CIVIL WRIT

Before Kapur and Soni, JJ.

SHRI NAUBAT RAI,—*Petitioner*

versus

(1) UNION OF INDIA, (2) DIRECTOR OF REMOUNT, VETERINARY AND FARMS ARMY HEAD QUARTERS,—*Respondents.*

Civil Writ No. 279 of 1951.

1952

September 15th

Constitution of India—Articles 226 and 300—Scope of—Circumstances when power under Article 226 not to be exercised stated—Specific Relief Act (I of 1877)—Sections 45 and 46—Principles underlying—Whether applicable to petitions for writs under Article 226—Article 226 whether subject to Article 300—Right and privilege—Distinction between—Government servant—Whether entitled to ask for enquiry when notice to show cause against dismissal served—Rules framed by Government—Failure to observe those rules, whether gives right of action—Another remedy open, whether bar to the issue of writ—Declaratory relief, whether can be granted under Article 226—Mandamus—Demand for performance and refusal—Whether condition precedent—Facts in dispute in a petition under Article 226 —Whether High Court will determine—Improper dismissal —Remedy of aggrieved employee.

The petitioner was in the service of the Military Farms Department of the Government of India for about 20 years and was due to retire in July 1952. He had been granted the privilege of gazetted status with effect from 8th August 1945. On certain allegations made against him the Sub-Area Commander constituted a Court of Enquiry and on its report suspended the petitioner. Subsequently on his representation the order of suspension was set aside and some time later he was given a charge sheet to which the petitioner submitted his defence. In June 1950 the petitioner was asked if he wished to further cross-examine any witnesses. In reply to this communication the petitioner sent a written statement and stated that he did not wish to cross-examine any witness. In September 1951 he was served with a notice to show cause why he should not be removed from service. The petitioner submitted his explanation but he was dismissed from service with effect from 24th November 1951. The petitioner filed a petition under Articles 226 and 227 of the Constitution of India for an order that the petitioner be not removed from service as the order of removal was void and of no legal effect. It was pleaded, *inter alia*, that the petitioner being a gazetted officer could only be removed from service by the Central Government and not by the Director of Military Farms,

the petitioner had not been given adequate opportunity to show cause against his removal from service and as there was no definite finding given by the Court of Enquiry as to the offence committed by the petitioner, no disciplinary action should have been taken and for this purpose he relied on rule 212(2) of the Army Instructions (India).

In reply to the petition the Union of India urged that the petitioner was not a gazetted officer, that he was given adequate opportunity to show cause against his removal from service and that in any event it was not a fit case for the exercise of the extraordinary and supervisory jurisdiction under Article 226 of the Constitution of India because—

(i) there is an equally efficacious remedy by way of suit;

(ii) no declaration can be given under Article 226 of the Constitution;

(iii) Article 226 is subject to the provisions of Article 300; and

(iv) when facts are disputed, no writ can issue under Article 226.

Held—(1) that there is a distinction between the word 'right' and the word 'privilege' and the mere fact that a person is granted the privilege of gazetted status does not make him a gazetted officer and does not entitle him to all the privileges and rights of gazetted officer.

(2) that if there had been an enquiry it would be unreasonable that the civil servant should ask for repetition of that stage at the time when he is asked to show cause against his dismissal. All that he is entitled to at that stage, is to represent against the punishment proposed.

I. M. Lall's case (1), relied on; *Ravi Pratab Narain Singh* v. *The State of Uttar Pradesh* (2), *Avadhesh Pratap Singh* v. *State of Uttar Pradesh* (3), *Board of Education* v. *Rice (4), Local Government Board* v. *Arlidge (5)*, distinguished.

(3) that even if there has been any transgression of Rule 212 of the Army Instructions (India) that cannot be a ground for interference by the High Court as there is no contract between the Government and its employee that the rules are to be observed. The dismissal of a Civil Servant in utter disregard of the procedure prescribed by the rules will not give a right of action for wrongful dismissal.

Venkata Rao v. *Secretary of State for India* (6) and *Shenton* v. *Smith* (7), relied on.

(1) 75 I.A. 225
(2) A.I.R. 1952 All. 99
(3) A.I.R. 1952 All. 63
(4) (1911) A C. 179
(5) (1915) A.C. 120
(6) I.L.R. 1937 Mad. 532 (P.C.)
(7) (1895) A.C. 229

(4) that there was in this case open to the petitioner a right of appeal under the Civil Service Rules and he had an equally efficacious remedy to enforce his rights by a suit and therefore the remedy by way of writ is not open to him.

The Queen v. *Charity Commissioners for England and Wales* (1), *Re Elverton R. Chapman* (2), Halsbury's Laws of England, Hailsham Edition, 9th Volume, Page 773-774 and Ferris on Extraordinary Legal Remedies, page 245, relied on; *Rashid Ahmad* v. *The Municipal Board Kairana* (3), distinguished.

(5) that no relief can be given which will be in the nature of a declaration. No doubt, the powers of the High Court are wide enough to frame its orders to suit a particular case but still they cannot be of the nature which would be given in a declaratory suit.

Charanjit Lal Chowdhri v. *The Union of India* (4), relied on; *Brijnandan Sharma* v. *State of Bihar* (5), not followed.

(6) that the petitioner has not been able to bring his case within the principles underlying section 45 of the Specific Relief Act which are the principles which govern the issue of a writ of mandamus under Article 226.

The Jupiter General Insurance Company, Ltd. v. *Rajagopalan* (6) and *Union of India* v. *Elbridge Weston* (7), relied on.

(7) that a demand for performance must precede an application for a writ of mandamus and the affidavit accompanying the petition must state the petitioner's right in the matter in question, his demand of justice and the denial thereof as is required by section 46 of the Specific Relief Act. *Sheoshankar* v. *State Government of Madhya Pradesh* (8), distinguished.

(8) that the High Court will not turn itself into a court of original jurisdiction while exercising its supervisory powers under Article 226 and proceed to enquire into the various issues which arise from the pleadings of the parties.

King v. *Bloomsbury Income-tax Commissioners* (9) and *King* v. *Swansea Income-tax Commissioners* (10), relied on.

