

(1953) 02 MP CK 0005

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Petition No. 22 of 1952

Dineshcharan Muzumdar

APPELLANT

Vs

The State of Madhya Bharat and Another

RESPONDENT

Date of Decision : 18-02-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 14, 16, 226
Gwalior State Civil Service Rules, 1991 — Rule 119, 139, 2, 3, 4

Citation : (1953) 02 MP CK 0005

Hon'ble Judges : Dixit, J; Chaturvedi, J

Bench : Division Bench

Advocate : A.N. Sinha, Dey, J.P. Gupta, Ram Ratan Gupta and P.L. Dubey, for the Appellant; K.A. Chitale, General, Mungre and Shivdayal, Government Advs., for the Respondent

Final Decision : Dismissed

Judgement

1. By this application under Article 226, Constitution of India, the Petitioner seeks from this Court an order or a writ in the nature of a writ of Mandamus directing the State of Madhya Bharat to pass a pension payment order in his favour.

2. The facts as stated in the petition, the return filed on behalf of the Government and the applicant's rejoinder thereto, and which give rise to the present proceedings are as follows:

3. The Petitioner entered the service of the former Gwalior State in 1910 as a ceramic engineer and worked in an institution known as Gwalior Potteries until 1919. In that year the management of the Gwalior Potteries was handed over to the Gwalior Trust Ltd., and the services of the Petitioner were lent by the Gwalior Durbar to the Trust. The Petitioner continued to work in the Potteries and on 17-9-1920, an agreement was executed between the Gwalior Trust Ltd., and the applicant as regards his employment as the General Manager of the Gwalior

Potteries Ltd. - a Joint Stock Company subsidiary to the Trust. The agreement inter alia proved that the Petitioner would be employed as the General Manager of the Potteries for a period of ten years beginning from 1-1-1920; that during the continuance of his employment he would get a salary of Rs. 600/- P.M. for the first year and with an annual increment of Rs. 50/- that he would draw for the fifth and every succeeding year, a maximum salary of Rs. 800/- per month; that he would, also be entitled to a commission at the rate of 25 per cent, of the net profits in any year arrived at after deducting dividend amount and the usual depreciation that during the continuance of the agreement the Trust would pay to the Gwalior State pension contribution on behalf of the applicant; and that the rules and regulations of Gwalior State Civil Service relating to furlough, leave of absence, sick leave, pick pay and termination of employment due to ill health would be binding on the parties to the agreement.

In 1928 the Gwalior Trust Ltd. was liquidated and the Gwalior Potteries Ltd., was taken over by the State and managed by the State as a separate entity under the name of Gwalior Potteries Ltd. By a resolution dated 26-3-1928 the Board of Directors of the Gwalior Potteries Ltd., continued the agreement of the Petitioner's employment with some modifications, which are not material here. In pursuance of an order dated 6-8-1929 of the Council of Regency the Gwalior Potteries Ltd. continued to pay to the State Pension Fund pension contribution on behalf of the applicant. On 1-7-1943 the Petitioner's salary was raised to Rs. 900/- P.M. and in the subsequent years it was raised to Rs. 1500/- P.M. In 1945 by a Durbar order dated 26-10-1945 the Gwalior Potteries Ltd., ceased to function as a limited liability concern and was placed on the footing of a State Commercial Concern. The Petitioner continued to work in Gwalior Potteries, now a State Commercial Concern, as the General Manager until 1-9-1949, when he was retired.

Thereafter the applicant made a claim on the State for the payment of pension due to him and also for the payment of his share in the profits under the agreement dated 17-9-1920. In reply to his representation with regard to these two claims, the Under Secretary Industries and Commerce Department wrote a letter on 26-1-1950 to the Petitioner telling him that his claim for a share in the profits and for a pension were inconsistent and that the pension claim would be considered only if he withdrew his claim with regard to the profits. The Petitioner was also told that the contract dated 17-9-1920 did not subsist as he had accepted a salary higher than that provided in the contract; that the Petitioner's refusal to hand over to his successor the processes and formulae evolved and used in the Gwalior Potteries constituted "an obstacle to the consideration of his pension case." By that letter the Petitioner was also asked to clarify certain matters. On 16-9-1950 the Petitioner acknowledged the letter dated 26-8-1950 of the Under Secretary and wrote back explaining at length how the two claims were consistent, and protesting against the delay in the consideration of his claims. In his reply the Petitioner also threatened legal action to enforce his claims.

