

(1958) 10 AHC CK 0022
In the Allahabad High Court
Case No : Original Suit No. 1 of 1955

Banarasi Das Kankan

APPELLANT

Vs

Uttar Pradesh Government and Another

RESPONDENT

Date of Decision : 16-10-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Constitution of India, 1950 — Article 233, 309, 310, 311, 315(4)
Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 5
Government of India Act, 1935 — Section 240, 241(3), 246, 246(1), 246(3)

Citation : AIR 1959 All 393

Hon'ble Judges : V.G. Oak, J; M.C. Desai, J

Bench : Division Bench

Advocate : Ambika Prasad, for the Appellant; N.D. Pant, Junior Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

V.G. Oak, J.—Sri Banarsi Das Kankan is a retired Civil Judicial Officer. He retired as a District Judge in 1942. He brought this suit against Government in 1944 for various declarations with respect to his service and pension, for the recovery of arrears of his pay, and for damages.

2. His case is that, he was appointed to the United Provinces Civil Judicial Service, Agra Branch, in April 1917, and was confirmed as Civil Judge in 1936. He was promoted to the selection grade of Civil Judge in 1936. He was promoted to the selection grade of Civil Judges with effect from the 10th of May, 1940. From 1935 to 1938 he officiated as a Civil and Sessions Judge four times. For the fifth time he was appointed as a Civil and Sessions Judge on 5-12-1938. The appointment continued for over three years. He was confirmed as a Civil and Sessions Judge with effect from the 1st of July, 1941.

3. A listed post of District and Sessions Judge in the Indian Civil Service cadre of

the United Provinces fell vacant upon the retirement of Sri Shiva Copal Mathur, District and Sessions Judge, Hardoi. The Governor appointed the plaintiff as District and Sessions Judge vice Sri Shiva Gopal Mathur. The plaintiff worked as District and Sessions Judge from 24th December, 1941 to the 14th of October, 1942, when he retired from service.

4. The plaintiff's appointment was as a permanent District and Sessions Judge. But a notification to the effect that the plaintiff was to officiate as District and Sessions Judge, Hardoi was wrongly published in the U.P. Gazette. The authorities concerned wrongly proceeded on the footing that, the plaintiff was only an officiating District and Sessions Judge. The plaintiff's case was wrongly referred to the Federal Public Service Commission for his confirmation as District and Sessions Judge.

5. As Civil and Sessions Judge, the plaintiff ranked with the Indian Civil Service officers holding the post of Civil and Sessions Judge, and had identical rights and privileges. The plaintiff was no longer a member of the Provincial Judicial Service. But the authorities proceeded on the footing that, the plaintiff continued to be a member of the Provincial Judicial Service in spite of his appointment as Civil and Sessions Judge. The plaintiff's pay as Civil and Sessions Judge and as District Judge was wrongly calculated.

6. Again, the plaintiff was entitled to get pension under Article 561 of the Civil Service Regulations, or under Rule 13(1) of the Superior Civil Services Rules. But the plaintiff's pension was not fixed under those provisions. The plaintiff has suffered greatly in reputation, money and future prospects.

7. The plaintiff, therefore, prayed for declarations to the effect (a) that the plaintiff was permanently promoted from the post of Additional Sessions Judge to the post of District and Sessions Judge, (b) that the post of Civil and Sessions Judge is not a Provincial Civil Service post but an Indian Civil Service post, and (c) that the plaintiff is entitled to get pension under Article 561 of the Civil Service Regulations. The plaintiff also prayed for the recovery of (a) a sum of Rs. 3,326/10/8 as arrears of his pay as Civil and Sessions Judge, (b) a sum of Rs. 3,524/- as arrears of his pay as District and Sessions Judge, and (c) a sum of Rs. 25,000/- as damages.

8. The suit was originally brought against (1) The United Provinces, and (2) The Secretary of State for India. Defendants' names were amended in 1955. The defendants are now (1) The Uttar Pradesh, and (2) The Union of India. The two defendants filed separate written statements. They raised a common defence.

9. The defendants conceded that the plaintiff was appointed to the U. P. Judicial Service in 1917, that he was promoted to the selection grade of Civil Judges in May 1940, that he officiated as a Civil and Sessions Judge several times from 1935 to 1938, and that he was confirmed as a Civil and Sessions Judge in July 1941. But the defendants denied that he became entitled to the rights and privileges of Indian Civil Service officers.

According to defendants, the plaintiff continued to be a member of the Provincial Judicial Service. The defendants pleaded that the plaintiff's pay and pension were correctly fixed. It was denied that the plaintiff is entitled to have his pension fixed under Article 561 of the Civil Service Regulations or under Rule 13(a) of the Superior Services Rules.

The plaintiff's claim to damages was denied. It was denied that the plaintiff was permanently promoted to the post of a District and Sessions Judge. The defendants maintained that the plaintiff's case was rightly referred to the Federal Public Service Commission for an opinion. The defendants pleaded that the suit is not cognizable by the Court, and that such a claim is not cognizable by the Civil Court.

10. The following issues were framed:

ISSUES:

1. Is the suit cognizable by this Court?
2. Whether a claim of the kind set up in the plaint is not cognizable by the Civil Court?
3. Whether as Civil and Sessions Judge the plaintiff held a post borne on the cadre of the I.C.S. and whether the G. O. O-868/II-303-1942 is ultra vires and whether U. O. No. 298 dated 25-7-1932 is still in force and effective. If so, how does the fact affect this case?
4. Whether Article 561 of the Civil Service Regulations or Rule 13(a) of the Superior Services Rules is applicable to plaintiff in the matter of pension?
5. Whether the plaintiff was permanently promoted from the post of a Civil and Sessions Judge to that of a District Judge, and/or was substantively holding the post of a District Judge from 24-12-1941? If so, how is this case affected?
6. Whether the post of the Civil and Sessions Judge is a post belonging to the I.C.S., and is not a post of the Provincial Service? If so, was the plaintiff, as a holder of that post, entitled to the privileges belonging to a post of the I.C.S. in matters of pay, promotion and pension?
7. What loss, if any, has the plaintiff suffered as a Civil and Sessions Judge, or as a District Judge, in the matters of pay and pension? Is the plaintiff entitled to any amount on either or both of these heads? If so, what amount is he entitled to recover?
8. Has the plaintiff suffered any loss of the kind mentioned in paragraphs 14 and 15 of the plaint? Is he entitled to any damages for such loss? If so, what amount, if any, is he entitled to recover?
9. Whether the course adopted in referring the case of the plaintiff to the Federal Public Service Commission and subsequent action was wrong, ultra vires and contrary to law? If so, how does the fact affect the case?

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

11. The suit was instituted in the Court of the Civil Judge of Bareilly. The plaintiff moved this Court under Article 228 read with Article 147 of the Constitution for withdrawing the suit to the file of the High Court. The application was allowed, and the suit was withdrawn from the file of the Civil Judge. The suit has been tried by this Court in the exercise of its extraordinary original jurisdiction.

