REVISIONAL CIVIL

Before Tek Chand, J.

UNION OF INDIA,—Petitioner.

versus

BAKHSHI AMRIK SINGH,—*Respondent.*

Civil Revision No. 113 of 1962.

1962

March, 29th

Injunctions—Temporary and perpetual—When to be granted—Principles regarding grant of injunctions stated—Discretion—How to be exercised—Constitution of India (1950)—Article 311—Retirement on reaching age of superannuation where date of birth erroneously entered—Whether amounts to dismissal or removal or reduction in rank—Code of Civil Procedure (V of 1908)—S. 115(c)—"Material irregularity"—Appellate Court setting up a new case for the party—Whether acts with material irregularity.

Held, that (1) it is not a violation of every legal right which justifies the grant of an injunctive remedy. A party seeking such a relief may be precluded by reason of his own conduct from resorting to this remedy. There must be some equitable ground for interference by injunction such as a necessity of preventing irreparable mischief, or, in cases when the injury apprehended is of a character as cannot be adequately compensated by damages, or, is one which must occasion constantly recurring grievance which necessitates a preventive remedy in order to put an end to repeated perpetration of wrongs. This power has to be exercised sparingly and cautiously and only after thoughtful deliberation and with a full conviction on the part of the Court of its urgency and necessity.

(2) Courts issue injunctions where the right which is sought to be protected is clear and unquestioned, and not, where the right is doubtful and there is no emergency, and further, where the injury threatened is positive and substantial and is irremediable otherwise. It is also an important rule that the conduct of the parties seeking injunction must not be tainted with unfairness or sharp practice.

(3) The principal function of an injunction is to furnish preventive relief against irremediable mischief. An injury is deemed to be irreparable and the mischief is said to be irremediable, when having regard to the nature of the act and from the circumstances relating to the threatened harm, the apprehended damage cannot be adequately compensated with money. In the case of premature retirement of a government servant full compensation can be obtained by damages and it is not a case which calls for application of the extraordinary remedy by way of injunction.

(4) An injunctive relief must not be granted when it is prone to operate contrary to the real justice of the case. Against the injunctive fiat of the Court ordering the plaintiff's wrongful continuance in office, the defendant has no *ex post facto* remedy. In other words, in the process of the inquiry, sa to whether the plaintiff is being rightly retired or not, the Court, by giving him a temporary accommodation and by prejudging the case, has given him the actual relief, the grant of which was throughout seriously contested. The balance of convenience in this case was on the side of the defendant and not of the plaintiff.

(5) The balance of convenience rule has no place where the applicant's right is doubtful, or, where he can be compensated by damages in money, or, where the wrong might have been redressed if the applicant had been sufficiently vigilant. It is not a good ground for granting injunction merely on the theory that no material injury would result to the party restrained. Balance of convenience cannot be judged on the score of the time taken in ordinary legal proceedings or by the change of social status of the plaintiff.

(6) The injunctive relief is available to those who show reasonable alertness in asking for equitable protection, and not to those who sleep over their rights. Courts do not countenance inexcusable delay when injunctive or similar special relief is sought.

(7) The Courts, when issuing permanent or temporary injunctions, must act in a careful and conservative manner and grant the relief only in situations which so clearly call

for it as to make its refusal work real and serious hardship and injustice. If the Court is satisfied that the circumstances of the case do not entitle the grant of a perpetual injunction, a temporary injunction has perforce to be refused. One of the prerequisites to the granting of an injunction is that the party seeking relief must establish the right that he claims. If a right is being asserted which is not justiciable, no injunctive relief can be given either temporarily or perpetually. A right not shown to be *in esse*, cannot be protected by an injunction. In other words, an act which does not give rise to a cause of action cannot be restrained or its perpetration prevented. The applicant must at least make out a *prima facie* case showing that the grant of the final relief sought is within the competence of the Court.

(8) Where breach of a contract has furnished a cause of action for the suit, the Court will not grant the relief prayed for, if it is a contract of which specific performance cannot be allowed. There are a large number of contracts illustrative of this rule, and one of them is contract relating to compulsory employment of a person particularly in matters where the services to be rendered are of a personal nature.

(9) Where in granting or refusing injunctive relief, the Court does not apply the law to the facts either conceded or undisputed, the discretion is deemed to have been abused. Discretion cannot be used as a cloak to screen, or to save a manifest misapplication of law. Discretion is best exercised when it is in conformity with the spirit of law with a view to subserve and not impede or defeat the ends of substantial justice. Its exercise is permissible where in doubtful cases an impartial mind hesitates. Discretion is exercisable within well-known confines, which excludes its exercise *ex gratia*. Though the granting or withholding of injunctive relief is within the discretion of the Court to whom an application has beeh made, but this power is not unlimited and cannot be equated with the whimsical will of the Court depending upon the temperament or mood of the presiding officer. It is based on sound judgment guided by law. The Courts are not given a handle to misapply law or to twist facts in seeming exercise of the discretionary power.