On 14-5-1951 the Petitioner served on the Government a notice u/s 80, Code of Civil Procedure, as regards his claim for profits on the basis of the agreement dated 17-9-1920. On 16-7-1951 the applicant filed a suit in the Court of Additional District Judge Gwalior against the State of Madhya Bharat claiming his share of profits in respect of the years 1944 to 1949 to the extent of Rs. 2,07513-9-0. The claim in the suit which is still pending in the Court of the Additional District Judge Gwalior, is based on the agreement dated 17-9-1920. On 10-4-1952 the Petitioner served a notice on the Government in regard to his claim for a pension. (sic)rein he mentioned that if the Government failed to pass a pension payment order and pay him the pension amount due to him since the date of his retirement within 15 days of the receipt of the notice, he would move this Court for an appropriate writ. In reply to this notice the Deputy Secretary to Government by a letter dated 7-7-1952 drew the applicant's attention to the letter addressed to him on 26- 8-1950 and informed him that his claim for pension was inconsistent with his claim for a share in the profits on the basis of the contract dated 17-9-1920; that he could not simultaneously claim a pension as a Government servant as well as profits as a co-sharer; and that it would be possible for the Government to consider his claim for a pension if he withdrew the suit in respect of a share in the profits.

This reply having been received, the applicant presented this application on 15-7-1952. He says that by reason of his length of service and the amounts contributed on his behalf from time to time to the pension fund he is entitled under the Gwalior State Civil Service Rules Samvat 1991 to a monthly pension of Rs. 618-5-4. He asks for an order or a writ in the nature of a writ of mandamus directing the opponents to issue an order with regard to the payment of pension to him.

4. Mr. Sinha learned Counsel for the Petitioner contended that the Gwalior Civil Service Rules Samvat 1991 by which the Petitioner's case was governed was a statute; that under Rules 3 and 119 of the Civil Service Rules a civil servant of the former Gwalior State after thirty years' service could claim as of right a pension; that the applicant who was retired after a service extending over thirty years had thus acquired a statutory right to pension which could be enforced in a Civil Court of Justice. While conceding that the applicant held his office until the formation of Madhya Bharat during the pleasure of the Ruler of the Gwalior State and thereafter during the pleasure of the Rajpramukh, learned Counsel for the Petitioner said that this fact did not affect his right to pension and that as the matter of pension was covered by the statute, namely the Gwalior Civil Service Rules enacted by the Ruler of the former Gwalior State, it could not be said that the applicant's claim for pension was on the bounty of the sovereign power or that no pension could be claimed except as a matter of grace or that the applicant had no legally enforceable right in regard to pension. In support of this contention learned Counsel relied on - "Attorney General v. De. Keyser's Royal Hotel 1920 A.C. 508 (A) - "Wigg v. Attorney General for the Irish Free State 1927 A.C. 674 (B); - "Smyth v. The Queen 1898 A.C. 782 (C). It was further said

that the provision regarding payment of pension on retirement in the Gwalior State Civil Service Rules was manifestly intended for the protection and benefit of the retired officers and it imposed a public duty of a purely ministerial character on the State and that the State, was under an obligation to discharge the duty by passing a pension payment order for, the benefit of the applicant, and could not evade it. A reference was made in this connection to the observations of Lord Cairns in "Julius v. Lord Bishop of Oxford V(1880) A.C. 214 (D). Learned Counsel proceeded to argue that the Petitioner's claim for a share in the profits, which is not the subject matter of a suit, has no relation to the claim for pension; that whereas the right to pension is a statutory right arising under the Gwalior State Civil Service Rules, the claim for a share in the profits is based on a contract, which is binding on the State as the successor in business of Gwalior Potteries Ltd., and that the opponent State is, therefore, not justified in withholding the payment of pension of the Petitioner by saying that the two claims are incompatible with each other or that the pension amount cannot be determined unless and until the applicant's suit for a share in the profits is decided or withdrawn.