12. Parties did not produce any oral evidence. They contented themselves with the production of documents, which are copies of official records.

13. ISSUE NO. 1: The learned Civil Judge of Bareilly took up this issue as a preliminary issue, and decided it on 9-8-1952. His finding is that the Bareilly Court has jurisdiction to entertain the suit. The issue was decided in plaintiff's favour,

14. Even if it is assumed that issue No. 1 is still open before us, the issue must be decided in plaintiff's favour. This Court's jurisdiction extends to the whole of Uttar Pradesh. The plaintiff was a member of U. P. Judicial Service. He lives at Bareilly, and draws pension from U. P. Government. Clearly, the cause of action arose within Uttar Pradesh. Issue No. 1 must be decided in plaintiff's favour.

15. ISSUE No. 2: Mr. N. D. Pant appearing for the defendants contended that the suit is barred under Article 310 of the Constitution and Section 240 of the Government of India Act, 1935. The suit was brought in the year 1944. That was long before the Constitution of India came into force. So Article 310 of the Constitution has no application to the present case.

16. Section 240 of the Government of India Act, 1935 came up for consideration before their Lordships of the Supreme Court in *The State of Bihar Vs. Abdul Majid*, . Their Lordships laid down that, the Rule of English Law that a civil servant cannot maintain a suit against the State or against the Crown for the recovery of arrears of salary does not prevail in this country. The Rule of English law that a civil servant holds office at the pleasure of the Crown has not been fully adopted in Section 240.

Section 240 itself places restrictions and limitations on the exercise of that pleasure, and those restrictions must be given effect to. Whenever there is a breach of restrictions imposed by the statute by the Government, the matter is justiciable and the aggrieved party is entitled to suitable relief at the hands of the Court.

17. *The State of Bihar Vs. Abdul Majid*, is a clear authority for the proposition that a civil. servant may sue Government to recover arrears of his salary. He may also sue to obtain declarations about conditions of his service. The civil Court is obviously competent to grant a decree for damages. The civil Court is competent to grant the plaintiff a decree, if he succeeds in establishing his claim. The issue is decided in plaintiff's favour.

18. It will be convenient at this stage to give a short history of the Civil Service in India. with special reference] to Judicial offices, reserved posts and listed posts. The Government of India Act, 1858 empowered the) Secretary of State in Council to make regulations for regulating the admission of persons to the Civil Services of the Crown (vide Ex. 53). Section 2 of East India (Civil Service) Act, 1861 (24 and 25 Victoria Chap. 54) laid down that, all vacancies in any of the offices specified in the Schedule annexed to the Act shall be filled up from amongst the Covenanted Civil Service of the Crown in India.

The offices mentioned in the Schedule included (1) Civil and Sessions Judges, or Chief Judicial Officers of District in the Provinces now known as Regulation Provinces, and (2) Additional and Assistant Judges in the said Provinces. According to Section 3 of the Act, persons not covenanted Civil Servants may, under special circumstances, be appointed to such offices, subject to certain restrictions. In the Government of India Act, 1870 it was mentioned that, it was expedient that additional facilities should be given for the employment of natives of India, of proved merit and ability, in the service of Her Majesty in India (vide Ex. 54).

19. A Notification dated 12-1-1893 published on N. W. Provinces and Oudh Gazette dated 4-1-1893 ran thus :

".. .. .The following appointments in the North-Western Provinces and Oudh, to fill which members of the Civil Service of India have hitherto been recruited, shall be appointments to which members of the N. W. P. and Oudh Provincial Civil Service can properly be appointed" (Vide Ex. 40).

Four posts of District and Sessions Judges and two posts of Judges, Small Cause Courts, Allahabad and Lucknow were mentioned in the Notification. Lord Crewe's Despatch dated 8-11-1912, dealt with reorganisation of the Judicial Service in the United Provinces. Provision was made for the creation of six Additional Sessions Judges. It was laid down that four Additional Sessions Judges should be members of the Indian Civil Service.

20. Section 19 of the Government of India Act, 1915 empowered the Secretary of State in Council to make Indian appointments. According, to Sec. 98 of the Act all posts specified in the Third Schedule of the Act were reserved for members of the Indian Civil Service. District and Sessions Judges were mentioned in Item No. 7 of the Third Schedule. Additional District or Sessions Judges and Assistant Sessions Judges were mentioned in item No. 8 of the Third Schedule. Section 99 of the Act gave power to the Indian authorities to appoint to any such reserved posts a person, who is not a member of the Indian Civil Service.

21. Similar provisions were contained in the Government of India Act, 1919. According, to Section 98 of the Act the posts specified in the Third Schedule to the Act were reserved for members of the Indian Civil Service District or Sessions Judge was mentioned in item No. 8 of Part B of the Third Schedule. Additional District or Sessions Judge was mentioned in item No. 9 of Part B of the

third Schedule.

Section 99 of the Act gave the Indian authorities power to appoint to any such reserved office a person, who is not a member of the Indian Civil Service. On 15-4-1919 the Government of India resolved that out of the six posts of Additional Sessions Judges in the United Provinces created in 1912, two shall be added to the list of appointments open to members of the Provincial Civil Service. (Vide Ex. 46).

22. Under Notification of the Government of India, dated 30-3-1922, the Local Government was empowered to declare the number of judicial offices, being offices ordinarily filled from amongst the members of the Indian Civil Service, to which persons not being of the Indian Civil Service may be appointed. (Vide Ex. A-2). By a Notification dated 18-7-1927, the U. P. Government declared that the number of posts of Additional Sessions Judges, being offices ordinarily filled from amongst the members of the Indian Civil Service, to which members of the U. P. Judicial Service may be appointed, was being increased to four. (Vide Ex. 51). By a similar Notification dated 5-9-1928, the number of posts of Additional Sessions Judges open to members of the U. P. Judicial Service was increased from four to five.

23. Then came the Government of India Act, 1935. The greater part of the Act came into force On 1-4-1937. The plaintiff's claim relates to his service between 1938 and 1942. The Government of India Act, 1935 was in force at the material time. It will be convenient to refer to that Act as the Constitution Act.

24. Section 241 of the Constitution Act dealt with recruitment and conditions of service. Section 246 of the Act dealt with reserved posts. Subsection (1) of Section 246 of the Constitution Act stated thus :

"The Secretary of State shall make rules specifying the number and character of the civil posts under the Crown (other than posts in connection with any functions of the Governor-General which the Governor-General is by or under this Act required to exercise in his discretion), which, subject to the provisions of this Sub-section, are to be filled by persons appointed by the Secretary of State to a civil service of, or a civil post under, the Crown in India, find except under such conditions as may be prescribed in the Rules no such posts shall, without the previous sanction of the Secretary of State--

(a) be kept vacant for more than three months; or

(b) be filled otherwise than by the appointment of such a person as aforesaid; or

(c) be held jointly with any other such post."

25. Unlike the Acts of 1915 and 1919, the Act of 1935 did not contain a Schedule of offices reserved for the Indian Civil Service. The matter was left for Rules to be framed by the Secretary of State.

