret laws, or declare what the law is Section 212, Government of India Act, 1935, does nothing more than, laying down that the interpretation of law by these Cts. will be recognised as binding on, & shall be followed by, all Cts, in British India. The section is :

> "The law declared by the F. C. & by any judgment of the P. C. shall, so far as applicable, be recognised as binding on, & shall be followed by all Cts. in British India ....."

The purpose of this section is to lay down that the Cts. in the country would be bound to follow the law as laid down by the F. C. They are not to interpret the law in any other manner. Interpretation of law by the F. C. or by the P. C. once given can be altered by them. There is nothing in the Government of India Act which makes it binding on these Cts. not to give a different interpretation to the same law, if on further consideration they came to a different opinion.

80. The mere fact that the view on the law expressed by a Ct. is changed subsequently by the same Ct. or by any Ct. superior to that Ct. should lead to a party's changing his reliefs & claiming a refund of court-fees would mean that every day Cts. would be ordering refund of court fee. It is not rare that views on questions of law expressed by a Ct. are changed by it subsequently or that such views are held to be wrong by a superior Ct. To me it appears quite a wrong approach to the question of payment of court-fee & its refund that it should be considered with respect to the question whether such a relief could have been obtained in law. It is not rare that parties come to Ct. for reliefs which the Cts. do not find to be justified in law, irrespective of the fact that facts alleged by the pltf. were found established. Court-fee is not paid for getting the relief. Court-fee is paid, in my opinion, for moving the Ct. to determine the claim put forward in a Ct. of law by the pltf. or appct. Once the party has moved the Ct. the purpose for which the court, fee was paid is served & no question for its refund should arise I may refer to Secretary of State v. A. Veerayya, A.I.R. (27) 1940 Mad. 451: (186 I. C. 770). Refund of court-fee was not allowed when new legislation enacted during the pendency of the suit took away the right to the relief claimed.

81. Further if the pltf. had come to Ct. with the relief of damages for wrongful dismissal in view of the decision of the F. C. there might have been something to be said that he acted according to law

laid down by the F. C. He, however, did not do so. His first & primary relief was for declaration that his dismissal was illegal & void, & that he was entitled to the arrears of pay. This relief was not in conformity with the order of the F. C. This shows that he himself was not sure of the legal position, otherwise no reasonable explanation exists for his putting in a claim in conformity with the F. C. judgment in the alternative & not as a primary claim.

82. The Ct. acted on the plaint as it was filed. The opposite party also filed its written statement in answer to the plaint as filed. The court-fee paid was according to the requirements of law. An order of refund at this stage would mean that the court-fee which has been, properly paid & without whose payment the Ct. would not have accepted the plaint be deemed to be accepted by the Ct. without the proper court-fee. We are not to undo, in the exercise of inherent power, what has been done according to law.

83. I am, therefore, of opinion that the applt. cannot have a refund of the court-fee claimed.

84. I am, therefore, of opinion that the appeal should be dismissed without costs.

85. By the Court.--We dismiss the appeal but in the circumstances of the case we make no order regarding costs.