Held, that an employee who is being retired on reaching the age of superannuation cannot be said to be "dismissed or removed or reduced in rank". Such a retirement, even if the date of superannuation has been erroneously entered, does not attract the operation of Article 311 as it does not entail any penal consequences and does not amount to "dismissal or removal". Both dismissal and removal entail penal consequences and to determine whether Article 311 applies, the penal consequences of the order have to be proved. A termination in accordance with the terms of the contract of employment, or in terms of the conditions of service, as embodied in the relevant departmental rules applicable to the Government servants, does not constitute dismissal or removal.

Held, that where new points, which at no stage had been taken by the plaintiff and are not covered by the pleadings or by the memorandum of appeal, are taken *suo motu* by the appellate Court and are disposed of in a manner manifestly contrary to the rules of procedure and pleadings, the appellate Court by setting up a new case for a party, acts with material irregularity and such order can be disturbed in revision under Section 115 of the Code of Civil Procedure.

Petition under Section 44 of the Punjab Courts Act and Article 227 of the Constitution of India for revision of the order of Shri Sant Ram Garg, District Judge, Ambala, dated the 23rd January, 1962, reversing that of Shri Muni Lal Jain, Sub-Judge, 1st Class, Ambala City, dated the 16th November, 1961 and restraining the defendant, Union of India from retiring the plaintiff from service till decision of the suit or 18th July, 1962, whichever is earlier and leaving the parties to bear their own costs.

N. L. SALOOJA, ADVOCATE, for the Petitioner.
H. R. SODHI, ADVOCATE, for the Respondent.

JUDGMENT

Tek Chand, J.

TEK CHAND, J.—This civil revision is preferred by Union of India against the plaintiff Bakhshi Amrik Singh who was Station Superintendent at the Railway Station Ambala.

The facts giving rise to this case are that the plaintiff joined service of the North Western Railway on 28th of August, 1927, and had been in the

railway service ever since. According to the rules governing his service the age of retirement is 55 years. The Divisional Personnel Officer, New Delhi, on 23rd of January, 1961, sent a communication to the officer concerned of the Railway Department to the effect that Shri Amrik Singh was due to retire on 14th of July, 1961 and the General Manager had desired that he might be relieved in time and information was sought if any monies were due from him on account of any claim of Railway or of Government on 24th of May, 1961. The plaintiff made an application for amendment of the order contending that the date of his birth was not 15th of July, 1906, but 18th of July, 1907 and, therefore, he would be due to retire on 18th of July, 1962. The Divisional Superintendent on this wrote to the General Manager that according to the plaintiff's B Card, the date of birth was shown to be 15th of July, 1906 and he had not produced any school leaving certificate in support of his contention. He had produced an affidavit of his elder brother and a photostat copy of the birth register, but that was not sufficient to warrant the recommendation for change in the date of birth. This communication was sent to the General Manager as the post of Station Superintendent was controlled by his office. The plaintiff was informed of the above communication. As the plaintiff's request was turned down he sent a notice under section 80, Civil Procedure Code, to the General Manager on 27th of April, 1961, in which he stated that the date of his retirement should be postponed and if this was not done a suit would be instituted against the Union of India. In the last para of the notice the plaintiff said, "the relief which I shall claim, shall be a decree declaring that, that my correct date of superannuation is 18th of July, 1962; that I am not liable to retirement as on 14th of July, 1961 and an injunction restraining you from enforcing the order communicated to me retiring me from service as on 14th of July, 1961."

On 10th of July, 1961, four days before the official date of his retirement, a suit was filed in

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the Court of Sub-Judge, First Class, Ambala Cantonment, against the Union of India. In the plaint it was alleged that by an inadvertent error resulting either from the ignorance of the true state of affairs or from some clerical error on the part of North-Western Railway the date of birth of the plaintiff was entered in the records of the Railway as the 15th of July, 1906, the true date of birth of the plaintiff being the 18th of July, 1907. According to the terms of contract of his employment he could be retired only on 18th of July, 1962, and the order of the Divisional Personnel Officer was against the terms and conditions of the plaintiff's employment and was, therefore, void. He, therefore, prayed for decree for permanent injunction restraining defendant from retiring him as from 14th of July, 1961, and compelling it to rectify the date of birth of the plaintiff as the 18th of July, 1907, and postponing the retirement of the plaintiff to the 18th of July, 1962. On the same date an application was made under Order 39, rules 1 and 2 and section 151, Civil Procedure Code, by the plaintiff for the issuance of temporary injunction to the defendant pending the disposal of the suit restraining the defendant from retiring the plaintiff as from 14th of July, 1961, as otherwise, the suit would become infructuous and the plaintiff would suffer an irreparable injury. It was stated that he had *prima facie* a good case and the balance of convenience also lay on his side. On 10th of July, 1961, Shri Sarup Chand Goel, Sub-Judge, passed an order granting an *ad-interim* injunction and restraining the defendant from retiring the plaintiff from service till further orders. Notice of the application was ordered to be issued to the defendant for showing cause against this order on or before 31st of July, 1961. On 31st of July, 1961, a written reply on behalf of the defendant was filed to the application under Order 39, rules 1 and 2. A written-statement was also put in Court on the same date. It was stated by the defendant that the certified copy showing birth of a son to Bakhshi Diwan Singh at Chunian in District Lahore on 18th of July, 1907, was not admissible, and, moreover, it did not prove as to whether it related to the plaintiff. It was denied that there was any