It was further submitted that the refusal of the State to pass a pension payment order on the ground that the Petitioner did not hand over to his successor certain formulae and processes and on the ground that the Petitioner during the period of his service with the Government worked as a Managing Director of the Gwalior Potteries Ltd., Delhi and received remuneration from that concern, was mala fide that the formulae and processes were the property of the Petitioner and the demand that they should be handed over to the successor had no basis in law and that the Petitioner's association with the Gwalior Potteries Ltd., Delhi was under an order of Gwalior Durbar which the Madhya Bharat Government at no time during the Petitioner's service cancelled. Learned Counsel also urged that the withholding of the pension payment and of the amount contributed from time to time by the Petitioner to the pension fund was an infringement of the Petitioner's fundamental right to property granted by the Constitution and was an act of confiscatory nature. Relying on - "Yick Wo v. Hopkins (1886) 118 U. S. 356 (E) learned Counsel argued that it was also discriminatory. Lastly it was said that the Petitioner was an old man of 70 years of age and if he were to file a suit to enforce his right to pension, it was doubtful whether in his life-time it would be finally decided; that, therefore the remedy of a suit was not a convenient, effectual and beneficial remedy in the present case and it was in the interest of justice that the Petitioner's right to pension, which was a question of considerable public importance should be decided by this Court in these proceedings.

5. On behalf of the State the learned Advocate General did not dispute that the Petitioner was entitled to a pension as a public servant. He, however, contended that the applicant had no right in law enabling him to bring this petition for enforcing his pension claim. It was said that the applicant like all other public servants of the State held his position during the pleasure of the head of the

State and that consequently payment of pension to a public servant was not a matter of legal right vesting in a public servant but was an act of grace of State policy on the part of the ruling power. This right of the State to pay pension at pleasure could not be derogated from by any rules framed by the Government as to the circumstances in which a pension could be earned by a Civil Servant; that the only manner in which this overriding right of the head of the State could be limited or modified was by a statute.

It was further urged that the Gwalior Civil Service Rules had no statutory force; they were not rules framed under any statute; nor were they rules framed by the Ruler of the former Gwalior State. The rules were merely administrative rules for the guidance of the officers, of the Government laying down the conditions, the circumstances, the manner and the method in which a pension could be earned, computed and paid to a Civil Servant. The learned Advocate-General proceeded to say that the Civil Service Rules did not confer any statutory right on a civil servant in regard to pension, that they were based on the principle of pension being a exgratia payment made to a public servant for maintaining the dignity of his office or to assure the due discharge of his duties. It was pointed out by the learned Advocate-General that under Rules 2 and 3 of the Gwalior Civil Service Rules the Government reserved to itself the right of changing the rules from time to time,, at its discretion and of interpreting their meaning in case of a dispute and that a Government servant's claim to pension was regulated by the Rules in force at the time of his retirement and not by the rules in force at the time of his entry in the service; that under Rule 92 future good conduct was made an implied condition to every grant of a pension and the Government reserved to itself the right of withholding or withdrawing pension or any part of it, if the pensioner was convicted of serious crime or found guilty of grave misconduct; that under Rule 139 pensions were exempted from attachment. It was said that these provisions showed that the payment of pension to a civil servant was entirely within the discretion of the Government and that a claim in regard to pension was not a claim in respect of a contractual debt which could be asserted in the law Courts; that the Civil Service Rules gave to the applicant no more than a right, to put forward his claim before the Government in respect of a pension and to receive such pension as the Government might award to him and that if the applicant thought that his pension was being withheld unjustly and contrary to the Civil Service Rules, he was not entitled to come to this; Court; his remedy was by an appeal of a financial or political kind to the Administrative Authorities. For this purpose reference was made to the cases of - AIR 1937 27 (Privy Council) - AIR 1937 31 (Privy Council) ; - AIR 1948 121 (Privy Council) and - "Lilawati Mutatkar v. State of Madhya Bharat AIR 1952 MP 105 (I). Learned Advocate-General sought to distinguish the cases reported in 1927 A.C. 674 (B)" and - 1898 A.C. 782 (C)" relied upon by the Petitioner by saying that those cases dealt with statutes conferring a right of pension and laid down that where there was a statutory right to pension, an aggrieved public servant to whom no pension has been paid could enforce his right in a Court of law; that those cases

were not authorities for the proposition that apart from a statutory right an action would lie.