26. In exercise of the powers conferred upon him by Section 246(1) of the

Constitution Act, the Secretary of State, Lord Zetland, framed the Reserved Posts (Indian Civil Service) Rules, 1938 (hereinafter referred to as the Reserved Posts Rules. According to Clause 2 of the Reserved Posts Rules,

"the posts specified in the Schedule to these Rules (hereinafter referred to as "reserved") shall be filled either by members of the Indian Civil Service or by persons, not being members of the Indian Civil Service, appointed in accordance with the provisions of these Rules....."

Clause 3 of the Reserved Posts Rules ran thus:

"The Governor may declare that such number of the superior reserved posts allocated to his Province as may be specified in the Notification may be filled by persons who are not members of the Indian Civil Service, and posts in respect of which such a declaration has been made are hereinafter referred to as "listed posts.""

According to the list of reserved posts in U. P. given in the Schedule of the Reserved Posts Rules, there were 102 superior posts including two selection grade District and Sessions Judges and 27 District and Sessions Judges in the time-scale. There were 38 inferior posts including four Civil and Sessions Judges.

27. I now proceed to record findings on the remaining eight issues.

28. ISSUE NO. 6: We have seen that six posts of Additional Sessions Judges having the powers of Subordinate Judges were created in the year 1912. Mr. Ambika Prasad appearing for the plaintiff rightly pointed out that, under the Government of India Act, 1915 and the Government of India Act, 1919, all posts of Additional Sessions Judges were ordinarily reserved for members of the Indian Civil Service. But the position was somewhat different under the Government of India Act, 1935. The Constitution Act did not lay down that posts of Additional Sessions Judges must be reserved posts. The matter was governed by the Reserved Posts Rules framed by the Secretary of State.

29. Mr. Ambika Prasad challenged the validity of the Reserved Posts Rules on various grounds. He pointed out that, under Sub-section (3) of Section 246 of the Constitution Act all Rules made under this section had to be laid before each House of Parliament. He contended that the Rules in question were not laid before the two Houses of Parliament as required by Section 246(3) of the Act. No such allegation was made in the plaint. It is true that the validity of the Rules was impugned in the plaint.

But there was no specific allegation that, the Rules were not laid before the two Houses" of Parliament. Whether the Rules were laid before Parliament or not is a question of fact. The plaintiff should not be allowed to raise this question of fact for the first time at the stage of arguments. u/s 114 of the Indian Evidence Act, there is a presumption that official acts were regularly performed. I shall, therefore, presume that the Reserved Post Rules were laid before Parliament as required by Section 246(3) of the Constitution Act.

30. Section 247 of the Constitution Act dealt with conditions of service, pension etc. of persons recruited by the Secretary of State. The plaintiff was not recruited by the Secretary of State. But it was urged by Mr. Ambika Prasad that the plaintiff held a reserved post before the Reserved Posts Rules came into force. So under Clause (a) of Sub-section (2) of Section 250 of the Constitution Act the plaintiff is entitled to the benefit of Section 247 of the Act.

31. The proviso to Sub-section (1) of Section 247 ran thus:

"Provided that no Rule made under this Sub-section shall have effect so as to give any person appointed to a civil service or civil post by the Secretary of State less favourable terms as respects remuneration or pension than were given to him by the rules in force on the date, on which he was first appointed to his service or was appointed to his post." The plaintiff was appointed to the Provincial Judicial Service in 1917, It has not been shown that the Reserved Post Rules, 1938, offered less favourable terms as respects remuneration or pension than were given to the plaintiff by the Rules which were in force in 1917.

32. Mr. Arnbika Prasad further urged that, the Reserved Posts Rules conflict with Section 254 of the Constitution Act. Sub-section (1) of Section 254 stated:

"Appointments of persons to be, and the posting and promotion of, District Judges in any Province shall be made by the Governor of the Province exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor."

Mr. Ambika Prasad contended that u/s 254 of the Act the Governor has to exercise his individual judgment in appointing a person as a District Judge. It was urged that the Reserved Posts Rules placed restrictions on the Governor's individual judgment.

33. I do not find any conflict between Section 246 of the Act and Rules framed u/s 246 on one hand and Section 254 on the other hand. Sections 246 and 254 deal with appointments from different angles. Section 246 deals with qualifications for certain offices. Section 254 deals with the appointment itself. Section 246 was as much a part of" the Statute as Section 254 was. Section 254 did not give the Governor full freedom to appoint anybody as a District Judge. A person must be qualified for the office before he could be appointed a District Judge, Reserved Posts Rules were not in conflict with Section 254 of the Act. All the objection raised against the validity of the Rules must be rejected. Reserved Posts Rules were valid.

34. Parties were not agreed about the date, on which the Reserved Posts Rules, 1938 came into force. The date 27-10-1938 was noted at the foot of the Rules. The Rules were published in the Gazette of India, dated 17-12-1938. The question, therefore arises whether the Rules came into force on 27-10-1938 or on 17-12-1938. Mr. Ambika Prasad urged that the Rules could not come into

force before their publication in the Gazette.

35. Reliance was placed upon *Harla Vs. The State of Rajasthan*, . In that case their Lordships of the Supreme Court held that, in the absence of any special law or custom, it would be against the principles of natural justice to permit the subject of a State to be punished or penalized by laws of which they had no knowledge and of which they could not, even with the exercise of reasonable diligence, have acquired any knowledge.

Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognizable way so that all men may know what it is. In the absence of any law, Rule, regulation or custom, a law cannot come into being by merely passing a resolution without promulgation or publication in the Gazette or other means. Promulgation or publication of some reasonable sort is essential.

36. In *Harla Vs. The State of Rajasthan*, their Lordships were dealing with the Jaipur Opium Act, which was a penal statute. In the present case we are not dealing with any penal statute or regulation. We are dealing with certain Rules framed by an employer with respect to conditions of service of his employees. There is no good reason why such Rules should not come into force as soon as they are framed. Section 246 of the Constitution, Act did not lay down that the Rules would come into force only upon publication in the Gazette of India.

The only condition laid down was that, the Rules, must be laid before Parliament. It was open to Parliament to annul the Rules placed before it. It was not mentioned in Section 246 that, the Rules would not come into force before the expiry of the period of 28 days mentioned in Sub-section 3. In my opinion, the Rules came into force as soon as they were framed. The Reserved Posts Rules, therefore, came into force on 27-10-1938.

37., Under the Reserved Posts Rules, 1938, four posts of Civil and Sessions Judges were classed as "reserved posts". It was not laid down in the Reserved Posts Rules that, all the posts of Civil and Sessions Judges in the United Provinces were to be reserved posts. Six posts of Additional Sessions Judges were created in the year 1912. The number of these posts was increased from time to time. Learned counsel for the parties agreed before us that, by 1928 the number of posts of Additional Sessions Judges or Civil and Sessions Judges was increased to nine.