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(1) (1897) 1 Q.B. 407
(2) 156 U.S. 211 at p. 218
(3) 1950 S.C.R. 566
(4) 1950 S.C.R. 869 at p. 900
(5) I.L.R. 29 Pat. 461
(6) A.I.R. 1952 Punjab 9 at p. 30
(7) 20 I.T.R. 400 at p. 403
(8) A.I.R. 1951 Nag. 58
(9) (1915) 3 K.B. 768 at p. 798
(10) (1925) 2 K.B. 250 at p. 256

(9) that Article 226 is not subject to the provisions of Article 300 as Article 226 gives to the Court the power to issue to any person or authority including, in appropriate cases, any Government, directions, orders or writs etc.

Province of Bombay v. *Khushal Dass* (1), held not applicable.

(10) that no employer can be compelled to retain an employee in service. For improper dismissal the aggrieved employee's remedy appears to be a suit for damages. Before a writ of mandamus can issue, it should be possible to hold in the words of clause (b) of section 45 of the Specific Relief Act that "the doing or forbearing is, under any law for the time being in force, clearly incumbent" on the person against whom the mandamus is to issue. The phrase "clearly incumbent" is not equivalent to "incumbent". The word "clearly" has to be given its natural meaning. If given that meaning it comes to this that before this court issues a mandamus it must hold imperatively that Government must keep the petitioner in its employ.

Petition under Articles 226 and 227 of the Constitution of India, praying as under :—

(a) *That this Hon'ble Court may be pleased to hold that the proceedings against the petitioner ending with his removal were contrary to law and in violation of the petitioner's constitutional rights*;

(b) *That this Hon'ble Court in the exercise of powers granted under Articles 226 and 227 of the Constitution of India, may be pleased to direct that as the order of removal of the petitioner is void and of no legal effect, the petitioner be not removed from service*;

(c) *That pending the final disposal of this petition, this Hon'ble Court may be pleased to pass an* ad interim *order restraining the respondents from removing the petitioner with effect from 24th November 1951; and*

(d) *This Hon'ble Court may be pleased to pass such other orders or give directions either in addition or in the alternative, as it may deem expedient in the circumstances of the case.*

TEK CHAND, RAM PARSHAD and A. C. HOSHIARPURI, for Petitioner.

S. M. SIKRI, Advocate-General, for Respondent.

(1) A.I.R. 1950 S.C. 222, p. 235

ORDER.

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KAPUR, J. This is a rule obtained by Naubat Rai, who was at one time the Manager of the Military Dairy Farm in Ambala Cantonment and previous to that at Bangalore at all relevant times praying for an appropriate writ to issue against the order of his removal from service passed on the 17th or 19th of November 1951. The petition was originally filed on the 22nd November 1951, which was supported by an affidavit and a supplementary petition was filed on the 22nd April 1952, which gives some additional facts and grounds.

The petitioner alleges that he was in the service of the Military Farms Department of the Government of India for about 29 years and was due to retire in July 1952—One of the annexures attached to the petition shows that he has chosen the new pension rules—that he had been granted a gazetted status as from the 8th August 1945 (*vide* annexure A), that on the 5th September 1949 an enquiry was instituted against him at the instance of one Jamadar Kishan Singh who complained that the petitioner was using a car belonging to a military contractor and that Cleaner Yaqub put in four gallons of petrol belonging to the military in this car which was standing in the compound of the petitioner. Thereupon it is alleged a Court of Enquiry was constituted by the Sub-Area Commander, Bangalore, who recorded statements of witnesses behind the back of the petitioner on the 8th September 1949, that the Court of Enquiry gave its finding on the 12th September 1949, which is Annexure C/1, that on the next day, i.e., 13th September, the Sub Area Commander suspended the petitioner but subsequently on his representation this order of suspension was set aside on the 17th September 1949, that on the 9th November 1949, a charge sheet was sent to the petitioner to which he was to submit his defence before the 16th November, the charge sheets being Annexures G and H, but no statement of the allegations on which the charges were framed was sent to him as required by Army

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Instructions, India, No. 212 of 1949. On the 19th November 1949, the petitioner submitted his statement which is Annexure I. Continuing it is alleged that on the 20th of June 1950, the Assistant Director of Military Farms sent a communication to the petitioner asking him if he wished to further cross-examine any witnesses and this is Annexure J. In reply to this a written statement, dated the 31st July 1950, was sent and this is Annexure K. A letter, dated the 25th September 1951, Annexure L, was sent to the petitioner along with Annexure M, dated the 21st September 1951, calling upon him to show cause why he should not be removed from service. To this an explanation, dated the 7th October 1951, Annexure N, was sent and he was finally removed by an order, which is Annexure O, dated the 17th/19th November 1951, removing the petitioner from service with effect from the 24th November 1951. The petitioner attacks the legality of this order which he submits is opposed to the mandatory rules of procedure on the ground that the provisions of Article 311 of the Constitution of India had not been complied with, that along with the charge sheets the statement on which each charge was based was not communicated, that the witnesses on the strength of whose statements he was found guilty were not examined in his presence, that the Sub Area Commander, Bangalore, had no authority to constitute the Court of Enquiry and he had no jurisdiction over the petitioner, that no disciplinary action could be taken against the petitioner for an offence which had not been clearly proved (reliance for this was placed on Army Instructions, (India) No. 212 of 1949), and that the findings of the Court were vague and indefinite as to the guilt of the petitioner and he had been materially prejudiced by "the erroneous mode in which the proceedings have been conducted and decisions taken". The prayer clause was as follows :—

> "That therefore the petitioner prays as under :—
>
> (a) that this Hon'ble Court may be pleased to hold that the proceedings against

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the petitioner ending with his removal were contrary to law and in violation to the petitioner's constitutional rights;

(b) that this Hon'ble Court in the exercise of powers granted under Articles 226 and 227 of the Constitution of India may be pleased to direct that as the order of the removal of the petitioner is void and of no legal effect the petitioner be not removed from service ;

(c) that pending the final disposal of this petition this Hon'ble Court may be pleased to pass an *ad interim* order restraining the respondents from removing the petitioner with effect from 24th November 1951 ; and

(d) that this Hon'ble Court may be pleased to pass such other orders or give directions either in addition or in the alternative as it may deem expedient in the circumstances of the case."

