

**(1965) 03 AHC CK 0020**

**Allahabad High Court**

**Case No:** Second Appeal No. 1237 of 1959

State of Uttar Pradesh

APPELLANT

Vs

Debi Prasad

RESPONDENT

---

**Date of Decision:** March 8, 1965

**Acts Referred:**

- Contract Act, 1872 - Section 73
- Uttar Pradesh Fundamental Rules - Rule 24

**Citation:** AIR 1966 All 129

**Hon'ble Judges:** V.G. Oak, J; D.D. Seth, J

**Bench:** Division Bench

**Advocate:** Prakash Gupta, for the Respondent

**Final Decision:** Partly Allowed

---

### **Judgement**

Oak, J.

This Second Appeal arises out of a suit to recover arrears of salary. Debi Prasad respondent was employed as a driver in the Government Roadways, Bareilly Division, at Shahjahanpur. He was dismissed from service on 19-2-1952. In 1952 he filed a suit against the State of Uttar Pradesh for a declaration that the order of dismissal dated 19-2-1952 was illegal and void. He also prayed for arrears of pay. That suit was decreed in Debi Prasad's favour on 24-9-1955. It was declared that the order of dismissal dated 19-2-1952 was void. The Court also passed a decree for Rs. 1,378/- for arrears of salary. In the year 1957 Debi Prasad filed against the State of Uttar Pradesh another suit to recover arrears of salary for the subsequent period. That is Original Suit No. 385 of 1957, out of which the present Second Appeal has arisen. In this suit filed on 22-2-1957 the plaintiff claimed a sum of Rs. 3,944/- on account of arrears of salary from 11-12-1953 to 10-2-1957. The claim was resisted by the defendant. The defendant pleaded that the plaintiff never reported for duty with the Government Roadways even after the decree dated 24-9-1955 in the previous suit. It was further pleaded in defence that the defendant was all along employed in

the Tubewell Department of U. P. Government at Shahjahanpur. The plaintiff has already drawn salary from the Tubewell Department. Consequently the plaintiff was not entitled to recover any salary from the Government Roadways.

2. The learned Civil Judge of Shahjahanpur held that the defendant was entitled to claim a set off on account of the salary drawn by the plaintiff from the Tubewell Department. Deducting Rs. 3,230/- on account of salary drawn from the Tubewell Department, the trial Court found that a sum of Rs. 714/- was due to the plaintiff as arrears of pay in the Government Roadways Department. The Trial Court, therefore, passed in plaintiff's favour a decree for Rs. 714/- as arrears of pay with proportionate costs.

3. Both the parties were dissatisfied with the decision of the trial Court. The defendant appealed; and the plaintiff filed a cross-objection. The learned District Judge of Shahjahanpur dismissed the appeal, but allowed the cross-objection. In the result, the plaintiff's claim was decreed in toto. The State of Uttar Pradesh has now come up in Second Appeal. When the Second Appeal was argued before a learned Single Judge of this Court, he found that the Second Appeal involves an important question of law. He, therefore, referred the case to a larger Bench.

4. The respondent claimed arrears of salary for the period 11-12-1953 to 10-2-1957 for his services in the Government Roadways Department. It is common ground that during the material time the plaintiff was employed in the Tubewell Department of U. P. Government, and that he drew salary from that Department. The principal question for decision in the Second Appeal is whether the plaintiff is entitled to draw salary from the Government Roadways Department in addition to the salary drawn by him from the Tubewell Department.

5. Parties referred to various rules contained in the Fundamental Rules. The defendant relied upon Rule 17. According to Rule 17, an officer shall cease to draw salary as soon as he ceases to discharge duties. That rule is meant to govern cases, where an officer ceases to be in service. In the present case it was held in the previous suit that the order of dismissal dated 19-2-1952 was void. No subsequent order of dismissal was passed against the respondent. It must, therefore, be held that the respondent continued in service in the Government Roadways Department throughout the material period (11-12-1953 to 10-2-1957). So, Rule 17 is not of much assistance to the defendant. The plaintiff relies upon Rule 52. According to Rule 52, the pay and allowances of a Government servant who is dismissed or removed from service cease from the date of such dismissal or removal. It is true that the respondent never ceased to draw his salary under Rule 52. But the question remains whether the respondent is entitled to draw salary from one department after having drawn salary from another Department.

6. According to Rule 12, a Government servant cannot be appointed substantively, except as a temporary measure, to two or more permanent posts at the same time.

According to that Rule, the respondent could not be appointed on two different posts, in the Government Roadways Department and the Tubewell Department, simultaneously. His employment in the Tubewell Department was due to the fact that, it was at one time thought that he had ceased to be an employee of the Government Roadways Department. That point was clarified by the Civil Court's decree, dated 24-9-1955. Yet the respondent continued his work in the Tubewell Department.

7. Chapter VI of the Indian Contract Act deals with the consequences of breach of contract. Section 73 deals with compensation for loss or damage caused by breach of contract. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach. There is an explanation to Section 73 of the Contract Act. That explanation runs thus:

"In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

That explanation brings out the principle that a plaintiff claiming damages must do his best to mitigate damages.

8. In the first place, the service rules do not contemplate employment of an official in two different posts simultaneously. Secondly, although the suit is for arrears of salary, in substance the claim is for damages for refusal by the defendant to pay the plaintiff his salary in terms of the contract of service. In such a case the plaintiff has to do his best to mitigate damages. In fact, the plaintiff did exert himself to mitigate damages. He got for himself service in the Tubewell Department. His salary in the Government Roadways Department was Rs. 85 per month. He drew the same salary from the Tubewell Department. He cannot get the same salary from Government Roadways Department for the same period. The trial Court was right in making a deduction on account of the salary drawn by the plaintiff from the Tubewell Department.

9. Lastly, we have to consider the plaintiff's claim for increments. Although the plaintiff's initial pay was Rs. 85 per month, his contention is that he would have earned increments in the ordinary course. He relied upon Rule 24 of the Fundamental Rules. According to Rule 24, an increment shall ordinarily be drawn as a matter of course unless it is withheld. Sri H. P. Gupta, appearing for the appellant, relied upon *Mokau Ouseph Thomakutty v. Thomas* AIR 1954 Trav. Co. 104. In that case it was held that promotions and consequent increase in salary cannot be taken to be automatic. That observation was not made with respect to any particular service rule. In the present case the plaintiff's increments were governed by Rule 24 of Fundamental Rules of Uttar Pradesh. According to that Rule, an increment is

ordinarily drawn as a matter of course unless it is withheld. In the instant case no order withholding any increment was passed by the authorities. We may, therefore, presume that the plaintiff would have earned increments in the ordinary course. It appears that, had ordinary increments been granted to the plaintiff, he would be entitled to a sum of Rs. 714 in addition to the salary drawn by him from the Tubewell Department. The plaintiff's claim for Rs. 714 was rightly decreed by the trial Court.

10. The Second Appeal is partly allowed. We set aside the decree of the learned District Judge of Shahjahanpur, and restore the decree passed by the trial Court. In the result, there will be a decree in plaintiff's favour for a sum of Rs. 714 only. In the circumstances of this case, we direct that parties shall bear their own costs in all the three Courts.