U.P. Government Through Collector, ... vs J.R. Bhatta on 6 May, 1955

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Bench: Raghubar Dayal

JUDGMENT

Chowdhry, J.

1. This is an appeal by the defendant, the U. P. Government through the Collector of Allahabad, against the judgment and decree of the learned Civil Judge of Allahabad, dated 23-12-1950, granting to the plaintiff respondent, J. R. Bhatt, a declaration that he "had a right of appeal from the order dated 27-3-1944 and his appeal could not be properly withheld under the rules then in force", and awarding half of his cost from the defendant-appellant. The order dated 27-3-1944 was to the following effect:

> "With reference to his application dated 21-9-1943 for permission to return to duty after the expiry of regular leave granted to him upto 31-3-1944, Mr. J.K. Bhatt is informed that the Hon'ble the Chief Justice has decided that he cannot be allowed to resume his duties. Accordingly he will be treated to have retired from the public service from 1-4-1944, W. Broome, I. C. S. REGISTRAR".

The relief prayed for by the plaintiff-respondent was that it be declared "that the order of the High Court dated 27-3-1944 inflicting compulsory retirement upon the plaintiff from public service was illegal, ultra vires, null and void and that, notwithstanding that order, the plaintiff be deemed to be in continuous-service from 1-4-1944".

As this relief was not granted to the plaintiff, but only a declaration that he had a right of appeal from that order, there is a cross-objection filed by the plaintiff-respondent praying that he be granted with full costs a declaration in terms, of the aforesaid relief in his plaint.

2. It is common ground that the plaintiff was appointed by the High Court on 14-3-1913 as a Stenographer in the Civil Court at Gorakhpur with effect from 1-4-1913 and his services were subsequently transferred to the High Court from 6-3-1926. He had put in 29 years of service and was, drawing Rs. 350/- per mensem, the maximum salary of a Judgment-Writer, in February 1942

when he went on a month's leave on medical certificate.

Before the expiry of that leave he applied for leave for a period of 24 months and 9 days from. 24-3-1942 to 31-1-1944 pending retirement, out of which four months were on full and the rest on half average pay. The plaintiff's case is that this leave was due to him, and that he had to apply for it as he was ill & in a state of deep mental depression occasioned by family circumstances.

As the granting of this leave was delayed, the plaintiff saw the then Deputy Registrar, Sri S.K. Banerji. The latter told the plaintiff that the matter could be expedited if he (the plaintiff) gave an undertaking that he would not return to duty after the expiry of his leave. The plaintiff, who belongs to a place called Bihar Sharif in the State of Bihar, was in dire necessity of leave and had packed up his luggage as he was anxious in his the then state of mental depression to reach his home town. He therefore succumbed to the suggestion of Sri S. K. Banerji and gave the undertaking, and after that his application for leave was granted.

Before the plaintiff could wind up his affairs at Allahabad and proceed to Bihar Sharif, where he intended to settle down, the August 1942 disturbances broke out, and it became impossible for the plaintiff to go to. Bihar Sharif and settle down there without putting his own life and the lives of the members of his family into jeopardy. He therefore aoplied to the Registrar High Court in August, 1942 for the cancellation of the rest of his sanctioned leave and for permission to resume his duties.

This application of the plaintiff was rejected by the Registrar on the ground that two men, Messrs. Gupta and Asthana, who had been called; as stenographers from outside, would have to be thrown out if the plaintiff were allowed to return. The plaintiff appealed to the Hon'ble the Chief Justice, but he was informed after about 10 months by a communication dated 13-8-1943 that his appeal had been dismissed.

3. After his application for cancellation of the unavailed portion of his leave had thus proved unsuccessful, the plaintiff applied on 21-9-1943 that owing to the abnormal economic conditions then prevailing he propped to return to duty after the expiry of his leave and his' application for retirement on the expiry of his leave be treated as cancelled.

The plaintiff's case is that this application of his was allowed by the then Registrar, Sri W. Broome, by an order dated 17-3-1944, and he was allowed to return to duty with effect from 1-4-1944 after the expiry of his leave on 31-3-1944.