In the supplementary application made on the 22nd April 1952, it was alleged that the petitioner was a Civilian Gazetted Officer and this was said to be clear from certain letters referred to in paragraph 4 of the petition, that he continued to hold the position of a gazetted officer beginning from the 8th August 1945, that on the 16th August 1949 the Ministry of Defence appointed the petitioner as a Farms Officer, that at the time of the offence he was a Farms Officer and therefore he could not be dismissed or removed from service except by the order of the Ministry of Defence, and, therefore, the order of the Director of Farms removing the petitioner from service was without jurisdiction and illegal. It was further stated in the petition that the proceedings of the Court of Enquiry beginning from its constitution and right up to the order of removal were without jurisdiction and *ultra vires* on the ground that the

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Court of Enquiry was not constituted at the instance of an officer entitled to constitute a Court, that the result of the enquiry was not sent to the Director of Remount, Veterinary and Farms, and that the constitution of the Court of Enquiry was not proper as there was no officer of the Department of Farms on the Court of Enquiry. The legality of the order was further attacked on the ground that the statements on which each charge was based had not been supplied nor the opinion of the Sub Area Commander, Bangalore, or of the General Officer Commander-in-Chief, Southern Command, given to the petitioner and the Court of Enquiry was held as if the Army Act applied and that the Public Service Commission had not been consulted as required by Article 320(3) of the Constitution of India.

On behalf of the Union of India the first reply was put in under the signatures of Lt. Col. Saran, Officiating Commander, Ambala Sub Area, in which it was pleaded that the petitioner was still a member of the subordinate service and would complete his 30 years of service on the 5th August 1952, when he would ordinarily retire and that he would attain the age of 55 years in July 1953 and that he was granted the privilege of gazetted status as from the 8th August 1945. It was admitted that the enquiry was instituted at the instance of Jemadar Kishan Singh for the reason that the petitioner was using a private car belonging to a milk contractor and into which four gallons of petrol which belonged to the Military Department were put, that the Court of Enquiry was constituted by the Sub Area Commander but it was denied that the statements of witnesses were recorded behind the back of the petitioner and it was asserted that proper notice was given to the petitioner of the convening of the Court of Enquiry which assembled on the 8th September 1949, and that after Yaqub, Cleaner of the car, had made a statement he was suborned by the petitioner and on the 9th September he resiled from the statement that he had previously made. The findings

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of the Court of Enquiry were given on the 12th September and the petitioner was suspended on the 13th September but this order was set aside as it was found that the Sub Area Commander could not make the order. It was admitted that a charge sheet was given and the petitioner was asked to reply and finally a notice was served on the petitioner by the Director of Remount, Veterinary and Farms, on the 21st September 1951, calling upon him to show cause why he should not be removed from service. It was also pleaded that under the Army Instructions, Rule 9, the responsibility for the discipline and interior economy of all personnel of Administrative Services and departments with the exception of interior economy of the Army Remount Department and the Military Farms Department rests with the Commander of the Formation or the Area in which the unit is serving. The other allegations of the petitioner were denied. In paragraph 15, it was stated that the petitioner had a right of appeal against the order of the Director of Remount, Veterinary and Farms and instead of availing himself of that right he has applied to the High Court for a writ and in paragraph 16 it was stated that no case had been made out for the same.

Another written statement in reply to the supplementary petition was filed on behalf of the respondent on the 31st July, 1952, by Brigadier Jai Singh, Commander, Ambala Sub Area, in which it was denied that the petitioner held any substantive gazetted office under the Ministry of Defence, that he had only been granted the status of a gazetted officer while he held the post of Manager but still continued to be a member of the subordinate service and subject to disciplinary rules applicable to such service, that the petitioner never became a gazetted officer and that this was only a privilege granted which did not make him a Civilian Gazetted Officer. It was also denied that the petitioner was a Class II Gazetted Officer. It was admitted that the petitioner became a Class II Gazetted Officer as a Farms Officer but he was reverted to his former post of Manager on

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the 26th January 1952, as from the 1st December 1950 ; at the time of his removal he was a Class III non-gazetted officer. The other allegations of the petitioner in his second petition were denied and it was pleaded that the proceedings taken were proper in accordance with the rules of the service and that it was not necessary to consult the Public Service Commission under Article 320 of the Constitution as the service to which the petitioner belonged was excluded under the regulations made under proviso to Article 320(3). It was then pleaded that Article 311 had been complied with and finally that the petitioner had no right to bring the petition.

We have had the advantage of a very full and elaborate argument by counsel for the parties. In support of the rule petitioner's counsel has submitted that—

(i) the petitioner was a gazetted officer and therefore he could only be dismissed or removed from service by the Central Government and not by the Director of Military Farms ;

(ii) the petitioner was not allowed to be present before the Court of Enquiry and evidence was recorded in his absence and therefore the provisions of rule 158 of the rules made under the Army Act of 1950, which was also in existence previously, have not been complied with ;

(iii) the petitioner was not given an adequate opportunity to show cause against his removal from service ; and

(iv) as there was no definite finding given by the Court of Enquiry as to the offence committed by the petitioner, no disciplinary action should have been taken and for this purpose he relies on rule 212(2) of the Army Instructions (India).

The learned Advocate-General on behalf of the Union contests the correctness of these four

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points. His submission is that the petitioner was not a gazetted officer, that he was present during the examination of witnesses and that he was charge-sheeted and asked to give such defence as he wished to do and was also allowed to recall witnesses for cross-examination and later on he was given opportunity as required by law to show cause as to why he should not be removed from service. He has further submitted that this is not a case in which this Court should exercise its extraordinary and supervisory jurisdiction under Article 226 of the Constitution of India as an equally efficacious remedy would be by a suit.

The petitioner's complaint involves the determination of certain questions which are alleged by him and are denied by the Union of India.

The first question in controversy between the parties is whether the petitioner was or was not a gazetted officer. Annexure A, dated the 29th September 1945, is an extract from the Gazette of India. It reads :—

"The following appointments are made :—

* * * * *

Military Farm Department.