6. In reply to the contention advanced on behalf of the Petitioner that the withholding of pension and of the pension contribution amount from him was an act of confiscation and discriminatory nature the learned Advocate-General said that the pension contribution amount was not in any sense, a part of the remuneration paid to public servant, that (SIC) Petitioner could not claim the refund of the amount; that as there was no refusal on the part of Government to pay a pension to the Petitioner but only delayed action there was no confiscation or infringement of the Petitioner's right to pension; that as the Petitioner was not challenging the validity of any law but only complaining against Government's inaction in passing a pension payment order under the Civil Service Rules, the Petitioner could not seek protection under Article 14 of the Constitution, which applied to laws and not to administrative acts or omissions alleged to be contrary to any law. As to the case of - (1886) 118 U.S. 356 (E)" cited by the learned Counsel for the applicant, the learned Advocate-General stated that it did not support the contention of the applicant that a specific mala fide action of an officer could be challenged by a petition in support of the fundamental right guaranteed under Article 14, that it only illustrated the case of a statute, which may be valid on its face and yet in its actual administration be so arbitrary, unequal and unfair as to be unconstitutional.

7. The relief asked for by the Petitioner was stoutly opposed by the learned Advocate-General also on the ground that in the present case there was no refusal on the part of Government to grant a pension to the applicant but only a delay in passing an appropriate order; that the delay had been occasioned by the Petitioner himself who put forward inconsistent claims as regards pension as well as a share in the profits; and that the delay was now inevitable because the Petitioner had filed a suit for enforcing his claim as regards a share in the profits. It is further submitted by the Advocate-General that in the Civil Suit the applicant has claimed on the basis of the contract dated 17-9-1920 which was to be in force for a period of ten years a share in the profits earned by the concern right upto the date of his retirement and that if in that suit it is held that the contract subsisted even after the expiry of the ten years and when the Gwalior Potteries became a purely government concern, and was binding on the Government and that the Petitioner's employment right upto the date of his retirement was governed by that contract, then the question would arise whether in view of the provisions of Rule 4 of the Civil Service Rules, which excludes from the purview of the rules a civil servant with whom there was a covenant as regards salary, leave, pension, allowance, the applicant is at all entitled to any pension under the Civil Service Rules; and that even assuming that the Petitioner would be entitled to a pension in addition to profits, a further question that would arise for consideration would be whether the pension should be computed on the basis of the salary permissible under the contract or on the basis of the higher salary actually drawn by the Petitioner. It was said that in these circumstances if

we were to ignore the contract which is now the subject-matter of a suit, take the view that the Petitioner was entitled to pension and to mandamus, the State to pass a pension payment order, and if the Civil Court were to take the view referred to above as to the operation of the contract, there would be a conflict of decisions. It was urged that an order in the nature of mandamus should not be issued when there (SIC) willingness on the part of the Government to pay a pension to the applicant, and when the Petitioner's act of filing a suit claiming a share in the profits has rendered a prompt performance of the duty sought to be enforced difficult of performance for the time being, and when this Court's command is likely to be rendered nugatory by a decision of the Civil Court in the applicant's suit. It was finally urged on behalf of the State that even assuming that the Petitioner has a legally enforceable right as regards pension yet according to the rule which has always been acted upon in this Court an order or writ in the nature of mandamus should not be made in respect of the claim because the applicant has another convenient and sufficient remedy. It was said that except stating that he was an old man and that the question whether under the Gwalior Civil Service Rules a public servant has statutory right to pension was a question of public importance, the Petitioner had made no attempt whatsoever to show how the remedy of a suit was not equally specific, effectual and convenient.