Against this order an appeal was filed by five Judgment Writers, and after the matter had been considered in an English Meeting on 24-3-1944 as was done on the previous occasion on the plaintiff's appeal against the Registrar's order of cancellation of his leave, the appeal of the Judgment Writers was allowed and the plaintiff was not allowed to return to duty. Of this decision the plaintiff was informed by means of the above cited letter of Sri Broome "Registrar dated 27-3-1944.

Subsequently the plaintiff addressed a petition of appeal to the Governor and thereafter to the Crown Representative in India but they were both Withheld by the High Court on the ground that there was no right of appeal against the order of the Hon'ble the Chief Justice which was final. After giving the necessary notice under Section 80, C. P. C., the present suit was filed by the plaintiff on 2-1-1947.

4. The plaintiff's case was that normally he would have retired on attaining the age of 55 years on 13-9-1947, but he was made" to retire compulsorily by the aforesaid order dated 27-3-1944 about three and a half years before superannuation, causing him a loss of Rs. 175/- per mensem from 1-4-1944 to 13-9-1947. He characterised the said order as illegal because, according to him, there was no rule or law under which it could be passed, and as he was quite fit physically and had a good record.

It was further alleged by the plaintiff that he had a lien on his post during leave and therefore no permanent arrangement could be made in respect of his post. In fact, when he applied to return to duty after the expiry of his leave there were five vacancies in the cadre of judgment Writers so that, if the plaintiff had been allowed to return to duty, Messrs. Gupta and Asthana would not have been affected.

It was also alleged by the plaintiff that the undertaking secured from him was ultra vires and a nullity since there was no rule or law under which he could be required to give it and the leave applied for was due to him, and since it was obtained from him in the circumstances mentioned above by an officer who had no right to ask for such an undertaking. It was also argued before the trial Court that before the order in question dated 27-3-1944 was passed the plaintiff should have been given an opportunity of being heard.

5. The material facts which were denied in the written statement of the defendant were that the Registrar Sri W. Broome had passed an order permitting the plaintiff to return to duty from 1-4-1944 after the expiry of his leave, and that at the time when the plaintiff applied on 21-9-1943 to return to duty there were five vacancies in the cadre of Judgment-Writers. It was further pleaded that cancellation of the un expired portion of the plaintiff's leave was discretionary with the Registrar and therefore he could not claim it as of right.

It was also pleaded that the plaintiff was not entitled to resume after the expiry of his leave. from 1-4-1944 inasmuch as he had put in more than 30 years of service and he had given an undertaking that he would retire from 1-4-1944 that the decision of the High Court to treat the plaintiff as retired from public service from 1-4-1944 was final and could not be questioned in a Court of law; that the suit was barred by the provisions of Section 42, Specific Relief Act; and that the plaint disclosed no cause of action.

6. The learned Civil Judge framed the following issues:

> l. Whether the plaintiff was or was not entitled ' to resume duties after the expiry of the leave.

2. Whether the plaintiff could do so in view of his undertaking to retire and on account of his having served for 30 years? Was the said undertaking not made out of the free will of the plain tiff?

3. Whether the order dated 27-3-1944 passed by the High Court is illegal and ultra vires

4. Whether the suit is barred by Section 42 Specific Relief Act

5. Whether the plaintiff had a right of appeal? If so, was the appeal improperly withheld?

6. Has the plaintiff a cause of action for the suit?

7. Whether the order of the High Court to treat the plaintiff as retired cannot be questioned in a. Court of law?

8. To what relief, if any is the plaintiff entitled?

7. Issue No. 4: The plea which gave rise to issue No. 4 was not pressed before him. Applying, the rules contained in the Financial Handbook. Volume II, issued by the authority of the Government of U. P., the learned Civil Judge decided the first two issues in plaintiff's favour. His findings were that there was nothing in the rules disentitling the plaintiff to return to duty, that in fact the option to come back to duty has been assumed in the rules to be inherent in the person, going on leave, and that the plaintiff's case with regard to the undertaking was not without force considering the circumstances in which it was taken from him, and considering the further factor that there were no rules under which such an undertaking could have been asked for and that the plaintiff had been released from the undertaking as a result of the order of the Registrar; dated 17-3-1944. He also decided the fifth issue in favour of the plaintiff, holding that the plaintiff had a right of appeal against the order dated 27-3-1944 and his appeal from that order could, not have been legally withheld.