The undermentioned Managers...... are granted the privilege of gazetted status with effect from 8th August 1945 :—

* * * * *
* * * * *

Mr Naubat Rai

* * * * *
* * * * *

On the basis of this the petitioner submits that he was appointed a gazetted officer, but the words in the notification are "The undermentioned Managers...........are granted the privilege of gazetted status". Mr Tek Chand submits that the effect of these words is that the petitioner became a

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gazetted officer, or at any rate, had the right to be styled as a gazetted officer and had all the privileges and rights of such officer. There is a distinction between the word 'right' and the word 'privilege'. Besides this there are certain documents produced by the Union which go to show that even though the petitioner may have had the privilege of being a gazetted officer he is not so in fact. There is a document, Exhibit R.1, dated the 11th July 1934, which is a letter from the Deputy Secretary to the Government of India to the Quartermaster General in India which shows that the grant of the privilege of gazetted status to Managers did not remove such personnel from subordinate service or from the disciplinary rules applicable to civilians in subordinate service as laid down in the Regulations for the Army in India. In the affidavit of Lt. Col. Saran it is denied that the petitioner was a gazetted officer. In the affidavit of Brigadier Jai Singh it is again stated that the petitioner continued to be a member of the subordinate service and reliance is placed on Exhibit R.1 of the 11th July 1934. The petitioner on the other hand has relied on two documents—(1) dated the 11th April 1946, which is a letter from the Director of Farms to the Controller of Military Accounts stating that the Managers to whom privilege of gazetted status has been granted are substantive gazetted officers and will retain the status after the termination of the war and that that letter was being issued with the concurrence of the financial authorities at the headquarters. It appears that there was some dispute between the Controller of Military Accounts and the Director of Farms as to the person who was to maintain service documents of these officers and it was in that connection that the Controller of Military Accounts was informed that the Audit Officers concerned were to maintain the service documents. The second document which the petitioner relies on is Annexure S which was sent to the Officer Commanding, Military Farms, from the Adjutant General's Branch in order to collect certain information for answers in Parliament and it was there stated that while compiling that return certain points

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will have to be borne in mind, the second one of which was that Class II (Gazetted) will consist of all posts which are not classified as Class I and where the maximum pay in the time-scale is not less than Rs 500. The Advocate-General placed another document, dated the 9th August 1945, but that related to the person at whose discretion Indian Managers of the Military Farms were to be granted the privilege of Gazetted Officer.

On the material that is now before me, it will be difficult for me to hold that the petitioner was a gazetted officer, and in my opinion this is a matter which may require further evidence for a definite conclusion one way or the other.

The next complaint of the petitioner was that the Sub Area Commander at whose instance the Court of Enquiry was constituted was not in law entitled to constitute one in order to try the petitioner. But even with regard to this it is stated in the affidavit of Lt. Col. Saran in paragraph 13(d) that under the Army in India Regulations the responsibility for the discipline of the personnel including the Military Farms rests with the Commander of the Formation or Area. There is no rebuttal of this. If this question is seriously in dispute and has to be decided then the evidence such as there is will not be sufficient for a finding in favour of the petitioner.

The next question that arises is whether the petitioner was present throughout the enquiry which was held by the Court of Enquiry. The documents which have been placed on the file show that the Court of Enquiry was constituted by an order, dated the 8th September by the Sub Area Commander. The first sitting of the Court of Enquiry was held on the 8th September 1949 and it appears that Yaqub Khan was examined on that day when the Court adjourned to 9 o'clock on the 9th September 1949. Yaqub Khan was recalled on that day and was "confronted" really cross-examined by Naubat Rai, the petitioner. Six other witnesses were examined on that day, the last one being Naubat Rai himself.

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The fourth witness, Fatakia, was recalled and again examined on the 11th September 1949 and on that day all he was asked was if he had any other car and whether he had any other partner. The Court of Enquiry gave its findings on the 12th September 1949, which is Annexure C/1, at page 15, in which it is certified that the provisions of I.A.A. rule 158 (F) had been complied with. There is a certificate, dated the 16th September 1949, by the Court of Enquiry which is in the following terms :—

> "We hereby certify that the Court of Enquiry proceedings were read and handed over to Mr Naubat Rai and he was asked to state whether he wished to cross-examine any witness. In accordance with the wishes of Mr Naubat Rai witness No. 1, Yakub Khan, was recalled and confronted by the former and his evidence was recorded in the Court of Enquiry proceedings. Mr Naubat Rai did not want to question anybody else."

On the 9th November the Assistant Director of Remount, Veterinary and Farms, Lt. Col. Misra, sent to the petitioner a charge sheet containing two charges, first being misappropriation of Military Stores and the second an act prejudicial to the good order and discipline, and along with this a copy of the proceedings of the Court of Enquiry was attached. The petitioner gave his reply on the 19th November 1949, which is Annexure I. On the 20th June 1950, Annexure J, the petitioner was asked if he wished to further cross-examine any witness who had appeared before the Court of Enquiry. The petitioner sent another written statement, Annexure K, on the 31st July 1950. In this he did not complain that he was not allowed to be present and cross-examine the witnesses when evidence was originally recorded and that the certificate under I.A.A. rule 158(F) was not

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correct as no evidence was recorded in his presence. He stated in this that he had reconsidered the matter and he did not think that any useful purpose would be served by cross-examining the witnesses. He, therefore, withdrew his previous petition and left it to "your noble sense of justice to decide the case in the light of investigation already held and various explanations on the subject". The opposite party has denied that the statements of the witnesses were recorded behind the back of the petitioner and even if some witnesses were examined in his absence he was given an opportunity to re-examine which he did not avail himself of. The question whether the petitioner was present throughout the enquiry or not has not been specifically stated in the affidavit, although it is in paragraph 2 of the first petition of November 1951. Again in the amended petition of the 22nd April 1952, this matter is stated in paragraph 7(e) but in the affidavit it is not so specifically stated although it can be inferred therefrom. Again, in the replication by the petitioner, dated the 15th July 1952, this matter is again referred to in paragraph 3(c) but there is no affidavit in support of it. It is disputed whether the petitioner was or was not present throughout the time when the witnesses were examined. I do not think that I should give a definite finding on this point and on this evidence.

It was then submitted by Mr Tek Chand that the petitioner was given notice on the 25th September 1951 to show cause why he should not be removed and along with that there was a communication, dated the 21st September 1951, also to the same effect. These are Annexures L and M. The petitioner gave his explanation on the 7th October 1951, which is Annexure N and the order of removal was made on the 17th/19th November 1951, which is Annexure O. The complaint of Mr Tek Chand in regard to this matter is that although the petitioner was asked to show cause why he should not be removed from service he was not given any adequate opportunity as required by Article 311(2) of the Constitution, as explained in a judgment of their Lordships of the

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Privy Council in *I.M.Lal's case* (1). I have already given the various dates on which the enquiry was held and the opportunity was given to the petitioner to cross-examine and lead evidence. That no doubt was before the notice to show cause was sent to him. In his written statement, Annexure K, dated the 31st July 1950, which was sent in reply to the previous notice to him, Annexure J, dated the 20th June 1950, the petitioner definitely stated—

> "* * * make me see no wisdom in exercising my right to further cross-examine them.
>
> I therefore withdraw my previous petition and leave it on to your noble sense of justice to decide the case in the light of investigation already held and my various explanations on the subject."