8. On giving the matter my anxious and careful consideration, I have formed the view that this is not a case in which an order or a writ in the nature of mandamus ought to be issued from this Court. There is no doubt that where a party, who has a legal right to the performance of a legal duty by another party, has no other specific remedy, this Court will assist him by issuing under Article 226 an order in the nature of mandamus in order to his obtaining such right. But the Court will not assist him unless he first shows that he has a clear and undisputable right and that justice cannot be done to him without a writ of mandamus being issued. The object of Article 226 being the enforcement of fundamental rights and other statutory rights and not the establishment of a legal right, the right of a Petitioner to the performance of a statutable duty must be clear and complete. In the case of - *The State of Orissa Vs. Madan Gopal Rungta*, , their Lordships of the Supreme Court stressed the point that the existence of a legal right was the foundation of the exercise of the jurisdiction under Article 226. and observed that if the High Court found itself unable to decide on the rights of the parties and thought they could be investigated more properly in a Civil suit, no direction under that Article 226 of the Constitution could be issued. It was also pointed out in that case that ordinarily the power under Article 226 should not be exercised by the High Court if the Petitioner has other convenient or adequate remedy. Following that decision it was held by this Court in - *AIR 1952 MP. 105 (I)*" that the burden lay on the applicant asking this Court to exercise the jurisdiction under Article 226 to show that he had no other specific and adequate legal remedy and that the power under Article 226 would not be exercised if the Petitioner's right depended on facts which were disputed

and on the legal effect of facts to be proved.

In the earlier case of - "Harendranath Sharma v. The State AIR 1950 MP. 46 (K) which was affirmed in - "Dayabhai v. Regional Transport Authority AIR 1951 MP. 121 (L) by making the observation that the object of Article 226 in giving to the High Court the discretionary jurisdiction to issue certain directions or writs or orders was to secure the protection of the rights of the public and to amplify justice and redress grievances in any matter which the ordinary course of law was defective to reach, I attempted to make it amply clear that the remedy under Article 226 was intended to supply defects of justice and to the end that justice may be done and was not intended to supersede the ordinary remedies of law.

The rule governing the discretion of the Court in the matter of an issue of writ of mandamus has been stated clearly by Brett, M.R. in - "The Queen v. Commissioners of Inland Revenue (1884) 12 Q.B.D. 461 (M). Explaining the observation of Lord Mansfield in - "Rex v. Bank of England (1790) 2 Dou 524 (N) that "when there is no specific remedy the Court will grant a mandamus that justice may be done", he said that the construction of that sentence was that where there was no specific remedy and by reason of the want of that specific remedy justice could not be done unless a mandamus was to go, then a mandamus would go. The principle that it is incumbent upon the party applying for a writ of mandamus to show that he has a clear legal right has also been laid down in a number of American decisions. In Corpus Juris Vol. 38 (1925 Edition) it is stated at page 582 that:

Since the purpose of a writ of mandamus is not to establish a legal right but to enforce one which has already been established, the legal right of Plaintiff or relater to the performance of the particular act of which performance is sought to be completed must be clear and complete. Indeed it has been said, and with good reason, that the right to its performance must be so clear as not to admit of reasonable doubt of controversy.

Again at page 585 of the same volume it has been observed that:

Mandamus will not issue to enforce a right which is in substantial dispute, or which is inchoate or prospective, or as to which a substantial doubt exists although objections raising mere technical questions will be disregarded if the right is clear and the case meritorious. Likewise mandamus will not issue to enforce a right which is contingent upon the further act of a third person or tribunal. However, it has been held that the rule that mandamus will not lie to enforce a doubtful right does not apply where the doubt is one arising upon the mere construction of a Statute or judicial order, or a legal doubt as to the effect or meaning of a record.

On these well settled principles, the question which arises and which we have to determine first is whether the Petitioner has succeeded in showing that he has a clear and indisputable right "to pension. The Petitioner founds his claim mainly