The sixth and seventh issues were also decided in favour of the plaintiff. The only issue decided against him was the third issue on which the learned Civil Judge's finding was that the passing of the order in question, dated 27-3-1944 involved no breach of the provisions of Section 240(3), Government of India Act, 1935, which required that no person who is a member of the Civil Services of the Crown in India shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

On this adverse finding alone the learned Civil Judge held that the plaintiff was not entitled to the declaratory decree which he had prayed for, and he granted to the plaintiff the aforesaid declaration in view of the finding on the fifth issue in his favour. It must be stated at once that having regard to the findings in favour of the plaintiff on the first two issues, the learned Civil Judge should have decreed the suit of the plaintiff-respondent in terms of the relief prayed for in the plaint.

8. All the points except those which were the subject matter of the 4th, 6th and 7th issues have again been argued in this Court by the learned Counsel for the parties. Before dealing With those points it is necessary to dispose of an application which was preferred on behalf of the plaintiff-respondent under Order 6, Rule 17, read with Sections 107 and 151, C, P. C., for amendment of the plaint by the addition of the following reliefs:

> That the plaintiff be given-
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> "(1) his full salary from April 1, 1944, to
>
> -September 13, 1947;
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> (2) dearness allowance permissible to him during the above period; (3) the increments which he would have earned during the above period; (4) pension on the average of last three years' salary; (5) the amount he would have earned as Oaths Commissioner on becoming Head Judgment-Writer on the retirement of Mr. Biswas from 16-12-1944 to 13-9-1947".

This application for amendment was preferred on the following grounds:

> (1) That on the date on which the suit was brought plaintiff was advised not to ask for the relief of arrears of salary for the following reasons
>
> (a) that no Government servant could then sue for arrears of salary, and
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> (b) that a Government servant, if re-instated, was entitled to all his arrears of salary;
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> (2) that in view of the decision of the Supreme Court in the case of -- 'State of Bihar v. Abdul Majid', 1954 SC 245 (AIR V 41) (A), the plaintiff-respondent is now advised to get his plaint amended in the above mentioned terms.

This application of the plaintiff-respondent was opposed by the defendant-appellant.

9. Now, there is no doubt that it was held by their Lordships of the Supreme Court in '1954 SC 245 (AIR V41) (A)', that the rule of English law that a civil servant cannot maintain a suit against the Crown for the recovery of arrears of salary does not prevail in this country since it has been negatived by the provisions of the statute law in India.

There is also no doubt that a contrary view had been expressed in the --- 'High Commissioner for India v. I. M. Lall', 1948 PC 121 (AIR V35) (B). It is worthy of note however that this Privy Council decision was passed on 18-3-1948, long after the institution of the present suit on 2-1-1947. The decision of the Federal Court, reported

-as -- Secretary of State v. I. M. Lair, 1945 FC 47 (AIR V32) (C) from which the said appeal to the Privy Council was taken, had been decided, long before the institution of the present suit, on 4-5-1945. The Federal Court had held that the proper remedy of the dismissed member of the Indian Civil Service was damages for wrongful dismissal for breach of statutory obligations imposed by Section 240(3), Government of India Act, 1935.

It is true that it was observed by their Lordships of the Federal Court in -- 'Suraj Narain v.

NWF Province', 1942 FC 3 (AIR V29) (D), that the plaintiff in that suit was obviously not entitled to any relief by way of damages for wrongful dismissal. At the same time, while setting aside the decree of the Judicial Commissioner's Court and remitting the case to that Court, it was observed by their Lordships as follows:

> "As the case has been disposed of by the Courts below on the preliminary issue, we are not in a position to say what other questions remain to be tried before the nature of the reliefs to be awarded to the plaintiff could be finally determined. It seems to us best in the circumstances to say that the plaintiff was at least entitled to a declaration that the order of dismissal passed against him was void and inoperative, and that the Courts below were not justified in dismissing the suit as wholly unsustainable".