It was after this that the notice to show cause was given by a letter, dated the 25th September 1951. At that stage the petitioner gave his explanation, Annexure 'N', dated the 7th October 1951. In this explanation he submitted that he was a Farms Officer on the 9th November 1949 and the only person who could charge-sheet him was the Ministry of Defence, that being a Farms Officer at the time the proceedings started and even after his reversion to the post of Manager the authority to take disciplinary action was still in the Central Government and that he was a civilian and not amenable to regulations of Army in India. He then went on to give other objections to the taking of disciplinary action which were that the finding of the Court of Enquiry regarding his guilt was not definite and Yaqub Khan had retracted his previous statement, that Kishan Singh and Arjan Singh were inimical towards him, that the evidence showed that as a matter of fact there was no shortage of petrol according to the accounts, that certain statements had not been furnished to him and the accounts of Messrs. Stephens Sons showed that the petitioner was innocent, that he had put in 29 years' service and was 53 years of age and having

(1) 1948 F.C.R. 44 at pages 63 & 64=75 I.A. 225

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accepted new pension rules was due to retire in July 1952 and there was no justification for any action being taken against him, and he emphatically asserted that he was innocent and that the allegations made against him were totally false. He then asked for certain documents stating that they were necessary for his complete representation. I might here state that no objection has been taken either in the original petition or in the supplementary petition that he was not given any documents and therefore was unable to put in a proper representation at that stage. It was after the representation and after this procedure had been adopted that the order for removal from service was passed by the Director.

Much reliance was placed by Mr. Tek Chand on the judgment in *I. M. Lall's case* (1). In the Federal Court, Varadachariar, J., agreed with the judgment of the Lahore High Court given in I.L.R. 1944 Lah. 347. The majority judgment in the Federal Court was given by the Chief Justice who observed as follows:—

> "It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases. In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. *See* 1945 F.C.R. 139"

(1) 75 I.A. 225

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In regard to this their Lordships of the Privy Council said—

> "Their Lordships agree with the view taken by the majority of the Federal Court. In their opinion, sub-section (3) of section 240 was not intended to be, and was not, a reproduction of Rule 55 which was left unaffected as an administrative rule.............. No action is proposed within the meaning of the subsection until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Before that stage the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which subsection (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under Rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the finding of the enquiry".

Mr Tek Chand strongly relied on the observations of their Lordships where they stated that they saw no difficulty in the statutory opportunity being reasonably afforded at more than one stage, but in my opinion that is qualified by the following sentence where their Lordships were careful to observe that if there had been an enquiry it would be unreasonable that the civil servant should ask for repetition of that stage. All that he would be entitled to would be to represent against the punishment proposed. Applying this to the facts of the present case we find that an

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enquiry was held by a Court of Enquiry and opportunity was given to the petitioner to recall and examine such witnesses that he desired, which he did not think necessary to avail himself of whatever be his reasons for that, and he threw himself on the mercy of his departmental heads, and the show-cause notice was given to him in September, 1951, Annexures L and M, in which the following words were used :—

> "It is provisionally proposed to remove you from Government service.........An opportunity is given to you to show-cause, if any, against the proposed action."

Counsel then referred to a judgment of the Allahabad High Court in *Ravi Pratab Narain Singh* v. *The State of Uttar Pradesh* (1), Which was a case under section 8(2) of the U.P. Court of Wards Act. There a petition had been filed against the Government of Uttar Pradesh to quash the declaration and all proceedings therewith which had been issued under section 8(1) (d)(v) of the U.P. Court of Wards Act. It appears that at no stage of the proceedings was the petitioner given a chance to contest the evidence on the basis of which the Government had come to the view that there had been mismanagement by the petitioner. No doubt certain enquiries were made by the Naib-Tehsildar, the Sub-Divisional Officer and the Collector of which the petitioner was aware and he had also taken part in those enquiries but after the issue of the notification declaring the petitioner a disqualified proprietor, he was not given an opportunity. It was in these circumstances that it was held by the learned Judges that a duty was enjoined upon the Government to ensure that an adequate opportunity of showing cause is given and the Government must on its own initiative adopt such a procedure that an opportunity does become available to the aggrieved person to adduce evidence. It was also found by the learned Judges that a clear demand

(1) A.I.R. 1952 All. 99

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had been made by the petitioner in that case to be given an opportunity to adduce evidence which was ignored by the Government. In these circumstances it was held that there was no compliance with the statutory rights of the petitioner in that case.

Reliance was also placed on another case decided by the Allahabad High Court under the same statute—*Avadhesh Pratap Singh* v. *State of Uttar Pradesh* (1), but that case does not go any further than the one which I have discussed above. There are two cases referred to in the first Allahabad judgment that was quoted to us—*Board of Education* v. *Rice* (2), and *Local Government Board* v. *Arlidge* (3). In the former case all that was held was that as the Board had not determined the "question" the decision must be quashed by certiorari and a mandamus must issue. Lord Loreburn said at p. 182—

> "But if the Court is satisfied that the Board had not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari."

In the latter case it was held that the petitioner in that case was not entitled to be heard orally before the deciding officer or to see the report made by the Board Inspector upon the public local enquiry. These two cases really are not of any very great assistance in the determination of the points in controversy in the present case. On the facts in the present case I am unable to hold that no sufficient opportunity as required by Article 311(2) was given to the petitioner.