Members of the Provincial Judicial Service could occupy five out of those nine posts. The position in 1928 was that, out of nine posts of Additional Sessions Judges ordinarily reserved for members of the Indian Civil Service, five posts could be held by members of the Provincial Judicial Service. The position was somewhat similar under the Reserved Posts Rules 1938. Only four posts of Civil and Sessions Judges were reserved for the Indian Civil Service. The remaining five posts could be held by members of the Provincial Service.

38. It is to be noted that under Clause 3 of the Reserved Posts Rules, "listed posts" could be created out of "superior reserved posts" only. Inferior reserved posts could not be listed.

39. Mr. Ambika Prasad relied upon the Civil List of United Provinces corrected up to 15-5-1938 for the contention that, the post of Civil and Sessions Judge held by the plaintiff was a listed post. The following note on listed appointments appeared on page 15 of the Civil List corrected up to 15-5-1938."

"LISTED APPOINTMENTS

The following appointments in the United Provinces, to fill which members of the Civil Service of India have hitherto been recruited, are the appointments to which members of the Provincial Civil Service may be appointed subject to the Rules for the time being in force under 33 Vict., Chap. 3, Section 6:

District and Sessions Judges -- Nine; Civil and Sessions Judges -- Five; Superior Executive Officers" -- Fourteen; Assistant Settlement Officers -- Two." No doubt that note does suggest that, five posts of Civil and Sessions Judges were listed posts. But that note is misleading. We have seen that, only four posts of Civil and Sessions Judges in the United Provinces were reserved posts," and that none of those four posts could be listed. It was clearly impossible to list five out of four reserved posts of Civil and Sessions Judges.

40. A list of officers, who were actually working as Civil and Sessions Judges in the United Provinces in 1938 was given on pages 211 and 212 of the same Civil List. On page 211 it was noted that, there were four posts of Civil and Sessions Judges for the I. C. S., and five posts of Civil and Sessions Judges for the Provincial Service. Sri Kali Das Banerji and three officers of the Provincial Service were acting in the four I. C. S. posts (Jaunpur, Muttra, Mirzapur and Bahraich). Sri Tufail Ahmad and four other members of the Provincial Judicial Service were acting in P. C. S. posts. On page 212 we find names of four I. C. S. officers, who were described as Temporary Civil and Sessions Judges.

41. It, therefore, appears that, in 1938 there were nine permanent posts of Civil and Sessions Judges in the United Provinces. Four posts were reserved for members of the Indian Civil Service. But officers of the Provincial Judicial Service were allowed to officiate in those four posts. The remaining five posts were meant for members of the Provincial Service. There were also some posts of Temporary Civil and Sessions Judges.

42. The plaintiff held one of the nine posts of Civil and Sessions Judges, which existed in the United Provinces in the year 1938. In the first place, an officer of the Provincial Judicial Service could not be permanently appointed to one of the four posts of Civil and Sessions Judges, that were reserved for the Indian Civil Service. Secondly, there is no evidence that there was any order of the Provincial Government appointing the plaintiff to one of those four posts. It must, therefore, be assumed that, the post actually held by the plaintiff in 1938 and

subsequent years was one of the five posts of Civil and Sessions Judges, that were ordinarily filled by members of the Provincial Judicial Service.

43. I, therefore, hold that the post of Civil and Sessions Judge held by the plaintiff from 1938 to 1941 was not a post on the I. C. S. cadre. It was a post allotted to the Provincial Service. Since the first part of issue No. 6 has been decided against the plaintiff, the second part of the issue does not arise. (44) ISSUE NO. 9: Clause 4 of the Reserved Posts Rules prescribed the procedure for appointment to any listed post. The first proviso to Clause 4 made it obligatory to refer every case to the Public Service Commission. It was not at first clear whether the Public Service Commission meant the Federal Public Service Commission or the Provincial Public Service Commission. Later the proviso was amended. The amendment appears to have been made on 6-7-1939. After the amendment the first proviso to Clause 4 of the Reserved Posts Rules ran thus:

"Provided that no person appointed under this Rule shall be appointed otherwise than in an officiating capacity unless the Governor-General in his discretion has consulted the Federal Public Service Commission and the Commission has certified that he is in all respects fitted to hold the post in question."

After the amendment it became clear that, the case had to be referred to the Federal Public Service Commission and not the Provincial Public Service Commission. In 1941 the question arose whether the plaintiff should be permanently appointed as a District Judge. So a reference to the Federal Public Service Commission became necessary. The plaintiff's case was rightly referred to the Federal Public Service Commission.

45. On 13-1-1956 Mr. N. D. Pant appearing for the defendants made a statement that the Governor consulted the Federal Public Service Commission in accordance with the Reserved Posts Rules. It appears that the reference was made by the Governor, U. P. directly and not through the Governor-General. Mr. Ambika Prasad contended that, the Governor was not competent to make a reference to the Federal Public Service Commission directly.

46. Reliance was placed upon Section 264 of the Constitution Act. Section 264 dealt with Public Service Commissions. According to Sub-section (3) of Section 264.

"The Public Service Commission for the Federation if requested so to do by the Governor of a Province may, with approval of the Governor-General agree to serve all or any of the needs of the Province."

According to Section 264(3) the Federal Public Service Commission could serve the needs of the United Provinces only with the Governor-General's approval. Mr. Ambika Prasad urged that Section 264(3) was contravened. Now, we do not know anything definitely about the Governor-General's approval. It was not necessary to obtain separate approval of the Governor-General for every case. It is possible that the U. P. Government had secured a general approval of the

Governor-General for making references to the Federal Public Service Commission.

47. Again, according to the first proviso to Clause 4 of the Reserved Posts Rules, it was the Governor-General himself, who could in his discretion consult the Federal Public Service Commission. If the matter did not go through the Governor-General, then there was no question of his acting in his discretion. The reference made by the Governor to the Federal Public Service Commission directly was not in accordance with the proviso to Clause 4 of the Reserved Posts Rules.

48. It has, however, not been explained how the irregularity affected the plaintiff's case on merits. It has not been shown that, the Federal- Public Service Commission would have expressed a different opinion if the plaintiff's case had been referred to it by the Governor-General instead of by the Governor.

49. I, therefore, hold that, the plaintiff's case was rightly referred to the Federal public Service Commission, but the procedure followed in making the reference was irregular. The irregularity did not affect the plaintiff's case on merits.

50. ISSUE NO. 5: The following Notification appeared in Part I of the U. P. Gazette dated 20th December 1941:

"With effect from 24th December, 1941 Mr. Banarsi Das Kankan, Civil and Sessions Judge, Cawnpore, to officiate as District and Sessions Judge, Hardoi vice Mr. Sheo Gopal Mathur."

On the face of the Notification, the appointment was on an officiating basis, and not on permanent basis.

51. Section 59 of the Constitution Act provided for the conduct of business of Provincial Government. Section 59(2) stated:

"Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in Rules, to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made Or executed by the Governor."

The Notification in question and a number of other Notifications appeared in Part I of U. P. Gazette dated 20th December, 1941 as orders issued from, the Appointment Department, Secretariat Administration Department and General Administration Department. Below these Notifications we find the-following words:

"By Order.

