CIVIL APPELLATE SIDE.

Before Kapur, J.

DASS MAL,—*Plaintiff-Appellant,*

versus

The UNION OF INDIA THROUGH THE SECRETARY, MINISTRY OF DEFENCE, NEW DELHI,—*Defendant-Respondent.*

Regular Second Appeal No. 171 of 1953

1955

April, 16th

Government of India Act, 1935—Section 240(3)—Constitution of India—Articles 310, 311—Army Act (VIII of 1911)—Section 16—Specific Relief Act (I of 1877)—Section 42—Member of Defence Services or persons holding posts connected with defence—Removal of from office—Suit for being retained in service—Whether competent—Compulsory retirement from service—Whether dismissal, or removal from service—Declaration as to a right—Declaration sought when right not subsisting—Declaration whether can be granted.

D. M. was born on the 16th March, 1894. He joined the army as a civilian clerk on the 4th January, 1918. In the Second World War he became full-fleged member of Defence Forces. On the 7th June, 1947, D. M.'s services were terminated as he was not suitable for retention in the post-war

army. He was discharged on the 27th February, 1948. D. M. brought the present suit when he was over 55 years of age claiming that he was entitled to serve up to the age of 60 years and his order of discharge was contrary to Section 240 (3), Government of India Act, 1935. The District Judge in appeal partly decreed the plaintiff's suit. He negatived his contention that he could serve up to 60 but accepted his contention that he had been discharged before the age of 55 by an authority not legally competent to do so. He also held that Section 240(3) of the Government of India Act was not applicable to the plaintiff's case. Plaintiff and the Government came to the High Court in second appeal.

Held, (1) that when the suit was brought the plaintiff was more than 55 years old. As the suit was one for declaration, it was incompetent and a declaration, even if it could be given, would be useless. Plaintiff was not entitled to get a declaration as to his legal character because at the time he brought the suit he did not have that character and in order to succeed he must have a valid and subsisting interest;

(2) Neither section 240(3) of the Constitution Act of 1935 nor Article 311 read with Article 310 of the Constitution of India is available to the plaintiff;

(3) When the plaintiff was discharged he was subject to the Indian Army Act and he was discharged from combatant service by prescribed authority as required by Rule 13.1 (i) (a) made under the Indian Army Act;

(4) All army personnel, whether belonging to the defence services or coming within the phrase "connected with defence services" hold office at the pleasure of the Crown and now at the pleasure of the President, and a suit cannot be brought for infringement of any rules as was held by the Privy Council; and

(5) On discharge from the army no lien was available to the plaintiff, but even if it was, no suit can be brought to enforce that lien, nor can it be decreed after he has attained the age of 60 years.

Bhikari Behara v. *Srimati Sitamoni Devi* (1), *Ram Sunder Sahu* v. *Ram Narain Sahu* (2), *Latifan Mian*. v. *Musammat Moorti Janana* (3), *Abdul Ahad* v. *Ashfaq Ali* (4), *Rangachari's case* (5), *Nokes* v. *Doncaster Amalgamated Collieries, Limited* (6), *Bhagwanti* v. *New Bank of India, Limited* (7), *Venkata Rao* v. *Secretary of State for India* (8), *and Shyam Lal* v. *The State of Uttar Pradesh* (9), considered.

Second appeal from the decree of Shri Hans Raj Khanna, II Additional District Judge, Ferozepore, dated 8th January, 1953, modifying, that of Shri Rajindar Lal, Seighal, Sub-Judge 4th Class, Ferozepore, dated 1st December, 1952, holding that the order of discharge that was issued to the plaintiff on the 27th February, 1948, was illegal, invalid and ineffective and that the plaintiff was entitled to remain in service till the age of 55 years, and also directing that the costs of the appeal will be borne by the parties.

SHAMAIR CHAND, for Appellant.

D. K. MAHAJAN, for Respondents.

JUDGMENT

KAPUR, J. These are two appeals (Regular Second Appeals Nos. 171 and 256 of 1953), one brought by the plaintiff Dass Mal, and the other by the Union of India against an appellate decree of the Additional District Judge of Ferozepore, dated the 8th January, 1953, by which the decree of the trial Court was modified to this extent that instead of relief that the plaintiff is entitled to remain in service up to the age of 60 years, 55 years was substituted. Kapur, J.