Here I may revert to the objection which was taken by Mr Tek Chand in regard to the defects in the constitution of and the procedure followed by the Court of Enquiry. The complaint was that A.I.I. No. 212 had not been followed and Rule

(1) A.I.R. 1952 All. 63
(2) (1911) A.C. 179
(3) (1915) A.C. 120

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158, F. Indian Army Act was disregarded. To this part of the case the learned Advocate-General replied by referring to a judgment of their Lordships of the Privy Council in *Venkata Rao* v. *Secretary of State for India*, (1), where their Lordships held that the terms of section 96-B of the Government of India Act contain a statutory and solemn assurance that the service though at pleasure, will not be subject to capricious or arbitrary action and will be regulated by rule but do not import a special kind of employment with an added contractual term that the rules are to be observed. The dismissal of a civil servant therefore in utter disregard of the procedure prescribed by the rules framed under the section will not give a right of action for wrongful dismissal. At page 540 Lord Roche quoted with approval the observations of Lord Hobhouse in the West Australian case in *Shenton* v. *Smith*, (2), where his Lordship observed as follows :—

> "It appears to their Lordships that the proper grounds of decision in this case have been expressed by Stone, J., in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown ; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind.........As for the regulations their Lordships again agree with Stone, J., that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants."

(1) I.L.R. 1937 Mad. 532 (P.C.)
(2) (1895) A.C. 229

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At page 542 Lord Roche observed :—

"They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious therefore that supreme care should be taken that this assurance should be carried out in the letter and in the spirit and the very fact that Government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress, if wrong has been done. Their Lordships cannot and do not doubt that these considerations are and will be ever borne in mind by the Governments concerned, and the fact that there happened to have arisen for their Lordships' consideration two cases, where there has been a serious and complete failure to adhere to important and indeed fundamental rules, does not alter this opinion. In these individual cases mistakes of a serious kind have been made and wrongs have been done which call for redress. But while thus holding on the clear facts of this case, as they now appear from the evidence, as they similarly held in *Rangachari's case,* their Lordships are unable as a matter of law to hold that redress is obtainable from the Courts by action."

Following this I am of the opinion that even if there has been any transgression of A.I.I. 212, on

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which I do not give any finding that cannot be a ground for interference by this Court.

I will now discuss the point raised by the learned Advocate-General that no writ, order, or direction should in this case issue under Article 226 because—

(i) there is an equally efficacious remedy by way of suit;

(ii) no declaration can be given under Article 226 of the Constitution;

(iii) Article 226 is subject to the provisions of Article 300; and

(iv) when facts are disputed no writ can issue under Article 226.

I shall take these points in seriatim.

The petitioner was removed from service by an order, Annexure O, dated the 17th/19th November 1951, and in the ordinary course he would have retired in July 1952. According to Col. Saran he would have retired in August 1952. In either case if he had been in service he would have retired by now. Therefore his complaint can be of wrongful dismissal which ended in monetary loss to him, deprival from pension and mental suffering which must necessarily result from wrongful or unjust removal from service. There is according to the learned Advocate-General no question of speed in the present case, at any rate, not at this stage. Even if the order of removal from service is set aside the petitioner will be or should be taken to have retired in July or August 1952. In the 9th Volume of Hailsham's edition of the Laws of England, at page 773 in paragraph 1309, the law is stated under the heading—"No other legal remedy"—as follows:—

> "The Court will, as a general rule, and in the exercise of its discretion, refuse a writ of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial, and effective."

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In *The Queen* v. *Charity Commissioners for England and Wales* (1), it was held by Wright and Bruce, JJ., that *mandamus* ought not to issue on the ground that the applicants had alternative convenient and effectual remedies. In *Re Elverton R. Chapman* (2), at page 218, Mr Chief Justice Fuller said—

> " We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings. "

In this case a petition for *habeas corpus* had been made to relieve from imprisonment the petitioner who was in the custody of the United States Marshal of Columbia for violation of U.S. Rev. Stat, section 102. In Ferris on Extraordinary Legal Remedies at page 245 it is stated :—

> " Mandamus will not, subject to the exercise of a sound judicial discretion, issue where there is another adequate and specific legal remedy competent to afford relief upon the same subject-matter. Mandamus is a supplementary remedy, to be used where the party has a clear legal right and no other appropriate redress to prevent a failure of justice. It does not supersede legal remedies, but rather supplies the want of such a remedy. Its use is confined to those occasions where the law has established no specific remedy and where in practice and good government there ought to be one. "

In Hailsham's Laws of England the language used is "which is not less convenient, beneficial, and effective ". At page 774 in the 9th Volume of Hailsham's Edition it is stated—

> " Nor will the Court interfere to enforce the law of the land by the extraordinary remedy of a writ of mandamus in

(1) (1897) 1 Q.B. 407
(2) 156 U.S. 211

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cases where an action at law will lie for complete satisfaction."

The petitioner strongly relied on a judgment of the Supreme Court in *Rashid Ahmad* v. *The Municipal Board, Kairana* (1), where the Supreme Court interfered with the order complained against although it was argued by the Advocate-General of Uttar Pradesh that the petitioner had an adequate remedy by way of appeal and therefore no writ of mandamus or certiorari should issue. Das, J., observed at page 572 as follows :—

> "There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only. The respondent Board having admittedly put it out of its power to grant a licence and having regard to the fact that there is no specific bye-law authorising the issue of a licence, we do not consider that the appeal under section 318 to the Local Government which sanctioned the bye-laws is, in the circumstances of this case, an adequate legal remedy."

This case therefore can be of no assistance to the petitioner because the facts there were quite different. It may be noticed that in the present case the petitioner would have had a right of appeal under Rules 56 and 57 of the Civil Service (Classification, Control and Appeal) Rules, but he did not avail himself of that remedy and this is one of the objections which has been taken by the respondent in the affidavit of Col. Saran in paragraph 15. Therefore I hold that there was in this case open to the petitioner a right of appeal under the Civil Service Rules and he had an equally efficacious remedy to enforce his rights by a suit, and that the remedy by way of writ is not open to him.

(1) 1950 S.C.R. 566

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The second question raised by the learned Advocate-General was that under Article 226 a declaration cannot be given and he relied on a judgment of the Supreme Court in the Sholapur case—*Charanjit Lal Chowdhuri* v. *The Union of India* (1), where Mukherjea, J., said :—

> "A proceeding under this Article cannot really have any affinity to what is known as a declaratory suit. The first prayer made in the petition seeks relief in the nature of a declaration that the Act is invalid and is apparently inappropriate to an application under Article 32……."

Mr Tek Chand, on the other hand, has drawn our attention to the form of relief given in *Brijnandan Sharma* v. *State of Bihar* (2), which was a case under the Bihar Maintenance of Public Order Act for restricting movement of a citizen. It was held that the Act in so far as it restricted the movement of a free citizen became void by reason of Article 13(1) read with Article 19, of the Constitution of India. This was a majority judgment and Meredith, C. J., gave the following relief at page 471—

> "I hold accordingly that section 2(1)(b) of the Act became void on the 26th of January and it necessarily follows that the order made under that provision became void. I would accordingly give the petitioner a declaration to that effect."