R. F. MUDIE, Secretary to Government, United Provinces."

Mr. Mudie was then the Chief Secretary to U. P. Government. A perusal of the other issues of the U. P. Gazette of the year 1941 shows that, this was the form

employed for notifying Government Orders. I take it that the expression "By Order" meant "By Order of the Governor". I take it that this was the prescribed manner for authenticating Governor's orders. In view of Section 59(2) of the Constitution Act, it seems doubtful whether the plaintiff can be permitted to urge that, the Governor's order was different from the order published in the U. P. Gazette.

52. The plaintiff's contention is that, in fact the Governor appointed the plaintiff as a permanent District Judge, but a mistake was made in publishing the Government Notification in the U. P. Gazette. In order to "substantiate this allegation the plaintiff summoned the original order of the Governor appointing the plaintiff as a District Judge. No such written order of the Governor was forthcoming.

One R. P. Srivastava, who is the Assistant Superintendent, Appointment Department, "A" Department, Civil Secretariat. Lucknow has filed an affidavit on the point. It was stated in paragraph 2 of the affidavit that, there is no written order of the Governor on the record appointing the plaintiff as a District Judge. In paragraph 3 of the affidavit it was stated:

"That the Chief Secretary, Sri U. F. Mudie, took the file of the plaintiff personally to H. E, the Governor on 15-12-41 and after discussion with him, Sri Mudie recorded the gist of his talk on the Secretariat file to the effect that the Governor was agreeable to Sri Kankan going to Hardoi and that order to that effect should issue at once. This arrangement was to be made at Hardoi in place of Sri S. G. Mathur, District and Sessions Judge, who was due to retire" with effect from 24-12-41. It was also mentioned in that note by Sri Mudie that the High Court should then be informed and they be requested to expedite their report in order that a reference might be made to the Federal Public Service Commission."

I see no reason for not accepting the facts mentioned in paragraphs 2 and 3 of the affidavit.

53. The position, therefore, is that there was no written order of the Governor appointing the plaintiff as a District Judge. The Chief Secretary obtained a verbal order from the Governor. The note prepared by the Chief Secretary did not expressly mention whether Sri Kankan was being appointed as a permanent District Judge or as an officiating District Judge. But a reference to the Federal Public Service Commission was contemplated.

54. According to the first proviso to Clause 4 of the Reserved Posts Rules, a person could not be permanently appointed to a listed post without obtaining a certificate of fitness from the Federal Public Service Commission. It is not the plaintiff's case that, the Federal Public Service Commission had issued a certificate of fitness in or before December 1941. It was not therefore, open to the Governor to appoint the plaintiff as a permanent District Judge in December 1941. Both the language of the Government Notification published in the U. P. Gazette and the requirement of the first proviso to Clause 4 of the Reserved

Posts Rules show that, the appointment was on officiating basis, and not on permanent basis.

55. In *Rup Kishan Agha Vs. Secy. of State*, it was held by a Division Bench of this Court that, it is impossible to argue that a member of the Provincial Judicial Service can claim appointment to the post of District Judge as a matter of right, merely because he has attained to a certain position in the order of seniority in the Provincial Judicial Service, or because he has been called upon to officiate in such posts.

56. I, therefore, hold that, the plaintiff was not permanently promoted from the post of a Civil and Sessions Judge to that of a District Judge, He was not substantively holding the post of a District Judge from 24-12-1941.

57. ISSUE NO. 3: The first part of issue No. ? has already been discussed under issue No, 6. I hold that as Civil and Sessions Judge, the plaintiff did not hold a post borne on the cadre of the I.C.S.

58. The second part of issue No. 3 relates to a conflict between two views expressed by Government in the years 1932 and 1943 The two views were expressed in letters addressed to the Accountant-General, U. P. The first letter was U.O. Mo. 298, dated 25th July, 1932 from the Chief Secretary. In that letter dated 25-7-1902 the Chief Secretary wrote thus:

".....The posts of Sessions and Subordinate Judge that were listed were not merged in the cadre of the Provincial Civil Service for the reason that though "inferior" they were covered by the Third Schedule to the Government of India Act. Such posts are regarded as inferior posts statutorily reserved for members of the Indian Civil Service but listed as open to members of the Provincial Civil Service. This being so, die listed posts of Sessions and Subordinate Judge are I.C.S. posts for the purpose of pension--only the system of recruitment is different....."

In this letter the Chief Secretary took the view that, for the purpose of pension, the listed posts of Sessions and Subordinate Judges should be heated as I.C.S. posts.

59. The second letter dated the 25th of September, 1943 was from the Deputy Secretary to Government. In this letter the Deputy Secretary wrote:

".....the Governor has had under his consideration the question whether a Provincial Judicial Service Officer holding permanently the post of Civil and Sessions Judge is or is not entitled to pension under the Superior Civil Services Rules. There is no doubt that though inferior, these posts were covered by the Third Schedule to the Government of India Act, 1919. and were statutorily reserved for members of the Indian Civil Service. But the requisite condition for the grant of pension in the scale laid down in Rule 13(a) of the Superior Civil Service Rules is that the posts must be borne on the cadre of the Indian Civil Service. It would appear from Schedule VII to those Rules and also from that

appended to the Reserved Posts (Indian Civil Service) Rules, that the five posts of Civil and Sessions Judge never were nor now are included in the cadre of that service. That being so, the Governor thinks that the decision contained in Government Unofficial Note No. 29S, dated July 25, 1932, was erroneous. As the five posts held by Provincial Civil Service Officers did not and do not form part of the cadre of the Indian Civil Service the provisions of the Superior Civil Services Rules cannot apply to the holders of these posts. Further, the position was entirely changed by the Government of India Act, 1935, and the Reserved Posts (I.C.S.) Rules made thereunder, in that the posts of Sessions Judge is no longer scheduled for the Indian Civil Service,. The Governor does not think that the pension of the officers who retired before October 27, 1938 should in any way be affected now owing¹ to a mistake made in 1932, but I am to make it clear beyond doubt that a Provincial Judicial Service Officer retiring as Civil and Sessions Judge is entitled only to the ordinary scale of pension admissible under the Civil Service Regulations."

It will be noticed that in this letter dated 25-9-1943, it was observed that the view taken in U/O note No. 298, dated 25-7-1932 was erroneous. The letter dated 25-9-1943 was registered as G. O. No. O-868/II-303-1942. The letter dated 25-7-1932 is Ex. 24 on the record, whereas the letter dated 25-9-1943 is Ex. A-12.

60. The question raised in the letter Ex. A-12 was whether an officer of the Provincial Judicial Service holding permanently the post of a Civil and Sessions Judge is entitled to get pension under Rule 13(a) of the Superior Civil Services Rules. Rule 13(a) of the Superior Civil Services Rules states:--

"In the case of members, of the services and holders of the post specified in Schedule V whose pensions are regulated under the Civil Rules and who retire on or after the 1st April, 1924, the maximum limits for retiring and superannuation pensions,..... shall be as follows....."