It would thus appear that in point of fact the question of what reliefs the plaintiff was entitled to in that case was left open. On the other hand, it was clearly laid down by their Lordships of the Federal Court in the -- 'Punjab Province v. Tara Chand', 1947 FC 23 (AIR V 34) (E), decided on 11-4-1947, that the prerogative that no servant of the Crown could maintain an action against the Crown to recover arrears of pay must be presumed to have been abandoned in the case of India.

It would thus appear that at the time of the institution of the present suit the only decision brought to our notice, i. e. -- 'Suraj Narain'a case (D)', had left the question open, and within about three months of the institution of the present suit the aforesaid decision in the case of the Punjab Province had been passed by the Federal Court. On the basis of this latter decision the plaintiff should have applied for an amendment of the plaint as he now seeks to do.

In fact as distinguished from -- 'Suraj Narain's case (D)', in which the point was left at large, there was a clear decision of the Federal Court in the -- 'Secretary of State v. I. M. Lall (C)', decided on 4-5-1945, which should have led the plaintiff to include the relief for recovery of damages in the plaint as it was filed. The Privy Council decision in the -- 'High Commissioner for India v. I. M. Lall (B)', came much later, i.e., more than a year after the institution of the present suit.

In these circumstances, the contention of the plaintiff-respondent that under the law as it. stood at the institution of the present suit no Government servant could sue for arrears of salary, and that it was only as a result of the decision of the Hon'ble the Supreme Court, on 11-2-1954 in the -- 'State of Bihar v. Abdul Majid (A)', that the rule of the English law as to a civil servant not being entitled to maintain a suit against the State for recovery of arrears of salary was negatived for the first time in India, cannot be accepted.

The learned counsel for the plaintiff-respondent drew our attention to a Division Bench decision of this Court reported as -- 'Om Frakash v. United Provinces', 1951 All 205 (AIR V38) (F), decided on 6-11-1950, in which also it was held that in a suit against the Crown no right to sue for arrears of salary arises from an order of wrongful dismissal. Much before this Division Bench decision of this Court could have been published in the law reports, the present suit had been decided by the learned Civil Judge on 23-12-1950.

There appears to be no justification therefore for the plaintiff not to have included the relief in question in the plaint as it was instituted on 2-1-1947. Even in this Court, the aforesaid decision of the Supreme Court in the -- 'State of Bihar v. Abdul Majid (A)', on which the plaintiff-respondent relies, had been passed on 11-2-1954 and published in the April, 1954 issue of the All India Reporter, seven months before the present application for amendment was filed on 23-11-1954.

The fact of the matter is that the application for amendment wa.3 filed at the fag end of the arguments after it should have become clear to the parties, as a result of the discussions between Court and counsel that the plaintiff-respondent's suit should have been decreed. The application for amendment on the ground on which it has been made cannot therefore be said to be a bona fide one. We, therefore, reject that application.

10. In the alternative, it was argued by the learned counsel for the plaintiff-respondent that even without amendment of the plaint the relief in question should be granted by this Court under Order 41, Rule 33, C. P. C, This argument cannot also be accepted. Rule 33 empowers the appelate Court to pass any decree and to make any order which ought to have been passed or made, and to pass or make such further and other decree or order as the case may require.

Neither the trial Court nor this Court could, however grant the relief in question since the only relief that had been asked for was a declaration that the order, dated 27-3-1944 was illegal and the plaintiff should be deemed in law to have continued in service even after 1-4-1944. The facts and figures contained in the relief sought to be added by the plaintiff-respondent were not there in the plaint, and any adjudication in respect of them must necessarily require evidence.

The defendant-appellant has not -admitted the correctness of those figures, or the plaintiff's right to the amounts claimed by him. That being so, the relief in question could not possibly be granted to the plaintiff-respondent under the provisions of Order 41, Rule 33, C. P. C. The result therefore is that the present appeal should be decided on the plaint as it stands.

11. Before proceeding to consider the points that arise for decision in the present appeal, it is necessary to be clear on the question of the rules which should govern the plaintiff's case. Under Section 241(2), read with Section 242(4), Government of India Act, 1935, it was open to the Hon'ble the Chief Justice of the High Court of Judicature at Allahabad to make rules with respect to the conditions of service of persons, serving on the staff attached to the High Court.