(1) A.I.R. 1924 Pat. 706
(2) 48 I.C. 936
(3) 49 I.C. 366
(4) A.I.R. 1933 Oudh. 423(2)
(5) I.L.R. 1937 Mad. 517 (P.C.)
(6) 1940 A.C. 1014 at p. 1021
(7) A.I.R. 1950 E.P. 111 at p. 117 (F.B.)
(8) I.L.R. 1937 Mad 532 (P.C.)
(9) 1954 S.C.A. 476

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The plaintiff was born on the 16th of March, 1894. On the 4th of January, 1918, he joined as a civilian clerk in the R.I.A.S.C. During the II World War the plaintiff became a full-fledged member of the Defence Forces and was given the rank of Subedar. By an order of the Director of Supplies and Transport No. 42, dated the 5th October, 1941, it was provided that non-combatant clerks, who were granted Viceroy's Commissions, would hold lien on their substantive appointments until such time as they are absorbed in the peace cadre of V.C.O.'s and in the case of those who are not eventually absorbed but are reappointed to their substantive appointments, the service as V.C.O. will count as qualifying for pension in their substantive appointments, *see* Exh. P. 5. Under an order issued on the 20th of July 1946, discharges of V.C.O.'s of R.I.A.S.C. (Sup.) serving on a regular engagment were provided for, see Exh. p. 15. At No. 2 V.C.O.'s who were militarized under "AI (I) 380/41" became due for compulsory discharge as under :—

"Sub Majors (on status Subedars and Jemadars on terms and status.	On attaining 55 years of age.

By the third clause V.C.O.'s who had already completed their age, service or tenure limits were to be discharged by O.C.'s of units direct from the units concerned, and such an Officer was competent authority to sanction the discharge. Reference there is made to the Table annexed to Indian Army Act, Rule 13 (b). In this order made under Rule 13 a V.C.O. could be discharged by a Commanding Officer under the following circumstances—

"On completion of the period of service or tenure specified in the Regulations for

his rank or appointment, or on reaching the age limit, whichever is earlier, unless retained on the active list for a further specified period with the sanction of the Commander-in-Chief in India, or on becoming eligible for release under the Regulations."

By Exh. p. 3 dated 30th May, 1947 the Adjutant-General in India made an order for disposal of V.C.O.'s (Supply) and the following categories of V.C.O.'s were to be released—

"All those not recommended as suitable for retention in the post-war army of the following categories—

(i) Subedar—28 years pensionable service.

(ii) Jamadars—24 years pensionable service.

On the 7th June, 1947 the services of the plaintiff were ordered to be terminated as he was not suitable for retention in the post-war army; see Exh. P. 4. Exh. p. 2 shows that on the 27th of February, 1948. the plaintiff was discharged. A document Exh. p. 10 dated 25th December 1948 has been placed on the record which shows that the retirement of ministerial Government servants governed by Article 459 (a) (i) of C.S.R. was raised to sixty years with certain provisions.

The plaintiff brought the present suit claiming that he was entitled to serve up to the age of 60 years and that his order of discharge was contrary to the Constitution Act of 1935, section 240 (3), as (1) he had been discharged by an authority not legally competent to do so, and (2) he was not

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given a reasonable opportunity of showing cause against the order proposed to be taken against him. and reliance was chiefly placed on Exh. p. 10 to which I have already referred. He states that he unsuccessfully petitioned the Government which is shown by Exh. p. 19, dated the 8th October, 1949. The suit of the plaintiff was for declaration to the effect that his discharge was void and he was entitled to remain in service up to the age of 60 years.

The Union pleaded that the plaintiff had been validly discharged from service, that he had completed his period of service and that the suit as framed did not lie.

The learned District Judge has held that the provisions of section 240 (3) of the Government of India Act were not applicable to the case of the plaintiff, that he was subject to the Indian Army Act,—*vide* section 2 (1) of the Act and as section 16 of Indian Army Act would be applicable he was not discharged by a person authorised to discharge him and reliance was placed on Exh. p. 13 which is a copy of Rule 13 framed under the Indian Army Act. The learned District Judge was of the opinion that the only person who could discharge the plaintiff was a person holding the rank of a Lieutenant-General but he also was of the opinion that the plaintiff could only serve up to the age of 55/50 year,—*vide* A. 1 (1) 380/41, para 2 clause (d), Exhibit p. 8, which is as follows—

> "In the case of those who elect either combatant terms or status, retirement will be compulsory on completing the age of 55 years, but those who wish to do so, may be permitted to retire on attaining the age of 50 years."

The plaintiff has come up in appeal to this Court claiming that he is entitled to remain in service up to the age of 60 and the Union has come up in appeal praying that the suit of the plaintiff be dismissed.