on the Gwalior State Civil Service Rules Samvat 1991 and says that these rules, which have a statutory force, confer on him a statutory right to get a pension and impose a statutory duty on the opponent to pay him pension. In the absence of any attempt on the part of the learned Counsel for the Petitioner to show by reference to the law and custom of the former Gwalior State that the right in the Gwalior Government to make these rules was given by a law enacted by the Ruler of the Gwalior State or existed without the necessity of any such enactment, it is difficult to see how the Civil Service Rules issued neither under a statute, nor by the Ruler of the former Gwalior State and having, the characteristics pointed out by the learned Advocate-General, can be regarded as having the force of a statute. The fact that the rules use these words "Haq" (right) and "isthaqaq" (rights) in relation to pension is not, I think, sufficient to, constitute the rules a statute or the claim of a public servant to receive a pension an enforceable right. The cases reported in (1927) A.C. 674 (B) and (1898) A.C. 782 (C) and cited by the learned Counsel for the applicant would apply only when it is held that the Civil Service Rules confer on the applicant a statutory right in the matter of pension. Otherwise the payment of pension to the applicant would be an ex gratia act on the part of the Government and would fall within the rule laid down in the case of - AIR 1948 121 (Privy Council) "in which following the observations of Lord Blackburn in - "Mulvenna v. Lords Commissioners of the Admiralty 1926 S.C. 842 (O) the Privy Council held that the payment of arrears of salary to a public servant was entirely on the bounty of the Crown i.e. the head of the State The same rule applies to pensions. I say so much upon this point and no more because of the objection, which has been raised by the learned Advocate-General and which I think must prevail, that if the Petitioner thinks that he has a statutory right to pension enforceable against the State in a Court of law, he has the remedy of a suit and that the Government though willing to pass an appropriate order as regards the pension due to the applicant, is now unable to do so till the applicant's suit for profits is decided.

9. It is not disputed that the Petitioner entered the service of Gwalior State in 1909; that in 1920 his services were lent to the Gwalior Trust Ltd., and an agreement was executed between him and the Trust as regards the terms of his employment. It is also clear that on the dissolution of the Trust the Gwalior Potteries though functioning as a limited liability concern was practically a State concern and that in any case it was so after 26-10-45 when the limited liability concern went in liquidation under a Durbar order, and during all these years the applicant continued to work with the Potteries. It is also not in dispute that on the basis of the agreement dated 17-9-1920 which provided that it was to be operative for a period of ten years and which governed the terms of the Petitioner's lent services with the trust, the applicant has filed a suit claiming a share in the profits of the concern from 1944 to the date of his retirement in 1949. The foundation of the Petitioner's claim in the civil suit is that the agreement dated 17-9-1920 between him and the Gwalior Trust Limited

remained in force right upto the time of his retirement in 1949; that on the dissolution of the Trust it became binding on the Gwalior Potteries Ltd., and that on the Gwalior Potteries Ltd., becoming a purely State Concern, in 1946 the Gwalior Government became bound by that agreement; and that, therefore, the Madhya Bharat Government as the successor Government was liable to pay his share of profits under the agreement. From the record of the civil suit it appears that the fact of applicant's retirement on 1-9-1949 is not in (SIC)pute. But an issue has been framed as to whether on this date the applicant retired from the service of the Gwalior Potteries and from the post of the General Manager of the concern. The question as to whether the agreement dated 17-9-1920 remained in force after the expiry of the period of ten years stipulated in the contract is also in issue. There is also a general issue as to the liability of the State to pay to the applicant any profits. The question whether the applicant having accepted a salary higher than that provided in the contract and having worked for another concern during his employment with the Gwalior Potteries contrary to the contract is entitled to the benefit of the contract is also the subject-matter of an issue in the suit. In the written statement the Government have taken the plea that the applicant's claim for profits is inconsistent with his claim for pension. But no issue seems to have been framed as regards this plea.

10. The capacity in which and the service from which the Petitioner retired is itself thus in dispute in the suit. If it is held in the civil suit that the agreement dated 17-9-1920 after the expiry of its term was not binding on the Gwalior Potteries Ltd., and on the Gwalior Government when the Potteries became a State concern, then the nature, terms and conditions of the Petitioner's service from 1909 to 1949 and his claim for pension would be easy of determination. If, on the other hand, the civil Court accepts the applicant's case in the suit and in effect holds that the Petitioner's employment with the Potteries even when it became a purely State concern and right up to the date of his retirement was covered by the agreement, then I think, it could with considerable degree of force be contended, as the learned Advocate-General did, that by reason of Rule 4 of the Civil Service Rules the Petitioner was not entitled to the benefit of pension under the rules and that even if he was entitled it would be on the basis of the contractual salary and not on the basis of the higher salary, actually drawn by him. In answer to the contention of the learned Advocate-General that the applicant's claim to pension was now dependent on the result of" the suit, learned Counsel for the Petitioner attempted to put in an attractive way the case of the Petitioner on the point by saying that the Petitioner's right to pension from State, being qua State was distinct and independent from his claim to profits from the State as successor in business of the Gwalior Potteries Ltd., and that the opponent State in asking the Petitioner in their letters to withdraw his claim for profits before his claim for pension could be considered was trying to avoid a decision by a Court of law on the merits of the Petitioner's claim for profits and was adopting an unwarranted and unjustified attitude.