Das, J., who gave a concurring judgment said at page 479—

> "In view of the very wide terms of that Article (226) I think that the petitioner is entitled to ask us for an order against the State Government prohibiting that Government from enforcing the order

(1) 1950 S.C.R. 869 at p. 900
(2) I.L.R 29 Pat. 461

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which must be declared to be void after the 26th of January 1950."

In my opinion, no relief can be given which will be in the nature of a declaration. No doubt the powers of this Court are wide enough to fram its orders to suit a particular case but still they cannot be of the nature which would be given in a declaratory suit.

The scope of writs has been given in three cases by the Supreme Court—(1) in *G. Veerappa Pillai's case* (1), the Supreme Court said at page 297—

> "Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice;"

(2) in *Messrs Parry & Co., Ltd,* v. *Commercial Employees Association* (2), Mukherjea, J., held that a certiorari will not be available to quash a decision passed with jurisdiction by an inferior tribunal on the ground that such decision is erroneous; and (3) a simliar view has been taken by Mahajan, J., in *Ebrahim Aboobaker* v. *Custodian-General* (3).

Lord Goddard, C. J., in *R.* v. *Ludlow* (4), at page 882 said:—

> "A person who is aggrieved by a decision of one of these statutory tribunals can

(1) 1952 S.C.A. 287
(2) 1952 S.C.A. 299 at p. 305
(3) 1952 S.C.A. 501
(4) 1947 A.E.R. 880

> only apply to the Court for relief by way of certiorari to bring up the order and quash it if the tribunal has acted outside its jurisdiction. It is now settled law that, if the tribunal is acting within its jurisdiction, absence of evidence does not affect its jurisdiction to deal with a case, nor does a misdirection of the tribunal to itself in considering the evidence, nor does a wrong decision in point of law."

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His Lordship quoted with approval the observations of Greer, L. J., in *R.* v. *Minister of Health* (1), where the law was stated as follows :—

> "Where the proceedings are regular upon their face, and the magistrates had jurisdiction, the superior Court will not grant the writ of certiorari on the ground that the Court below has misconceived a point of law. When the Court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence."

In the *Racecourse Betting Control Board* v. *Secretary of State for Air* (2), a similar view was taken. Goddard L.J. (as he then was) said—

> "This power of setting aside awards of arbitrators for error appearing on the face of an award was said by Lord Haldane in *British Westinghouse Co.* v. *Underground Electric Rys* (3), to be a well established part of the law, but, in my opinion, it is none the less an exception to the general rule, that, not only is the arbitrator judge of law as well as of fact, but that, where a tribunal acts

(1) (1938) 4 All. E.R. 36
(2) (1944) 1 A.E.R. 60
(3) 1912 A.C. 673

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> within its jurisdiction, the only remedy if its decision be wrong is by appeal, and appeal only lies if given by statute."

The requisites of a writ of mandamus are given at page 768 of the 9th Volume of Hailsham's Edition of Laws of England. The petitioner must have a legal right which should not be a private right and a demand for performance must precede an application for a writ of mandamus. Before Article 226 of the Constitution of India the three Presidency High Courts in India had the power under section 45 of the Specific Relief Act to issue orders of the nature of a mandamus. Section 45 of this Act gives the circumstances in which a writ of mandamus would issue and they are as follows:—

> " (a) That an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;
>
> (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;
>
> (c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;
>
> (d) that the applicant has no other specific and adequate legal remedy; and
>
> (e) that the remedy given by the order applied for will be complete."

In *the Jupiter General Insurance Company, Ltd.*, v. *Rajagopalan* (1), my learned brother Soni, J., said—

> " Section 45 laid down the principles under which writs used to be issued and the

(1) A.I.R. 1950 Punjab 9 at p 30

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introduction of Article 226 has not, in my opinion, varied in any manner the principles under which these writs are now to be issued. That section, in my opinion, lays down good conditions to be fulfilled before a writ can be issued even under the Constitution."

In the *Union of India* v. *Elbridge Watson* (1), at page 403, it was held that section 45 of the Specific Relief Act, has not been repealed by Article 226 of the Constitution and that the Article has enlarged the jurisdiction of the Courts for the issue of writs mentioned in that Article, and Banerjee, J., said—

> "It should be noted that our Constitution has adopted the nomenclature of the English writs and I apprehend the English law relating to these writs must govern the issue of the writs herein, so far as they are not opposed to our Constitution."

In my opinion, the petitioner has not been able to bring his case within the principles underlying section 45 of the Specific Relief Act which are the principles which govern the issue of a writ of mandamus under Article 226.

Under section 46 of the Specific Relief Act a petitioner has to state in his affidavit "his right in the matter in question, his demand of justice and the denial thereof" and the principle underlying this section is in accordance with the rule of English law that a demand for performance must precede an application for a writ of mandamus which it was submitted by the learned Advocate-General had not been done in this case.

(1) 20 I.T.R. 400

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Mr. Tek Chand relied on a Full Bench judgment of the Nagpur High Court in *Sheoshankar* v. *State Government of Madhya Pradesh* (1), where two of the learned Judges held that when in the peculiar circumstances such a demand could not have been met the absence of a demand would be immaterial. But this rule will not apply to the present case because the petitioner has not shown that he applied for reinstatement or that he even appealed under the rules against the order of removal and that such a demand was denied.

It was then submitted by the learned Advocate-General that this Court will not turn itself into a Court of original jurisdiction when it is exercising its supervisory powers under Article 226 and therefore when the facts are disputed this Court would not exercise its jurisdiction. Reliance was placed on the observations of Lush, J., in *King v. Bloomsbury Income-tax Commissioners* (2).

> "But if the ground is one which requires serious investigation and is not the result of an obvious mistake, I think that the matter must be left to the General Commissioners, who can state a case."

In *King* v. *Swansea Income-tax Commissioners* (3), during the course of the arguments Lord Hewart, C. J. said :—

> "The fact that a trading loss was sustained was not admitted."

Counsel argued, "The Court can ascertain whether there has been a loss by directing an issue to be tried."