term in the plaintiff's contract of employment by which he could claim correction in birth entry at any time he liked. The suit was not entertainable as the orders had been made on the administrative side and for the same reason no temporary injunction could be granted. It was also stated that if the temporary injunction continued, the result would be that the plaintiff would take full advantage of the relief claimed even though, the suit ultimately might fail. It was said, that there was no *prima facie* case and the conduct of the plaintiff had not been fair, inasmuch as, he kept quiet for a long time and agitated the matter on the eve of his retirement. The application was alleged to be bad because of laches on the part of the plaintiff and that the balance of convenience was on the defendant's side. It was also said that even if the plaintiff was successful in showing that he had been retired prematurely he could sue for damages; but if the plaintiff's services were inflicted on the defendant the latter would have no remedy against the plaintiff in case date of retirement proved to be 14th of July, 1961. The matter was not disposed of on 31st of July, 1961, despite the request of the defendant's counsel, that the matter, in view of its urgency, be decided on that very day. The Sub-Judge adjourned the hearing for arguments to 11th of August, 1961.

On 4th of August, 1961, an application was made on behalf of the defendant stating that the delay in the disposal of this urgent matter was causing great injustice. In the application attention of the Sub-Judge was drawn to Rules and Orders of the High Court, Volume I, Chapter I-L, rule 3. The relevant portion of the rule was given *in extenso* in the application. It is reproduced below—

> "(ii) * * * * Interlocutory injunctions should be granted *ex parte* only in very exceptional circumstances, and only when the plaintiff can convince the Court that by no reasonable diligence could he have avoided the necessity of applying behind the defendant's back.

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(iii) Such injunctions, when granted, should be limited to a week or less, i.e., the minimum time within which a defendant can come before the Court assuming that to get rid of the injunctions, he will be prepared to use the greatest expedition possible. * * * *

(v) When the defendant appears and files his affidavit, the plaintiff should be given only a few days to answer it. The contested application should then be heard, as soon as possible, and if the Judge cannot dispose it of at once, should, for the term of the adjournment, which should be as short as possible, either grant an *ad-interim* injunction, or obtain an undertaking from the defendant not to do any acts complained against."

Despite drawing pointed attention to the above, by the learned counsel for the defendant, the Sub-Judge refused the prayer for expediting the case

On 9th August, 1961, the Union of India applied for the transfer of the case from the Court of Shri Sarup Chand Goel, Sub-Judge. In the application made under section 24, Civil Procedure Code, to the District Judge, reference was also made to the High Court Rules and Orders mentioned above, and also to Rule 6, Chapter 8, Volume I, to the effect, that all suits against Union of India should be heard at the headquarters of the District and such suits should be given priority of hearing and such cases should, when possible, be heard continuously until completion. It was said that the institution of the suit by the plaintiff at Ambala Cantonment and its reception by the Sub-Judge at Cantonment was in violation of the above rule. As the plaintiff could not be served though he was residing at Ambala Cantonment during that time, the transfer application

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was not disposed of till 7th October, 1961. In the meanwhile, Shri Sarup Chand Goel had been transferred. When the matter came up on 14th of October, 1961, before Shri Muni Lal Jain, the successor of Shri Goel, the case was adjourned to 24th of October, 1961, and on this date adjournment was granted on the ground that the plaintiff's counsel was busy in Delhi Courts and could not attend. On 30th October, 1961, arguments were heard in part and arguments were concluded on 11th of November, 1961. Shri Muni Lal Jain, in a detailed and considered judgment came to the conclusion that no case for temporary injunction had been made out and the *ex parte* temporary injunction issued by his predecessor was vacated.