When this suit was brought, i.e. on the 17th of February, 1951, the plaintiff was more than 55 years old. He was as a matter of fact 56 years 11 months old, and as the suit was one for declaration only, it was incompetent and a declaration, even if it could be given, would be useless. Whatever other remedy the plaintiff may or may not have had, in my opinion, he was not entitled to get a declaration as to a legal character because at the time he brought the suit he did not have that character and in order to succeed he must have a valid and subsisting interest. In *Bhikari Behara* v. *Srimati Sitamoni Devi*, (1), Dawson Miller, C.J., observed at page 707—

> "The Court ought to be satisfied that the plaintiff has an interest in the property in respect of which the declaration is claimed which is a valid and subsisting interest."

In the present case the plaintiff is seeking a declaration in regard to an office in which at the time he brought the suit he had no valid or subsisting interest. In another Patna case *Ram Sunder Sahu* v. *Ram Narain Sahu* (2), another Division Bench interpreting section 42 of the Specific Relief Act was of the opinion that the section is available to obtain a declaration for a present legal character or a legal right. It has no application to a case where the plaintiff seeks a declaration as to a right which has ceased to exist. Similarly in *Latifan Mian* v. *Musammat Moorti Janana* (3), it was held that a wife cannot ask the Court

(1) A.I.R. 1942 Pat. 706
(2) 48 I.C. 936
(3) 49 I.C. 366

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to make a declaration under section 42 of the Specific Relief Act as to her marriage with the defendant after her divorce, inasmuch as there is no legal character in having been a wife and then divorced. In an Oudh case *Abdul Ahad* v. *Ashfaq Ali*, (1), a declaration as to the correctness of an electoral roll after the election was held not to be available on the ground that it will not affect the legal position of the parties to the election.

In *Rangachari's case*, (2), although it was found that the removal from service was by a person not authorised and therefore illegal because of section 96-B of the Government of India Act of 1919, yet no relief was granted because the appellant there could not be restored to his office on account of his state of health : *see* page 530.

The appellant Dass Mal has also raised the question which has been decided in favour of the Union that under the Constitution Act of 1935 the protection provided by section 240 (3) of that Act is available to the plaintiff which is controverted by the Union. The plaintiff was a civilian clerk and therefore he was a person who came within section 238 read with section 235 which is in part X of that Act dealing with the services of the Crown in India, Chapter I of which relates to Defence Services. Section 235 provides for control of Secretary of State with respect to conditions of service and section 23 makes provisions as to civilian personnel. It provides—

> "The provisions of three last preceding sections shall apply in relation to persons who, not being members of His Majesty's forces, hold, or have held,

(1) A.I.R. 1933 Oudh 423 (2)
(2) I.L.R. 1937 Mad. 517 (P.C.)

posts in India connected with the equipment or administration of these forces or otherwise connected with defence, as they apply in relation to persons who are, or have been, members of those forces."

As a result of this section therefore the rules made in regard to Defence Services become applicable to civilian personnel. Civil Services of the Crown are dealt with in Chapter II and section 240 occurs in this Chapter. The protection as to dismissal including removal or reduction in rank is not contained in Chapter I of Part X, and it has been held by Viscount Simon L. C. that the section being two different Parts is by itself a relevant fact ; see *Nokes* v. *Doncaster Amalgamated Collieries, Limited*, (1), and this was applied to a company case in *Bhagwanti* v. *New Bank of India, Limited* (2). Section 240 (3) applies to civil services of India and a combined reading of Chapter I and Chapter II of part X shows that civil personnel attached to Defence Forces is not civil services in India and in my opinion the learned District Judge has rightly held that section 240 (3) of the Constitution Act does not apply to the facts of the present case.

When the suit was brought the Government of India Act had been repealed and the Constitution of India had come into force. Under the Constitution for purpose of interpretation the General Clauses Act applies ; *see* Article 367 of the Constitution. The corresponding provision in regard to services of the Union and the States is contained in Articles 310 and 311 of the Constitution. Under the former every person who is a

(1) 1940 A.C. 1014 at p. 1021
(2) A.I.R. 1950 E.P. 111 at p. 117

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member of a defence service or of a civil service of the Union of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President. In Article 311 (1) a member of a defence service or a person who holds any post connected with defence has been omitted, and in my view this omission has only one meaning that the protection afforded under Article 311 (1) is not available to the appellant Dass Mal. And the Constitution is not retrospective.