In fairness to the learned Advocate-General it must be stated that he candidly

admitted that the tone of letters dated 26-8-1950 and 7-2-1952 addressed by the Government to the Petitioner smacked of brow-beating. But he said, however unfortunate the language of the letters was, all that was intended by the Government was to impress on the Petitioner the fact that it was not possible for the Government to consider his pension claim so long as his suit for profits was not decided. I am myself inclined to think that the Government's (sic) of view could have been brought home to the applicant without the use of minatory language. However, to revert to the reply of the applicant's learned Counsel, here again, I think, as the applicant is claiming in the suit a share in the profits also of the years 1946 to 1940 that is of a period not covered by that stated in the agreement and during which the Potteries was run purely as a State concern, the question whether the Petitioner was seeking to make the Government liable for his claim in respect of profits as a Government or as a successor in business of the Gwalior Potteries Ltd., is a part of the very issue as regards Government's liability to pay to the Petitioner profits, into which the civil Court has to enquire. To a question put by the Bench counsel for the applicant was unable to clarify the basis on which the applicant was claiming a share in the profits of the years 1946 to 1949.

11. It is thus plain that the right which the applicant is seeking to enforce in this petition does not depend merely on an interpretation and construction of the Civil Service Rules. It substantially rests upon certain doubtful facts which are now under adjudication in the civil suit and on a controversial legal effect of the facts which may be held to be proved in that suit. Until that suit is determined, it is difficult to say whether the Petitioner is entitled to any pension and if he is entitled on what salary basis and at what rate he is entitled to a pension. In these circumstances there can be no question of issuing an order or a writ to compel the opponent to pass a pension payment order, which act, as the learned Advocate- General says, Government is willing to perform, but which has for the time being become difficult of performance by reason of the applicant's civil suit for profits. Again in the circumstances stated above to issue an order in the nature of mandamus directing the Government to pass a pension payment order, would be to use the words of Bowen L.J. in (1884) 12 Q B D 461 (M)" "to create a defect of justice" and "not to supply a defect of justice". Because it would amount to a determination of matters which are in substantial litigation in the applicant's suit for profits.

12. There is a further consideration which leads me to the conclusion that the relief asked for by the Petitioner cannot be granted. Assuming in favour of the applicant what I do not myself think for the moment is established, that the Petitioner has a statutory right to pension under the Gwalior Civil Service Rules and the Government is under a statutory obligation to pay him a pension, then the Petitioner has the remedy of a suit to enforce his right. From the cases I have already referred to, it will be apparent that a heavy onus is thrown on the applicant to show that the remedy or a suit is not convenient, beneficial or effectual and one by which justice could be satisfactorily obtained by him. The

question which arises is whether he has discharged that onus. We were pressed by counsel for the applicant on the authority of - Prabhavati Devi Vs. District Magistrate and Another, and - Buddhu Vs. Municipal Board and Others, to hold that the remedy of a suit was really no remedy at all to meet the grievance of the Petitioner on the ground that the applicant is an old man and that the case raises a question of public importance. I do not think much assistance can be derived from these cases (sic) determining whether the remedy of a suit is in the present case an adequate or an inadequate remedy. For, after all the question whether an alternative specific remedy is or is not equally convenient, beneficial and effective has to be considered on the facts and circumstances of each case.