On the same day the plaintiff presented an appeal to the District Judge and, it is stated, at the latter's residence. No copy of the judgment was attached. The District Judge issued *ex parte* temporary injunction on the same day. On 2nd of December, 1961, an application was made on behalf of the defendant for vacating the *ex parte* order. It was mentioned, that in view of sections 21 and 56 of the Specific Relief Act, no suit of the type was entertainable. The plaintiff was guilty of laches in contesting the date of his birth by bringing a suit 34 years after his service and only 4 days' before the official date of his retirement. The object of the plaintiff in obtaining temporary injunction was to illegally prolong his service and he had already succeeded by extending it by four-and-a-half months. It was also said, that the continuation of the injunction would mean, that the plaintiff would get the requisite relief even if his suit ultimately failed. The District Judge heard arguments and adjurned the case for announcement of judgment to 11th of December, 1961. The judgment was not announced on that date and on 14th December, 1961, the temporary injunction was made absolute. The defendant took up the matter to the High Court, on appeal against the grant of temporary injunction but the appeal was dismissed by the

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High Court on 8th January, 1962, for the reason, that the main appeal, would be shortly disposed of by the District Judge.

In the meanwhile an application was made by the defendant to the District Judge on 23rd of December, 1961, for acceleration of the hearing of the appeal stating that the plaintiff had already gained 50 per cent of the entire relief and this was a case for early disposal of the appeal. It was also suggested, that in case the District Judge was busy and could not dispose of the appeal earlier, the appeal might be made over to the Additional District Judge. On 2nd of January, 1962, the District Judge rejected this application on the ground that his diary was full. On 20th of January, 1962, the appeal was heard and on 23rd of January, 1962, the District Judge passed orders allowing the appeal. From this order the present revision has been filed.

On 26th February, 1962, notice was issued to the plaintiff for 9th of March, 1962. On 16th March, 1962, Mehar Singh, J., ordered that special messenger be sent to bring record of the case from the trial Court, and the office was required to make inquiry why the delay had occurred in the transmission of the record. The case was set down for hearing on 28th of March, 1962, when it was argued before me.

It has been necessary to give in detail the various dates, as, one of the contentions advanced on behalf of the defendant-petitioner, is, that the process of the Court has been abused in order to give to the plaintiff, through delays, the virtual benefit which he has now obtained even if his suit were to fail. According to this reckoning, the plaintiff has continued in service for nearly eight-and-a-half months beyond the due date of his retirement, and there is no prospect of the case being disposed of expeditiously, as, a number of issues have been framed and no evidence has been led so far. The apprehension of the defendant is shown to be fully justified; the plaintiff has

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achieved his object by obtaining temporary injunction; and even if the suit is ultimately dismissed, the benefit which he has received indirectly, cannot be annulled. Both Shri Goel and Shri Garg were made completely cognizant of the immediacy of the situation and had been alerted by the counsel appearing for the Union of India. In the clearest language, attention was drawn of the trial Court and also of the learned District Judge to this important aspect of the matter, but it was wittingly disregarded by Shri Sarup Chand Goel, the Sub-Judge, and also by Shri Sant Ram Garg, the District Judge. This result has been achieved by overlooking, not only the principles of law governing such matter, but also the express rules and orders of the High Court to which pointed attention was drawn of the lower appellate Court and also of the Court of first instance. Whatever the explanation of the transgression may be, it will be straining one's credulity to attribute this lapse to inadvertence or oversight, and this infraction cannot but be discountenanced and deprecated.

The cardinal principles regarding the grant of temporary injunctions are well known, and detailed reference to them would not have been deemed necessary, had it not been for their manifest non-observance in this case. It is not that the lower appellate Court merely omitted to take note of them or simply passed them over; in this case the well-settled principles of law have been circumvented and glossed over.

It is not a violation of every legal right which justifies the grant of an injunctive remedy. A party seeking such a relief may be precluded by reason of his own conduct from resorting to this remedy. There must be, some equitable ground for interference by injunction such as a necessity of preventing irreparable mischief, or, in cases when the injury apprehended is of a character as cannot be adequately compensated by damages, or, is one which must occasion constantly recurring grievance which necessitates a preventive remedy

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in order to put an end to repeated perpetration of wrongs. This power has to be exercised sparingly and cautiously and only after thoughtful deliberation and with a full conviction on the part of the Court of its urgency and necessity.

Courts issue injunctions where the right which is sought to be protected is clear and unquestioned, and not, where the right is doubtful and there is no emergency, and further, where the injury threatened is positive and substantial and is irremediable otherwise. It is also an important rule that the conduct of the parties seeking injunction must not be tainted with unfairness or sharp practice.

The principal function of an injunction is to furnish preventive relief against irremediable mischief. An injury is deemed to be irreparable and the mischief is said to be irremediable, when having regard to the nature of the act and from the circumstances relating to the threatened harm, the apprehended damage cannot be adequately compensated with money.

In a case like the present, there is no difficulty in assessing the amount of damages which may be said to have been suffered in consequence of premature retirement. It is a case in which full compensation can be obtained by damages and does not call for application of this extraordinary remedy by way of injunction.