During the course of his judgment the Lord Chief Justice said at page 256—

> "The whole argument falls to the ground unless it is found or admitted that in

(1) A.I.R. 1951 Nag. 58
(2) (1915) 3 K.B. 768 at p. 798
(3) (1925) 2 K.B. 250

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the year referred to there was a loss, and it is suggested, with an appearance of seriousness, that this Court is the tribunal which should undertake the task of deciding whether there has been a loss or not, and for that purpose the Court ought to direct an issue or order pleadings to be delivered. In other words, the argument involves this, that this Court is to undertake the very task which in the clearest language the statute has imposed upon the General Commissioners. That argument is put forward, paradoxically enough, in an argument for a writ of prohibition which is based upon a lack, or an excess, of jurisdiction in the Commissioners in entertaining the very question which under the statute they have to undertake. It is quite clear to my mind that this Court cannot entertain the question whether there has been a loss in this particular year. "

In the present case, it is in dispute whether the petitioner was or was not a gazetted officer and what is the effect of his being one. It is also in dispute whether he was or was not present during the course of enquiry which was held by the Court of Enquiry. At the time of the arguments it was contested that the petitioner was not to retire in July or August 1952. This was based on a line in paragraph 1 of the affidavit of Lt. Col. Saran where he said that the petitioner will attain the age of 55 in July 1953, although in his explanation, Annexure N, the petitioner had stated he had chosen the new pension rules and was due to retire in July 1952. This again may be a matter in controversy. In my opinion this Court cannot turn itself into a Court of original jurisdiction and proceed to enquire into the various issues which arise on the pleading of the parties.

There then remains the submission of the learned Advocate-General that Article 226 is subject to the provisions of Article 300. Article 226

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gives to the Court the power to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, etc. This goes beyond the provisions of section 45 of the Specific Relief Act where no mandamus could issue to the Secretary of State, or the Central Government or the State Government. The Advocate-General referred to a judgment of the Supreme Court in *Province of Bombay* v. *Khushal Das* (1), at page 235. This was a case under the Government of India Act of 1935. The Attorney General there had argued that section 176 was confined to suits and to actions and did not cover the case of a writ of certiorari and that no command could issue to the Sovereign. In reply to this Mahajan, J., said that the Provincial Government was not the Sovereign, that the Government of India Act itself had given the right to sue a Province, that the expression "sue" means —"the enforcement of a claim or a civil right by means of legal proceedings", and that any remedy that could be taken to vindicate the right was included within the expression "sue" and so a writ of certiorari would also fall within that expression. As I read that judgment, what the learned Judge was driving at was that if there was a right of suit against the Provincial Government a right of bringing a writ of certiorari was also included. This judgment cannot have any application to the facts of the present case, because the interpretation of Article 226 was not in dispute in that case. I would, therefore, overrule this submission of the Advocate-General.

Lastly, there remains the submission by Mr Tek Chand that the provisions of Article 320 of the Constitution have not been complied with in so far as the Union Public Service Commission was not consulted before the order of removal was passed. It is not necessary to discuss this point at any length because the service to which the petitioner belongs has been expressly excluded by the Regulations made under the proviso to clause (3) of Article 320 of the Constitution.

(1) A.I.R. 1950 S.C. 222 at p. 235

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Mr. Tek Chand took an objection that the Regulations produced by the Union were up to June 1950 and that it was the duty of the Government to show that the service still continued to be excluded. In my opinion, this is not a correct approach. It was shown excluded in June 1950 and it was for the petitioner to show that it was no longer in the Regulations. There is nothing which has been brought to the notice of this Court showing that it has been excluded from the Regulations. I would, therefore, repel this contention of the petitioner.

In the result, therefore, I would dismiss this petition and discharge the rule. The opposite party will have their costs in this case. Counsel's fee Rs 500.

Soni, J.

SONI, J.—I agree. But I would like to add a little to what my learned brother has said in his order.

The petitioner put in this application for a writ on the 22nd November 1951, in which he stated that he was due to retire in July 1952. He stated various facts which have been given at length by my learned brother and submitted that this Court should hold that the Court of Enquiry held on him was not properly constituted, that the Court did not conduct the enquiry properly, that the petitioner was not given proper opportunity to make his representation, that being a gazetted officer he could only be removed by Government and not by the officer who passed orders of his removal, and that this Court should issue a writ of mandamus against the Union ordering it not to remove the petitioner from service.

The first part of the prayer is for purely declaratory reliefs. It involves questions which for their proper disposal can only be decided in a regular trial in one of the ordinarily constituted Courts of the land. At the time of arguments, which were heard in the beginning of September 1952, the petitioner on his own allegations would have retired had he not been removed from

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service. Moreover, no employer can be compelled to retain an employee in service. For improper dismissal the aggrieved employee's remedy appears to me to be a suit for damages. Before a writ of mandamus can issue, it should be possible to hold in the words of clause (b) of section 45 of the Specific Relief Act that "the doing or forbearing is, under any law for the time being in force, clearly incumbent" on the person against whom the mandamus is to issue. The phrase "clearly incumbent" is not equivalent to "incumbent". The word "clearly" has to be given its natural meaning. If given that meaning it comes to this that before this Court issues a mandamus it must hold imperatively that Government must keep the petitioner in its employ. In the facts of this case it is impossible to come to this conclusion. Moreover, before a writ of mandamus is issued it must be held that the applicant had no other specific and adequate legal remedy. In the facts of this case I cannot so hold. I would hold in the words of Fuller C. J., in the case of *Eleverton R. Chapman*, (1), that "the orderly administration of justice will be better subserved" by declining to exercise jurisdiction in favour of the petitioner.

APPELLATE CIVIL.

Before Harnam Singh and Kapur, JJ.

1952
September 18th

FIRM JOINT HINDU FAMILY PURAN MALL-GANGA RAM,—*Plaintiffs-Appellants,*

versus

THE CENTRAL BANK OF INDIA, LTD.,—*Defendant-Respondent.*

Regular first Appeal No. 121 of 1948.

Indian Partnership Act, (IX of 1932)—Section 69—Whether bars the institution of the suit—Subsequent Registration—Effect of—Whether validates the suit—Difference between the word 'institute' in Section 69 of Partnership Act and the word 'commence in section 171 *of Indian Companies Act, stated.*

The plaintiff firm filed the suit without being registered under section 59 of the Indian Partnership Act. The defendant objected that the suit was liable to dimissal

(1) 156 U.S. 211.