In the Allahabad case the learned Judges of the Allahabad High Court thought it fit to direct under Article 226, the District Magistrate not to give effect to an order passed by him requisitioning a newly constructed house because the Petitioner in that case had built the house with a view to live in it and pass her old age and widowhood in piety in the holy city of Allahabad and because no alternative suitable accommodation had been provided to her. The other case which dealt with the validity of a municipal bye-law prohibiting slaughter of cows, bulls etc. is also similarly distinguishable on facts. No such considerations as those which existed in the cases cited by the learned Counsel for the applicant are present here to impel us to treat this matter of pension as one of urgency. The Petitioner is no doubt an old man. That, of itself, is not a decisive reason for exercising our jurisdiction under Article 226 when the Petitioner does not allege that an early payment of the pension due to him is so vital to him that without it he cannot live and maintain his family. I do not agree that this case raises a question of public importance requiring an early decision from this Court. The question whether the Gwalior Civil Service Rules confer a statutory right in respect of pension is no doubt of some importance to public servants who have earned pensions under the Rules and to whom pension has been denied. But this does not make a speedy decision on that, question a matter of urgency. For whatever justification there may be in the allegation that officers responsible for passing pension payment orders are generally inclined to make difficulties and perhaps be contumelious and hostile, and delay the making of an order, one is yet fortunately able to say that cases of capricious and arbitrary denial of pensions are very rare indeed.

13. In view of what I have said above, it is really unnecessary to consider the argument put forward on behalf of the applicant that the opponent's act in withholding pensions and the amount of pension contribution from the applicant is an act of confiscatory and discriminatory nature. But I think it is right to say that the argument is based on the assumptions that the Petitioner has a statutory right to pension and that the opponent has infringed that right. As I have indicated above the applicant has not been able to show conclusively that the Gwalior Civil Service Rules under which he claims a pension is a statute. During the course of his argument counsel for the applicant suggested that Article XVI of the Covenant creating the United State of Madhya Bharat

guaranteed the payment and continuance of pensions and that, therefore, the right to pension was a statutory right. As to this it is sufficient to say that Clause (i) of that Article guaranteed the continuance in service or the payment of reasonable compensation to the permanent members of the public service of each of the Covenanting States. The Article did not confer on the Civil Servants retiring after the formation of that Madhya Bharat an enforceable right to pension. That Article taken by itself is not enforceable by an individual in the Courts for the reason that the Covenant has not been made a part of law of the State by any enactment. Again there has been no refusal to pay a pension to the applicant; and it seems to me quite impossible to suggest that pension contributions made by an employer on behalf of a servant whose services have been borrowed by him, are a part of the salary and that, therefore, on retirement a public servant is entitled to receive the amount so contributed by his employer. The Petitioner cannot really challenge the omission, according to him, on the part of the Government to pass, under, the Gwalior Civil Service Rules a pension payment order as contravening Article 14 of, the Constitution of India. This article as enacted applies to laws and not, to administrative, acts, or omissions said to be contrary to any law. If any authority is needed for this proposition I refer to the case of - Dhanraj Mills Ltd. Vs. B.K. Kocher and Another, . In that case the learned Judges of the Bombay High Court after distinguishing the decisions in (1886) 118 U S 356 (E)", made the following observations with which I am in respectful agreement. They said:

Now a clear distinction must be borne in mind between the law and the administration of the law. If the law itself permits discrimination even though the law may appear to be fair and undiscriminatory, the Court may interfere and say we are more concerned with how the law actually works rather than how it appears in black and white in the statute book. One may even have a case where in exercising the discretion vested in officers under the statute the State may as a policy of administration, require its officers to exercise the discretion unfairly and unequally. We can imagine that even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the state of discrimination. But to our mind the position is different when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of Article 14. The officer in acting contrary to Article 14 is really acting contrary to the law and not in conformity with or in consonance with the law. When the law invests an officer with a discretion, the law assumes that the officer will exercise the discretion bona fide and not dishonestly, arbitrarily or capriciously, and if he exercises the discretion dishonestly, arbitrarily or capriciously, he is really going contrary to the law. In such a case the subject comes to Court not for protection under Article 14, but for protection against the dishonest, arbitrary or capricious act of the officer. The Court is not powerless to give the subject protection against a dishonest officer, but that . protection cannot be sought under Article 14 or under Article 226.

14. For all these reasons in my judgment, this application fails and must be dismissed. As we have not considered, this application on the merits, the points raised by the applicant are entirely at large and the civil Court before whom the applicant's suit for profits is pending need not itself feel bound by the opinion expressed by us in this order.

15. The consequence is that this application fails and is dismissed. In the circumstances (sic) the case there will be no order as to costs of this application.