An injunctive relief must not be granted when it is prone to operate contrary to the real justice of the case. What are the hardships which had to be balanced in this case ? If the plaintiff thought that he was being prematurely retired, he could claim damages measurable by the extent of the emoluments of which he had been unjustly deprived. On the other hand if the plaintiff was actually due to retire on 14th July, 1961, on account of superannuation, he could not be permitted to remain in service after that date, and, as a result of the arbitrary exercise of the discretion, he continues in the office which he could not hold

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even for a day after 14th July, 1961. Against the injunctive fiat of the Court ordering his wrongful continuance in office, the defendant has no *ex-post facto* remedy. In other words, in the process of the inquiry, as to whether the plaintiff is being rightly retired or not, the Court, by giving him a temporary accommodation and by prejudging the case, has given him the actual relief, the grant of which was throughout seriously contested. The balance of convenience in this case was on the side of the defendant and not of the plaintiff.

On the question of balance of convenience, the lower appellate Court has stretched the case out of all proportions and has rested in on loss of status as a senior Railway officer, and the social advantages attached to the office giving prestige to its holder. The District Judge has also referred to the present status which enables the plaintiff "to discharge his social obligations of marrying one's children and such other things, quite often in a much better way than a public servant already retired". This reason has nothing to do with the question of balance of convenience to be taken into consideration by the Court when granting temporary injunction. The considerations which have weighed with the learned District Judge are entirely otiose and irrelevant, and are in the nature of special pleadings on behalf of the plaintiff. Another reason that has been assigned is that the ordinary remedy would entail a lengthy and tortuous litigation against the Union of India. This might be said of any regular civil proceedings; but the law would not allow a short-cut on that score. Balance of convenience cannot be judged on the score of the time taken in ordinary legal proceedings. The balance of convenience rule has no place where the applicant's right is doubtful, or, where he can be compensated by damages in money, or, where the wrong might have been redressed if the applicant had been sufficiently vigilant. It is not a good ground for granting injunction merely on the theory that no material injury would result to the party restrained.

A well-known principle which has been set at naught in this case is, that injunctive relief is

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available to those who show reasonable alertness in asking for equitable protection, and not to those who sleep over their rights. The plaintiff is a man of education and has served the Railway Administratiion for thirty-four years and during this period he had undeniably ample means to ascertain whether the date of his retirement was 14th July, 1961, or 18th July, 1962. The suit was instituted by him only four days before the date of retirement as contended for by the defendant and as it appears from the plaintiff's B Card maintained in the office of his employer. Courts do not countenance inexcusable delay when injucntive or similar special relief is sought. If the plaintiff did not posses full knowledge regarding the correctness of the birth entry maintained in the records of the Railway Administration, he had the means of acquainting himself with what was stated therein, and, if incorrect, of seeking rectification. It is not suggested that he made any effort to find out the due date of his retirement, and if the entry was wrong then for its amendment. The plaintiff had ample means of acquiring knowledge within a reasonable time.

The general principles governing grant of temporary injunctions and of perpetual injunctions are analogous and well-settled. Courts, when issuing permanent or temporary injunctions, must act in a careful and conservative manner and grant the relief only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice. If the Court is satisfied that the circumstances of the case do not entitle the grant of a perpetual injunction, a temporary injunction has perforce to be refused. One of the prerequisites to the granting of an injunction is that the party seeking relief must establish the right that he claims. If a right is being asserted which is not justiciable, no injunctive relief can be given either temporarily or perpetually. A right not shown to be *in esse*, cannot be protected by an injunction. In other words, an act which does not give rise to a cause of action cannot be restrained or its perpetration

prevented. The applicant must at least make out a *prima facie* case showing that the grant of the final relief sought is within the competence of the Court.

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Where breach of a contract has furnished a cause of action for the suit, the Court will not grant the relief prayed for, if it is a contract of which specific performance cannot be allowed. There are a large number of contracts illustrative of this rule, and one of them is contract relating to compulsory employment of a person particularly in matters where the services to be rendered are of a personal nature. This matter was examined by Kapur, J., in *Dewan Chand Sabbarwal* v. *Union of India*, (1), That was a case arising from a building contract. The contract had been rescinded and the services of the contractor had been dispensed with. The contractor applied for the issuance of a temporary injunction. In a considered judgment, in which a large number of authorities were reviewed, the learned Judge came to the conclusion that in such cases specific performance was not a suitable remedy and, if the dismissal of the building-contractor was wrongful, the remedy lay in demanding damages.

Breaches of contract for personal service are not restrained by Courts ordering the employer to retain the employee in his service, or directing or commanding an unwilling employee to continue to serve the employer. Speaking generally, it is the right of the employer to discharge his employee, and of the employee to quit his employer's service subject to the right to damages for breach of contract. Courts cannot compel a person against his will, to employ or serve another notwithstanding the contract of service, and no mandatory injuntion can be issued for such purposes. Courts do not order specific performance of an agreement to serve or to take service. In contracts of service, the Courts do not, as a rule, grant injunctive relief. principally for the reason that it is considered invidious to keep persons tied to each other in business

(1) A.I.R. 1951 Punj. 426.