It was, however, only in the year 1946 that, In exercise of the powers conferred by those sections, the Chief Justice with the approval of the Governor framed rules by means of Notification No. 4141

,dated 29-4-1946, published in Part II of the U. P. Gazette, dated 18-5-1946. Before that no rules had been framed by the Chief Justice so that rules framed by the U. P. Government would be the rules applicable to the conditions of service of persons serving on the staff attached to this High Court.

These would be the rules made by the Governor under Section 241(2)(b), Government of India Act, 1935, contained in Volume II of the Financial Handbook issued by authority of the Government of U. P., and those framed by the Government of U. P. in exercise of the power conferred by Rule 54, Civil Service (Classification Control and Appeal) Rules, made by the Secretary of State in Council under Section 96B(2), Govern-

ment of India Act. 1919, published on pages 732 to 734 of the U, P. Gazette,, dated 6-8-1932.

This position was admitted by the learned counsel for the defendant in the trial Court, vide his statement, dated 16-11-1950 on paper No. 57A (1). That statement was to the effect that there were no rules framed by the Hon'ble High Court for its staff before 1946, and that the staff of this Court which was in the Civil service of the Crown used to be governed by the general rules as applicable to other Government servants.

It may be noted in this connection that Clause (1), of Rule 7 of the, aforesaid 1946 Rules published in the U. P. Gazette, dated 18-5-1946, provides that subject to these rules, the rules and orders for the time being in force and applicable to services of the Crown of corresponding classes in the services of the United Provinces Government shall regulate the conditions of service of persons serving on the staff attached to the High Court: provided that the powers exercisable under the said rules and orders by the Governor shall be exercisable subject to Rule 17 by the Chief Justice or by such person as he may, by general or special order, direct.

The rules applicable to the plaintiff-respondent's case would therefore be those contained in the Financial Handbook and published in the U. P. Gazette, dated 6-8-1932.

12. The matter of the undertaking given by the plaintiff before his application for leave from 23-3-1942 to 31-3-1944 was granted may be taken up first. It was the definite case of the plaintiff, as set forth in the plaint, that although the leave applied for was to the credit of the plaintiff, the granting of that leave was being delayed; that the plaintiff was in dire need of leave in his the then state of mental depression; that the plaintiff saw the Deputy Registrar, Sri S.K. Banerji, to enquire about the cause of the delay in passing the orders on his leave application: that thereupon Sri Banerji gave the plaintiff to understand that unless an undertaking in writing was given by the plaintiff that he would not return to duty after the expiry of his leave his application might not have early disposal; that it was in this state of affairs that the plaintiff succumbed to the suggestion of Sri Banerji and gave the required undertaking; and that his application for leave was then granted.

The plaintiff supported these plaint allegations by his statement on oath. The only cross-examination on this point was as to the exact time when he gave the undertaking. That is however immaterial since it is in the written statement of the defendant that the leave applied for was granted to the plaintiff after he had given the undertaking. The plaintiff's statement was not

rebutted.

No other theory as to the circumstances in which the undertaking was given has been put forward on behalf of the defendant. Indeed, the written undertaking itself was not produced inspite of its having been summoned by the plaintiff. In these circumstances, there appears to be no reason for not believing the aforesaid statement of the plaintiff. Prom that statement it would appear that the relation subsisting at the time between the Deputy Registrar and the plaintiff was such that the former was in a position to dominate the will of the latter.

It would also appear that the Deputy Registrar used that position to obtain an unfair advantage over the plaintiff since the consent of the plaintiff to give the written undertaking was obtained in return for what the Registrar was bound even otherwise to do, viz., to expedite disposal of plaintiff's application for leave which was admittedly due to him. It would appear, therefore, that the plaintiff's consent to the undertaking was induced by undue influence and the plaintiff is in consequence not bound by it.

The contract embodied in the written undertaking in question would also not be enforceable against the plaintiff for want of consideration since, in the words of 'Anson in his Principles of the English Law of Contract (1929 Edition at page 102), "If the promisor gets nothing in return for his promise but that which he is already legally entitled to, the consideration is unreal."