The learned District Judge has applied section 16 of the Indian Army Act which provides that the prescribed authority may, in conformity with any rules prescribed in this behalf, discharge from service any person subject to this Act. It is not disputed that the plaintiff was subject to the Indian Army Act at the time when he was discharged. The question is—was he removed from service by the prescribed authority. In my opinion he was. According to Exh. p. 3 which deals with disposal of V.C.O.'s (Supply), all persons not recommended for retention in the post-war army were to be released : see para 1 (c) of this document, and he was released by the Officer Commanding. He had already put in 28 years' pensionable service and therefore even under Rule 13(1) (i) (a) an Officer Commanding was the competent authority to discharge the appellant on completion of his period of service or tenure or on reaching the age limit, whichever is earlier. I find that a document Exh. p. 9 has been filed which is dated the 8th March, 1947, and deals with release and reversion of V.C.Os. and in para 2 of this document it is stated—

> "G.H.Q. (A. G.'s Branch) have now ruled that prewar civilian clerks (now

V.C.O.'s) who have been granted extensions to serve up to the age of 55 years can be no longer required."

But even if the plaintiff were to rely on paragraph 2 of the instructions dated the 20th of July, 1946, (Exh. p.5) and was entitled to remain in service up to the age of 55 years he has no right to bring a suit to enforce this contract because conditions of service are no part of the contract which is justiciable or can be enforced by Courts. It was so decided in *Venkata Rao* v. *Secretary of State for India* (1), where it was held that rules made do not import a special kind of employment with an added contractual term that the rules are to be observed and a dismissal in utter disregard of the procedure will not, therefore, give a right of action for wrongful dismissal. I am, therefore, of the opinion that the learned Judge took an erroneous view of the case in giving a declaration to the plaintiff that he is entitled to remain in service up to the age of 55. If a person holds office at the pleasure of the President and the protection of Article 311 of the Constitution or section 240(3) of the Constitution Act of 1935 is not available, then it is not for the Courts to put limitation on the exercise of the pleasure by the President or the Crown as the case may be.

If section 16 of the Indian Army Act was applicable to the plaintiff, as he submits it was, and the discharge was in accordance with the rules made and by the authority prescribed, as it was in this case, then the plaintiff has no case of grievance at all.

But the plaintiff submits that even if he was properly discharged from his service as a combatant, or what he calls "militarized officer," on his

(1) I.L.R. 1937 Mad. 532 (P.C.)

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discharge from the army, he was entitled to go back as a civilian into the civil personnel, because of the lien which he held on his substantive appointment, until such time as he was absorbed into the peace cadre of V.C.O.'s, *see* Exh. 5 which contains the rules made on the 5th October, 1911. The law in regard to this argument is really the same as the one in regard to discharge and if a member of the civil personnel holds office during the pleasure of the President, he cannot bring a suit for his being retained in service. No precedent was quoted and no principle was relied upon in support of the submission that if a man has a lien and he has not been given an opportunity to take advantage of it, he has a right to enforce it through a Court of law. On the other hand *Venkata Rao's case,* (1), seems to be a case which supports the contrary opinion.

Even if lien available, the suit is incompetent as the plaintiff is more than 60 years old at the time of this appeal, and the rule in *Rangachari's case,* (2), applies.

Even if the action of the Government amounts to compulsory retirement of the plaintiff, the matter does not fall under Article 311 of the Constitution and would not fall under section 240 (3) of the Constitution of 1935 because a compulsory retirement has no stigma or implication of misbehaviour or incapacity. The rule laid down in *Sham Lal* v. *The State of Uttar Pradesh* (3), would be applicable to this case.

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(1) I.L.R. 1937 Mad. 532 (P.C.)
(2) I.L.R. 1937 Mad. 517 (P.C.)
(3) 1954 S.C.A. 476

I would therefore hold that—

(1) to the plaintiff relief of declaration is not available as at the time he brought the suit he had no present legal character or subsisting right ;

(2) neither section 240 (3) of the Constitution Act of 1935 nor Article 311 read with Article 310 of the Constitution of India is available to the plaintiff ;

(3) when the plaintiff was discharged he was subject to the Indian Army Act and he was discharged from combatant service by prescribed authority as required by Rule 13. 1 (i) (a) made under the Indian Army Act;

(4) all army personnel, whether belonging to the defence services or coming within the phrase "connected with defence services" hold office at the pleasure of the Crown and now at the pleasure of the President, and a suit cannot be brought for infringement of any rules as was held by the Privy Council in *Venkata Rao's case*, (1) ; and

(5) on discharge from the army no lien was available to the plaintiff, but even if it was, no suit can be brought to enforce that lien, nor can it be decreed after he has attained the age of 60 years.

I would therefore allow the appeal of the Union and dismiss the appeal of the plaintiff. As a result the suit of the plaintiff will be dismissed, but the parties will bear their own costs throughout.

(1) I.L.R. 1937 Mad. 532