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relations when the tie has become odious and, further, that it is undesirable to turn a contract of service into a status of servitude (*vide* Modern Equity by H. G. Hanbury, P. 547, Seventh Edition). For these reasons, contracts for personal services are not, in general specifically enforcible (vide *Righly* v. *Connol* (2). A *fortiori*, such contracts cannot be specifically enforced against the Union of India. I am not aware of any case, and none has been cited at the bar, where a Court has compelled an employer to cantinue in his service a servant or agent no longer acceptable to him.

For reasons discussed in detail above, this certainly is not a suit in which either on the principles of law or in the circumstances of the case relief by way of permanent injunction could be claimed or granted; and in a case in which a decree for perpetual injunction cannot be passed, a temporary injunction, and it is a case of reckless assumption a semblance of excuse for granting temporary injunction, and it is a case of reckless assumption of jurisdiction.

For the sake of argument, even if it be supposed that under conceivable circumstances, a temporary injunction could be granted, the basic question still is whether there is any room for the exercise of discretion within its well-recognised bounds. Where in granting or refusing injunctive relief, the Court does not apply the law to the facts either conceded or undisputed, the discretion is deemed to have been abused. Discretion cannot be used as a cloak to screen, or to save a manifest misapplication of law. Discretion is best exercised when it is in conformity with the spirit of law with a view to subserve and not impede or defeat the ends of substantial justice. Its exercise is permissible where in doubtful cases an impartial mind hesitates. Discretion is exercisable within well-known confines, which exclude its exercise

(2) 14 Ch. D. 482, 487.

ex gratia. The guiding principles as to the exercise of discretionary power, summarised by Maxwell, are in point—

> "According to his discretion" means it is said, according to the rules of reason and justice, not private opinion (Rook's case, 5 Rep. 100 a; Keighley's case, 10 Rep. 140 b; Eastwick v. City of London, Style, 42, 43 per Willes J., Lee *v.* Bude Raiway L.R. 6 C.P. 576); according to law and not humour, it is to be not arbitrary, vague, and fanciful, but legal and regular (per Lord Mansfield R. v. Wilkes, 4 Burr. 2839); to be exercised not capriciously, but on judicial grounds and for substantial reasons (per Jessel, M.R. Re Taylor, 4 Ch. D. 160; and per Lord Blackburn, Dohetry *v.* Allman 3 App Ca. 728). And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself (per Lord Kenyon, Wilson *v.* Restall, 4 T.R. 757); that is within the limits and for the objects intended by the legislature". (Maxwell, 9th Edition 129—133).

It will thus be seen that though the granting or withholding of injunctive relief is within the discretion of the Court to whom an application has been made, but this power is not unlimited and cannot be equated with the whimsical will of the Court depending upon the temperament or mood of the presiding officer. It is based on sound judgment guided by law. The Courts are not given a handle to misapply law or to twist facts in seeming exercise of the discretionary power.

Apart from the general principles discussed above, a reference to the express provisions of the Indian Specific Relief Act will be of considerable help. Section 21 of the Specific Relief Act enumerates contracts which cannot be specifically enforced. Mr. Salooja, learned counsel for the

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petitioner, has drawn my attention to parts (b) and (d) of this section, which are reproduced below :—

"21. The following contracts cannot be specifically enforced—

* * ** * * * *

(b) a contract which runs into such minute or numerous details, or which is so dependant on the personal qualifications or volition of the parties, or otherwise from its nature, is such, that the Court cannot enforce specific performance of its material terms;

* * ** * * * *

(d) a contract which is in its nature revocable;

* * ** * * * *

He has also drawn my attention to section 56(d), (f), (i) and (j), and these provisions are also reproduced below :—

"56. An injunction cannot be granted—

* * ** * * * *

(d) to interfere with the public duties of any department of the Central Government, or any State Government or with the sovereign acts of a foreign Government;

* * *

(f) to prevent the breach of a contract the performance of which would not be specifically enforced;

* * *

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceedings except in case of breach of trust;

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(*j*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court;

*   *   *"

This section gives a list of cases in which injunction cannot be granted. The law relating to the grant of temporary injunctions is contained in the Code of Civil Procedure, Order 39, rules 1 and 2. It is difficult to see how in the face of the clear provisions of the Specific Relief Act and the well-settled principles governing the grant of injunctive remedy, the learned District Judge has disregarded them while futilely endeavouring to distinguish them.

At no stage during his long service, the plaintiff tendered proof of his birth by submitting a copy of the Matriculation certificate. A copy of the birth entry from the birth record of town committee, Chunian, now in West-Pakistan, is not admissible in evidence in the absence of attestation by the High Commissioner, for India in Pakistan, under section 78(6) of the Indian Evidence Act. Learned District Judge, conceded that the copy marked 'A' could not be taken as admissible in evidence, nevertheless, he did take it into consideration as he thought that it could not be fabricated. In other words, while realising that it was inadmissible, the learned District Judge treated the document as good evidence, though it had not been proved under section 78, ostensibly for the reason that while issuing interim injunction he could treat an unproved document as if it had been proved. This, to my mind, is an untenable position.