A number of services are mentioned in Schedule V of the Rules. Provincial Judicial Service is not expressly mentioned in Schedule V. But one of the entries in Schedule V is the following:

"Officers who, though not members of one of the services mentioned above, held posts borne on the cadres of any of those services or of the Indian Civil Service."

The question, therefore, arises whether a member of the Provincial Judicial Service, who is holding the post of a Civil and Sessions Judge, can be said to be the holder of a post borne on the cadre of the Indian Civil Service. This question has been discussed under issue No. 6.

It was found that, when a member of U. P. Judicial Service holds the post of a Civil and Sessions Judge, that post cannot be regarded as a post borne on the cadre of the Indian Civil Service. It is a post attached to the Provincial Service. He is not an officer contemplated by Schedule V of the Superior Civil Services

Rules. He is not, therefore, entitled to get pension under Rule 13(a) of the Superior Civil Services Rules. The view expressed on this point in the letter Ex. A-12 is correct.

61. Mr. Ambika Prasad contended that it was not open to U. P. Government to depart from the view taken in Ex. 24 in the year 1932. Reliance was placed upon Clause (a) of Sub-section (3) of Section 241 of the Constitution Act, Sub-section (2) of Section 241 enables the Governor to make rules to regulate conditions of service of persons employed in the Province. Section 241(3) stated:

"The said rules shall be so framed as to secure--

(a) that in the case of a person who before the commencement of Part III of this Act was serving His Majesty in civil capacity in India, no order which alters or interprets to his disadvantage any rule by which his conditions of service are regulated shall be made except by an authority which would have been competent to make such an order on the eighth day of March, nineteen hundred and twenty-six or by some person empowered by the Secretary of State to give directions in that respect....."

Mr. Ambika Prasad, therefore, urged that, the view taken by Government in 1932 being favourable to the plaintiff, a contrary view could not be taken in 1943.

62. Now the material portion of Clause (a) of Sub-section (3) of Section 241 of the Constitution Act is: "no order which alters or interprets to his disadvantage any rule by which his conditions of service are regulated shall be made". In order to get benefit of Clause (a) of Section 241(3) of the Act, it is necessary to show that, the person's conditions of service are regulated by the relevant Rule.

In the present case in Ex. A-12, Government interpreted Rule 13(a) of the Superior Civil Services Rules. I have shown above that, Rule 13(a) does not apply to the plaintiff's case. Since the plaintiff's conditions of service were never regulated by Rule 13(a), there is no bar against a fresh interpretation of that Rule so far as the plaintiff is concerned.

63. It is to be noted that Ex. 24 discussed the question of pension in 1932 before the passing of the Government of India Act, 1935. In Ex. A-12, the question of pension was examined long after the passing of the Government of India Act, 1935. Circumstances in 1943 were different from those which existed in 1932. Even if it is assumed that the view taken by the Chief Secretary in Ex. 24 was correct, there was nothing to prevent Government from examining the legal position in the light of the changes introduced by the Government of India Act, 1935.

The plaintiff was confirmed as Civil and Sessions Judge in 1941. That was after the passing of the Government of India Act, 1935, and enforcement of the Reserved Posts Rules, 1938. There was no objection to the Government examining in 1943 the question whether a member of the Provincial Judicial Service confirmed in the post of Civil and Sessions Judge in 1941 was entitled to

get a pension under Rule 13(a) of the Superior Civil Services Rules.

64. I, therefore, hold that G. O. No O-868/II-803-1942 is not ultra vires, and that U/O No. 298, dated 25-7-1932 is no longer in force or effective. This part of issue No. 3 is decided against the plaintiff.

65. Issue No. 4: The plaintiff's contention is that he is entitled to get pension either under Article 561 of the Civil Service Regulations or Rule 13(a) of the Superior Civil Services Rules. Article 561 appears in Chapter XXV of the Civil Service Regulations. Article 561 provides for annuity upon retirement. Chapter XXV applies to members of the Indian Civil Service. The plaintiff was never a member of the Indian Civil Service, nor did he hold permanently any post on the cadre of the I.C.S. so Chapter XXV does not govern his case. Article 561 does not apply to the plaintiff in the matter of pension.

66. Under Issue No. 3, it was found that the plaintiff's case is not governed by Rule 13(a) of the Superior Civil Services Rules. I, therefore, hold that neither Article 561 of the Civil Service Regulations, nor Rule 13(a) of the Superior Civil Services Rules is applicable to the plaintiff in the matter of pension.

67. Issue No. 7: This issue relates to the alleged mistakes in fixing the plaintiff's pay and pension. The question of pension has already been discussed under issues Nos. 3 and 4. The plaintiff claimed special pension either under Article 561 of the Civil Service Regulations or under Rule 13(a) of the Superior Civil Services Rules. It has been found under issue No. 4 that neither Article 561 of the Civil Service Regulations nor Rule 13(a) of the Superior Civil Services Rules is applicable to the plaintiff in the matter of pension. The plaintiff's case was governed by the ordinary pension rules.

68. Next, we have to consider the question of pay which the plaintiff was entitled to get as a Civil and Sessions Judge and as a District Judge. In paragraph 2 of the plaint it was stated that, for the fifth time the plaintiff was appointed as Civil and Sessions Judge from 5-12-1938. It means that the plaintiff was a Civil Judge on 4-12-1938. Parties are agreed that on 4-12-1938 the plaintiff's pay as Civil Judge was Rs. 850/-.

69. The plaintiff began to officiate as a Civil and Sessions Judge for the 5th time on 5-12-1938. Ex. 14 is a copy of the Rules framed by the Secretary of State for India in Council to regulate the pay of Provincial Civil Service Officers holding inferior Indian Civil Service posts. Parties were agreed that the plaintiff's pay as Civil and Sessions Judge had to be fixed in accordance with the directions contained in Ex. 14.

70. According to Sub-clause (i) of Clause (b) of the Rules (Ex. 14)

"the initial pay of a Provincial Civil Service Officer appointed to an inferior post of Sessions and Subordinate Judge in the Indian Civil Service Cadre of the United Provinces shall on each occasion of such appointment be fixed at the stage of the inferior scale of basic pay fee the Indian Civil Service next above the substantive

pay last drawn by him in the regular line of the Provincial Civil Service, subject to a minimum of Rs. 800/-".

71. The plaintiff's substantive pay as Civil Judge was Rs. 850/-. The stage in the junior scale of pay for I. C. S. officers above Rs. 850/- is Rs. 900/-. So the plaintiff's pay on 5-12-1938 was rightly fixed at Rs. 900/- p. m.

72. Allowance was made for the periods, for which the plaintiff had officiated as a Civil and Sessions Judge before 5-12-1938. It was then found that the plaintiff completed one year as an officiating Civil and Sessions Judge on 11-3-1939. According to Sub-clause (in) of Clause (b) of Rules (Ex. 14), an officer holding the post of a Sessions and Subordinate Judge was entitled to an increment on completion of one year's service. So the plaintiff was given an increment on 12-3-1939. His pay arose to Rs. 1100/- p. m., from 12-3-1940. The plaintiff has no grievance about the salary paid to him up to March 1940.