It was not shown also that there was any rule whatsoever under which such an undertaking could have been obtained from the plaintiff. Lastly, even if it be supposed that the undertaking had any binding force, the plaintiff appears to have been released from it. The plaintiff s case is that on his applying on 21-9-1943 that he should be allowed to return to duty after the expiry of his leave the then Registrar, Sri W. Broome, passed an order permitting the plaintiff to return to duty from 1-4-1944.

That such an order was in fact passed by the Registrar appears from Exh. 21, copy of the minutes of the English Meeting, dated 24-3-1944, filed by the plaintiff. Strangely enough, however, the passing of such an order was not admitted in the written statement of the defendant, and the order was not filed even though summoned from the defendant.

Admittedly, the granting and cancellation of leave were within the competence of the Registrar of the High Court. It would also, therefore, be within the competence of the Registrar to permit the plaintiff to return to duty after the expiry of his leave. If then the Registrar, Sri Broome, had passed an order on 17-3-1944 permitting the plaintiff to return to duty after the expiry of his leave with effect from 1-4-1944, the effect of that order should be that the plaintiff was released from his undertaking.

From all that has been stated above it is manifest that the undertaking obtained from the plaintiff was no bar to his returning to duty after the expiry of his leave on 31-3-1944.

13. The merits of the impugned order dated 27-3-1944 may now be examined. The first question is as to the nature of that order. Rule 56 of the Financial Hand-book prescribes that:

> "Except as otherwise provided in Clause (b) the date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds, which must be recorded in writing but he must not be retained after the age of 60 years except in very special circumstances".

Clause (b) is irrelevant as it applies to civil engineers of the Public Works Department. Section 241(3)(b)(iii) provides for an appeal against termination of appointment of a person serving in a civil capacity in India otherwise than upon his reaching the age fixed for superannuation. A provision to the same effect is also contained in Rule 17 of the 1946 Rules framed by this High Court.

It would appear therefore that, except where a civil servant's appointment is terminated before the age of superannuation by way of punishment, he has a right subject to his continuing to be fit and efficient, to be retained in service till he reaches the age of 55 years. There is no allegation that the plaintiff was not physically fit or that he was inefficient.

So far as the last point is concerned, he has filed certificates of three former Judges, the Hon'ble Mr. Justice G. P. Boys, the Hon'ble Mr. Justice E. Bennet Kt. and the Hon'ble Mr. Justice R. L. Yorks, which would show that he was considered to be efficient and "most reliable". The plaintiff would have reached the age of 55 years on 13-9-1947.

The impugned order, dated 27-3-1944 had therefore the effect of terminating the plaintiff's, appointment otherwise than upon his reaching the age fixed for superannuation. That being so, it lay upon the defendant-appellant to justify the passing of that order. It is true that the plaintiff had at his own request been allowed to proceed on leave preparatory to retirement, but it is open to a servant, who has expressed a desire to retire from service and applied to his superior officer to give him the requisite permission, to change his mind subsequently and ask for cancellation of the permission thus obtained, except that he cannot be allowed to do so after he has ceased to b(c) in service: 'Jai Ram v. Union of India', 1954 SC 584 (AIR V41) (G). The plaintiff respondent applied for being allowed to return to duty about three and a half years before his services would nave terminated on superannuation. He was therefore fully entitled to change his mind & to be allowed to resume his duties even though he had proceeded on leave preparatory to retirement. In these circumstances, it lay upon the defendant, as adverted to above, to justify the passing of the impugned order.

The only justifications pleaded were (1) that the plaintiff had put in more than 30 years of service, and (2) that he had given the aforesaid undertaking. No rule was pointed out under which the plaintiff could have been made to retire simply because he had put in more than 30 years of service although he had not reached the the age of superannuation.

The only rule cited on behalf of the appellant in this connection was Article 465A Civil Service Regulations, or rather Note I underneath it, which speaks of the Government retaining an absolute right to retire any officer after he has completed 25 years' qualifying service without giving any reasons, and no claim to special compensation on this account will be entertained.

In the first place, the rule applies to officers mentioned in Article 349A, in which category the plaintiff does not come. In the next place, the concluding portion of the Note says that the right in question (the right, that is, of the Government to retire an officer after 25 years' qualifying service) will not be exercised except when it is in the public interest to dispense with the further services of the officer.