Learned District Judge has gone completely off the pleadings and has tried to make out an entirely new case for the plaintiff by maintaining, that the constitutional right of the plaintiff, under Article 311 has been threatened. Apart from the

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fact, that the view of the learned District Judge is palpably erroneous and Article 311 has not been violated, he was entirely in error in bringing in Article 311, which had never been pleaded at any stage, in these proceedings. The District Judge went outside the pleadings and decided the case as if Article 311 has been pleaded by the plaintiff. A decision must be warranted by the pleadings of the party in whose favour it is given. A finding unsupported by the pleadings is gravely defective and, in the present case, it is patently indefensible. An employee who is being retired on reaching the age of superannuation cannot be said to be "dismissed or removed or reduced in rank". Such a retirement, even if the date of superannuation has been erroneously entered, does not attract the operation of Article 311 as it does not entail any penal consequences and does not amount to "dismissal or removal". Both dismissal and removal entail penal consequences which is not the case here, (vide *Sham Lal* v. *State of U.P.* (3), In this case, there is no question as to the plaintiff's conduct being blameworthy or deficient. No minconduct or incapacity has been imputed. To determine whether Article 311 applies, the penal consequences of the order have to be proved. A termination in accordance with the terms of the contract of employment, or in terms of the conditions of service, as embodied in the relevant departmental rules applicable to the Government servants, does not constitute dismissal or removal. The learned District Judge has referred to the case of *Jai Ram* v. *Union of India* (4). Nothing decided by the Supreme Court in that case is of any avail to the plaintiff in this case. Not only the facts were distinguishable, but there is no principle of law enunciated which the plaintiff could invoke with advantage in this case. The District Judge then proceeded to remark that the plaintiff had challenged his removal from service before attaining the age of superannuation and had claimed the protection

(3) A.I.R. 1954 S.C. 369,
(4) A.I.R. 1954 S.C, 584,

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of the provisions of the Constitution. Nothing is farther from actuality. It has never been the case of the plaintiff that he was being deprived of any constitutional rights. The plaintiff has alleged breach of contract of employment and the terms and conditions of his service. There is no allusion, either express or by necessary implication, to breach of constitutional rights, either under Article 311 or under any other provision of the Constitution. While Article 311, which had no applicability, was called into service, the provisions of Article 310 were ignored. Subject to the other provisions of the Constitution, all civil posts are held during the pleasure of the President or the Governor as the case may be. Except for the provisions of Article 311, the exercise of pleasure cannot be fettered. This well-known proposition is supported by a catena of decisions, and among others reference may be made to *A. Sambandhan* v. *R. T. Superintendent S. Railway* (5), *S. Framji* v. *Union of India* (6), and Civil Writ No. 349/1959, decided by this Court on 15th March, 1960; (*Didar Singh* v. *State*).

The excuse that the learned District Judge has given for interfering with the discretion exercised by the trial Judge (Shri Muni Lal Jain) is that he had misinterpreted facts and had misapplied law. Shri H. R. Sodhi, on behalf of the plaintiff has not drawn my attention to any misconstruction of facts or misapplication of law.

The other plea of the plaintiff has been that no revision is competent and the provisions of section 115, C.P.C., ought to be applied stringently and the discretion exercised by the lower appellate Court in reversing the discretionary order of the trial Court must not be interfered with in revision. Reliance has been placed upon the observations of the Supereme Court in *Keshardeo* v. *Radha Kishan* (7). It was held by the Supreme

(5) A.I.R. 1959 Mad. 68.
(6) A.I.R. 1960 Bom. 14.
(7) A.I.R. 1953 S.C. 23.

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Court in that case, that the High Court acted in excess of its jurisdiction when it entertained a revision against the order of the executing Court and set it aside in exercise of that jurisdiction and remanded the case for further enquiry. In that case, the Supreme Court found that the order of the Subordinate Judge was one that he had jurisdiction to make and that in making the order he neither acted in excess of the jurisdiction nor did he assume jurisdiction which he did not possess. In the circumstances, it could not be said that in the exercise of it he acted with material irregularity or committed any breach of the procedure laid down for reaching at the result. Reference was made, *inter alia,* to the observations of the Privy Council in *Venkatagiri Ayyangar* v. *Hindu Religious Endowments Board, Madras* (8), wherein it was said that there was no justification for the view that section 115 was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate Courts so as to prevent grave injustice in non-appealable cases. The following observations of the Privy Council were referred to—

> "Section 115 applies only to cases in which no appeal lies, and, where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is

(8) 76 Ind. App. 67.