73. The plaintiff was promoted to the selection grade of Civil Judges with effect from the 10th of May, 1940. The plaintiff's contention is that, he was entitled to have his salary re-calculated in the light of his promotion to the selection grade of Civil Judges. In support of this contention he relied upon Sub-clause (ii) of Clause (b) of Rules Ex. 14. Sub-clause (ii) of Clause (b) runs thus:

"On any enhancement of his Provincial Civil Service pay (whether as a result of general revision of the Provincial Civil service rates of pay, or the operation of the Provincial Civil Service, time-scale or of promotion to the selection grade of that Service) while officiating in the inferior Indian Civil Service post of Sessions and Subordinate Judge, such an officer shall be entitled to have his pay on the Indian Civil Service scale re-calculated in accordance with the provisions of Sub-section (1) above on the basis of his enhanced pay in the Provincial Civil Service and with effect from the date of such enhancement."

"December 1938, the plaintiff was in the time-scale of Civil Judges. He was appointed to the selection grade of Civil Judges with effect from 10-5-1940. The time-scale of selection grade Civil Judges was Rs. 1,000/- 50-1,200. So the plaintiff's basic pay rose from Rs. 850/- to Rs. 1,000/-. The plaintiff was, therefore, entitled to have his officiating pay as Civil and Sessions Judge re-calculated as laid down in Sub-clause (ii) of Clause (b) of Rules Ex. 14.

74. But we find that such a re-calculation made no difference to the plaintiff's pay as officiating Civil and Sessions Judge, In accordance with Sub-clause (1) of Clause (b), the plaintiff's officiating pay was now to be fixed in the junior I. C. S., scale next above Rs. 1,000/- i. e. Rs. 1100 p. m. That was the pay he was actually getting since 12-3-1940. Thus the pay re-calculated in accordance with Sub-clause (ii) of Clause (b) of the Rules was the same as he was already getting.

75. The plaintiff's contention is that, the two increments in the scale of Civil and Sessions Judges that he had already earned should be tacked to the pay found upon re-calculation under Sub-clause (ii) of Clause (b) of Rules Ex. 14. The Rules

do not support this contention. Clause (b) of Rules Ex. 14 consists of four sub-clauses. Sub-clause (i) lays down the principle for fixing the pay at the first appointment as a Civil and Sessions Judge. Sub-clause (ii) provides for re-calculation when the basic pay is increased.

Sub-clause (iii) provides for increment for a full year's service. Sub-clause (iv) is not material "in the present case. There is nothing in these Rules to suggest that, the increments calculated under Sub-clause (iii) are to be added to the pay fixed upon re-calculation under Sub-clause (ii). We have seen that the salary payable to the plaintiff in May 1940 and subsequent months was Rs. 1,100/-, whether the salary was calculated under Sub-clause (ii) or under Sub-clause (iii) of Clause (b) of the Rules.

76. The plaintiff earned another increment "in the time-scale in March 1941. His pay was rightly fixed at Rs. 1,200/- from 12-3-1941. There was no mistake in calculating the plaintiff's pay as a Civil and Sessions Judge. The plaintiff continued as a Civil and Sessions Judge up to 23-12-1941. He was confirmed as a Civil and Sessions Judge on 1-7-1941. But that made no difference to his pay. The plaintiff was correctly paid up to 23-12-1941,

77. Now we have to consider the plaintiff's employment as officiating District and Sessions Judge from 24-12-1941 to 14-10-1942. Ex. A-19 is a copy of a Notification of Government of India dated 31-8-1924. Parties were agreed that the plaintiff's pay as a District Judge had to be calculated in accordance to the principle laid down in Ex. A-19. In Ex. A-19 it was laid down:

"The initial pay of an officer promoted from the Provincial Civil Service shall on each occasion of his promotion be fixed on the superior time-scale of pay for the Indian Civil Service at the lowest stage which exceeds by not less than Rs. 300/- a month the substantive pay last drawn by him in the regular line of the Provincial Civil Service or at the stage of the superior scale for the tenth year of service in the Indian Civil Service (Rs. 1,275/-), whichever is greater".

78. The defendant's case is that the plaintiff was paid in accordance with this principle. According to the defendants, the plaintiff's substantive post in the regular line was selection grade Civil Judge. The plaintiff was appointed a Civil Judge in the selection grade on 10-5-1940. He earned an increment on 10-5-1941. His basic salary was, therefore, Rs. 1,050/- with effect from 10-5-1941.

The salary to which the plaintiff was entitled as District Judge in December 1941 was Rs. 1050/- plus Rs. 300/- = Rs. 1,350/-. So the plaintiff's pay as officiating District and Sessions Judge was fixed at Rs. 1,350/-. The next increment in the basic pay fell due on 10-5-1942. So the plaintiff's pay as officiating District and Sessions Judge was raised from Rs. 1,350/- to Rs. 1,425/- from 10-5-1942.

79. The plaintiff's contention is that, he had been confirmed as a Civil and Sessions Judge in July 1941. So the substantive post held by him in December

1941 was of Civil and Sessions Judge, and not of Civil Judge in the selection grade. In order to decide which of the two rival contentions is correct, it is necessary to find out the substantive pay last drawn by the plaintiff in the regular line of the Provincial Civil Service immediately before 24-12-1941.

I have seen two different editions of a booklet containing (i) The United Provinces Civil Service (Judicial Branch) Recruitment Rules, 1940 hereinafter referred to as Recruitment Rules, 1940 and (ii) The United Provinces Civil Service (Judicial Branch) (Conditions of Service) Rules, 1942.

The first edition gives Rules corrected up to April, 1944. The second edition contains Rules corrected up to 31-5-1946. There is a slight difference in Clause 2 of the Recruitment Rules, 1940 as given in the two editions. Clause 2 of Recruitment Rules, 1940 deals with status of the Service. According to the 1944 Edition, Clause 2 ran thus :

"The United Provinces Civil Service (Judicial Branch) consists of Civil Judges and Munsifs and is a Provincial service."

There was no mention of Civil and Sessions Judges in Clause 2. According to the 1946 Edition, Clause 2 runs thus :

"The United Provinces Civil Service (Judicial Branch) consists of Civil and Sessions, Judges, Civil Judges and Munsifs and is a Provincial service."

The United Provinces Civil Service (Judicial Branch) (Conditions of Service) Rules, 1942 came into force on the 28th of February, 1942. Clause 2 of the said rules describes the scope of these Rules. Clause 2 runs thus :

"These Rules apply to the members of the United Provinces Civil Service (Judicial Branch) consisting of :

- (a) Civil and Sessions Judges,
- (b) Civil Judges, and
- (c) Munsifs."

It will be seen that, the 1942 Rules recognize Civil and Sessions Judges as Members of the U. P. Judicial Service. It appears that in the light of the 1942 Rules, Clause 2 of the Recruitment Rules, 1940 was amended, and Civil and Sessions Judges were inserted in Clause 2. Since Civil and Sessions Judges were not mentioned in Clause 2 of the Recruitment Rules, 1940 as given in the 1944 Edition, I take it that the amendment was made after April 1944.