That being so, even if this-rule were applicable to the plaintiff, its application will have to be justified on the ground of public interest. There was never any attempt at a justification on this or any similar ground by the appellant. As regards the undertaking, it has already been seen that it was no bar to the plaintiff returning to duty after the expiry of his leave. The defendant-appellant thus having failed to justify the passing of the impugned order, the plaintiff respondent's suit should have been decreed.

14. There is one other short ground in favour of the plaintiff-respondent. Under Rules 13 and 14 of the Financial Handbook his lien not having been suspended, the plaintiff retained his lien on the substantive permanent post which he held at the time of proceeding on leave, and under Rule 12 neither Sri Asthana nor Sri Gupta should have been appointed substantively to the post on which the plaintiff held a hen.

It will be observed that the impugned order was passed as a result of the appeal which was filed by these two judgment-Writers and three others. A copy of this appeal is Exh. 20 on record. The impugned order appears therefore to have been passed in contravention of the provisions of Rules 12, 13 and 14 of the Financial Handbook.

15. Under Section 241(3)(b)(iii), Government of India Act 1935, any rules regulating the conditions of service of persons employed in a civil capacity in India should provide that every such person shall have the same rights of appeal to the same authorities from any order which terminates his appointment otherwise than upon his reaching the age fixed for superannuation as he would have had immediately before the commencement of part III of that Act, or such similar rights of appeal to such corresponding authorities as may be directed by the Secretary of State or by some person empowered by the Secretary of State to give directions in that respect.

Even in the absence of any rules therefore the plaintiff would have had a right of appeal from the order in question. But the relevant rules which govern the plaintiff's case, i.e., the aforesaid rules published in the U. P. Gazette, dated 6-8-1932, did provide by Rule 1 that every member of a subordinate service against whom an order is passed by the Government imposing any of the punishments specified in Notification No. 2627/11-264, dated August, 3, 1953 shall have the right to appeal to the Governor.

Removal from service is one of the punishments specified in the Notification just cited. That being so, the plaintiff-respondent had a right of appeal from the order in question to the Governor. In this connection it is relevant to refer to the Note appended at the foot of Rule 17 of the 1946 High Court Rules which provides that "Every person who before April 1, 1937, had a right of appeal to the Governor from any of the orders specified in Clause (b) of the above rule, shall have a similar right from any such order to the Governor exercising his individual judgment".

Termination of appointment otherwise than upon a civil servant reaching the age fixed for superannuation is one of the punishments specified in Clause (b) of Rule 17. The defendant's contention in the present petition that the plaintiff had no right of appeal against the impugned order appears therefore to be unfounded. The plaintiff was however admittedly not permitted to prefer such an appeal. This would be an additional ground for holding the impugned order to foe illegal and inoperative.

16. The defence plea that the order in question passed by the Chief Justice was not own to question in a Court of law was rejected by the trial Court and was not pressed in this Court. It was an administrative order and therefore, if would be shown, as it has been in this case, that it was illegal and inoperative, it would certainly be challenged in a Court of law by the person adversely affected thereby.

17. To sum up the above findings, the impugned order, dated 27-3-1944 disallowing the plaintiff to return to duty on the expiry of his leave preparatory to retirement, even though the plaintiff was still entitled to put in about three and a half years of service, was in the nature of a penal order which the defendant-appellant has failed to justify and which, on the contrary, was invalid and inoperative and challengeable in a Court of law since it had been passed against the mandatory provisions of Rules 12 and 14 of the financial Handbook, and the plaintiff was prevented from exercising his right of appeal against that order; and the plaintiff was not debarred from challenging the validity of that order by reason of the undertaking relied upon by the defendant-appellant.

In view of these findings, the appeal of the defendant-appellant is dismissed and the cross-objection of the plaintiff-respondent is allowed with costs to the plaintiff in both the Courts, so that, over & above the declaratory decree passed by the trial Court, the plaintiff-respondent is also award ed a declaration as prayed for in the plaint namely, that the order of the High Court, dated 27-3-1944, imposing compulsory retirement upon the plaintiff from public service was illegal, ultra vires, null and void, and that the plaintiff shall be deemed in law, notwithstanding the passing of that order, to have continued in service from 1-4-1944 to the date when he attained the age of 55 years.