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> satisfied on those three matters, it has no power to interfere because it differs, however, profoundly from the conclusions of the subordinate Courts on questions of fact or law."

Applying the above observations to the facts of this case, I am of the view, that the lower appellate Court has acted illegally or with material irregularity. The errors, that it has committed, are in the erroneous exercise of its jurisdiction and these errors do, if left unchecked, affect the ultimate decision. It had virtually given a relief which had been prayed for by the plaintiff and seriously contested by the Union of India. In *Badam Khan* v. *Suraj Narain* (9), a point had not been taken either in the lower Court or in the memorandum of appeal to the appellate Court. It was held that the appellate Court acted illegally and with material irregularity in allowing the point to be raised for the first time, and such an appellate order could be interfered with in revision. In this case, as has been noticed above, new points relating to the applicability of Article 311 had been raised which at no stage had been taken by the plaintiff. They were taken *suo motu* and were not covered by the pleadings or by the memorandum of appeal and were disposed of in a manner manifestly contrary to the rules of procedure and pleadings. An appellate Court, when it sets up a new case for a party, acts with material irregularity and such an order can be disturbed in revision (vide *Pohla Singh* v. *Jamal Din* (10). Madhavan Nair J., in *N. Mahopatro* v. *Sri Ramachandra Mardaraja Deo Garu* (11), expressed the view, that reversing judgment of a lower Court on a new question, not raised by the parties, and for which, there were not sufficient materials before the Court, was acting with material irregularity and such an order was liable to be interfered with under section 115, Code of

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(9) A.I.R. 1947 All, 299.
(10) A.I.R. 1927 Lah, 73.
(11) A.I.R. 1925 Mad, 357.

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Civil Procedure. Where a decision is based not merely on a forced and impossible construction of the facts that were before the Court but which did not exist, there was held to be a material irregularity in the exercise of jurisdiction of the sort contemplated by section 115, Civil Procedure Code (vide *Pandurang* v. *Kalludas* (12). In *Hari Chand Anand & Co.* v. *The Singer Manufacturing Co.,* (13), a Division Bench of the Lahore High Court had reached the conclusion, that the balance of convenience was on the side of the defendant, and that the temporary injunction should not be granted, and, further, that the interests of plaintiff could be safeguarded by putting the defendant on conditions. In that view of the matter, the revision was allowed. Where a lower Court loses sight of the first principles governing the issuance of temporary injunctions, it acts with material irregularity in the exercise of its jurisdiction (vide *Mayyappa Chettiar V. Gopalakrishna Ayyar* (14). In the instant case, as will appear from the matters already examined, there has been a manifest violation of the principles governing the grant of interlocutory relief under Order 39, Civil Procedure Code, clear departure from the well-settled principles of the law of pleadings, and there is hardly any basic rule governing grant of injunctions of which breach has not been committed. This case falls eminently within the purview of section 115(c), Civil Procedure Code. I need not dilate on the successive delays in the disposal of the applications of the Union of India requiring expendition and promptitude, or, on the alacrity and despatch in entertaining the plaintiff's appeal and in granting the interlocutory relief before the copy of the judgment under appeal was made available, and without acquainting himself with the reasoning of the trial Court which had impelled it to vacate the temporary injunction granted by the Sub-Judge at Ambala

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(12) A.I.R. 1923 Nag, 108.
13) A.I.R. 1933 Lah, 1046.
(14) A.I,R. 1939 Mad, 750.

cantonment. The perusal of this record is a dismal reading as to the manner in which the elementary principles which are to be kept in the forefront by those who are called upon to administer justice according to law, have been departed from.

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For reasons mentioned above, this revision is allowed, the order of the learned District Judge is reversed and the temporary injunction granted by the learned District Judge is vacated. The trial Court may now proceed with the case where it was left by its order, dated 16th November, 1961. The petitioner will be entitled to its costs in this Court and in the Court of the District Judge.

B.R.T.

REVISIONAL CRIMINAL

Before D. Falshaw, C.J., and Inder Dev Dua, J.

SHEO DAN,—*Petitioner.*

versus

PIR DAN AND ANOTHER,—*Respondents.*

Criminal Revision No. 645 of 1961.

1962
———
April, 2nd

Code of Criminal Procedure (Act V of 1898)—S. 520—Appeal under—Whether lies from an order passed by a magistrate under S. 517—Power of Sessions Judge to reverse or modify order passed by a magistrate under S. 517.

Held, that the Sessions Judge has no jurisdiction as an appellate Court under section 520 to reverse or modify an order passed by a Magistrate, under section 517 since no appeal lies against an order under that section as such, and in exercise of his powers of revision the Sessions Judge can only exercise revisional powers conferred on him by Chapter 32 and, therefore, must, if he thinks an order under section 517 requires correction, forward the case to the High Court under section 438 for the orders of that Court.