We are concerned with the situation which existed in 1941 and 1942. So the amendment made in Clause 2 of the Recruitment Rules, 1940 after April 1944 may be ignored. As Clause 2 of Recruitment Rules, 1940 stood in 1941 and 1942, Civil and Sessions Judges were not treated as regular members of the U. P. Judicial Service. It may be that Recruitment Rules, 1940 do not in terms apply to an officer recruited in the year 1917.

But the Recruitment Rules, 1940 indicate that. Civil and Sessions Judges were not treated in May, 1940, as regular members of the U. P. Judicial Service. The position was altered when the U. P. Civil Service (Judicial Branch) (Conditions of Service) Rules, 1942 came into force. The 1942 Rules expressly recognized Civil and Sessions Judges as members of the U. P. Judicial Service.

The position, therefore, appears to be that, Civil and Sessions Judges were not in the, regular line of the U. P. Judicial Service up to 27-2-1942. With effect from 28-2-1942 Civil and Sessions fudges became officers in the regular lime of the U. P. Judicial Service. For purposes of calculation of pay, the plaintiffs tenure as District and Sessions Judge from 24-12-1941 to 14-10-1942 may be divided into the following periods :

- (i) From 24-12-1941 to 27-2-1942;
- (ii) From 28-2-1942 to 9-5-1942;
- (iii) From 10-5-1942 to 30-6-1942; and
- (iv) From 1-7-1942 to 14-10-1942.

His pay for each of the four periods may be calculated separately.

80. Period (i) : From 24-12-1941 to 27-2-1942. During this period the post of Civil and Sessions Judge was not recognized as an office is the regular line of the Provincial "Civil Service, So, although the plaintiff had been confirmed as a Civil and Sessions Judge, that was not an office in the regular line of the Provincial Civil Service, The substantive post in the regular line of the Provincial Civil Service was of Civil Judge in the selection grade. So his basic pay was rightly taken as Rs. 1,050/- in the time-scale of selection grade Civil Judges. His pay as officiating District and Sessions Judge was correctly fixed at Rs. 1,350/-per month in December 1941. There was no mistake in the salary paid to him from 24-12-1941 to 27-2-1942.

81. Period (ii) : From 28-2-1942 to 9-5-1942. From 28th February, 1942 the post of Civil and Sessions Judge was recognized as an office in the regular line of U. P. Judicial Service. So for purposes of Rules Ex. A-19, the substantive post held by the plaintiff on 28-2-1942 in the regular line of the Provincial Civil Service was of Civil and Sessions Judge. The pay had to be re-calculated under Clause (b) of Ex. A-19.

His substantive pay as Civil and Sessions Judge was Rs. 1,200/- p.m. A sum of Rs. 300/- had to be added to the plaintiffs substantive pay as Civil and Sessions Judge. So the plaintiff's correct pay as officiating District and Sessions Judge came to Rs. 1,500/- p.m. He was actually paid at the rate of Rs. 1,350/- p.m. He was under paid at the rate of 150/- p.m. The deficit payment during the period of two months and 10 days came to Rs. 350/-.

82. Period (iii): From- 10-5-1942 to 30-6-1942: During this period the plaintiff was paid at the rate of Rs. 1,425/- p.m. His correct pay was Rs. 1500/- p.m. He

was underpaid at the rate of Rs. 75 p.m. The deficit payment during the period of one month and 22 days comes to Rs. 125/-.

83. Period (iv) : From 1-7-1942 to 14-10-1942: On 1-7-1942 the plaintiff completed one year as a confirmed Civil and Sessions Judge. So his pay as Civil and Sessions Judge rose from Rs. 1,200/- to Rs. 1,300/-. So the plaintiff's pay as officiating District and Sessions Judge rose from Rs. 1500/- to Rs. 1600/- p.m. But he was paid at the rate of Rs. 1,425/- p.m. He was under-paid at the rate of Rs. 175/- p.m. The deficit payment during this period of three months and 14 days came to Rs. 605/-.

84. Thus, we find that as District and Sessions Judge the plaintiff" was underpaid to the extent of Rs. 1,080/- (Rs. 350/- plus Rs. 125 plus Rs. 605/-) in all.

85. I, therefore, hold that in the matter of his pay as District Judge, the plaintiff suffered to the extent of Rs. 1,080/-. The plaintiff did not suffer any loss in his pay as Civil and Sessions Judge, or in the matter of pension.

86. Issue No. 8 : The plaintiff examined one Hori Lal Verma on commission. Hori Lal's statement is to the effect that, services of a retired District and Sessions Judge were needed in certain quarters. But it was represented that the plaintiff had retired merely as an officiating District and Sessions Judge. So, he could not get those jobs.

87. The plaintiff's case is that, he was in fact permanent District and Sessions Judge, and the defendants wrongly described him as an officiating District and Sessions Judge. The point has been decided against the plaintiff under Issue No. 5. Since the defendants did not commit any mistake in this connection there is no question of any wrongful loss caused by the defendants. I hold that the plaintiff did not suffer any loss as mentioned in paragraphs 14 and 15 of the plaint. He is not entitled to any damages.

88. Issue No.-10 : Reliefs (a), (c) and (g) of the plaint relate to the plaintiff's contention about his status as a Civil and Sessions Judge and as District Judge. The contentions raised by the plaintiff have been found to be incorrect. Relief (b) relates to the claim for damages. He is not entitled to any damages.

Reliefs (d) and (e) relate to the pay which the plaintiff was entitled to receive as Civil and Sessions Judge. It has been found that he was properly paid as Civil and Sessions Judge. Relief (f) relates to arrears of pay as District Judge. It has been found that the plaintiff was underpaid to the extent of Rs. 1,080/-. Relief (h) relates to the withholding of the plaintiff's appeal to the Secretary of State for India.

The allegation contained in paragraph 15 of the plaint with reference to the withholding of the appeal has been struck off. Thus the only relief which the plaintiff is entitled to get is a decree for Rs. 1080/- on account of arrears of pay. The plaintiff's salary was payable by defendant No. 1. So the decree will be against defendant No. 1. The issue is decided accordingly.

89. In the result I would pass in plaintiffs favour a decree for a sum of Rs. 1,080/- against defendant No. 1. In other respects the plaintiffs claim fails. I would further direct the plaintiff to pay costs of defendant No. 2, and three-fourth of the costs of defendant No. 1. The plaintiff should bear his own costs.

M.C. Desai, J.

90. I agree with the findings of my learned brother and the final order proposed by him.

By The Court

91. We pass in plaintiffs favour a decree for a sum of Rs. 1080/- against defendant No 1. In other respects, the plaintiffs claim is dismissed. We direct the plaintiff to pay costs of defendant No. 2, and three-fourth of the costs of defendant No. 1. The plaintiff shall bear his own costs. We direct that the decree shall be satisfied within three months.