

APPELLATE CIVIL

Before D. Falshaw, C.J., and A. N. Grover, J.

LT. COLONEL GURCHARAN SINGH,—*Appellant.*

versus

UNION OF INDIA,—*Respondent.*

Regular First Appeal No. 311 of 1959.

1965
January, 5th

Code of Civil Procedure (Act V of 1908)—S. 9—Suit by a member of the Armed Services challenging an order prematurely retiring him—Whether maintainable—Farman-i-Shahi of erstwhile Patiala State dated 2nd January, 1940 and Patiala and East Punjab States Union General Provisions (Administration) Ordinance (XVI of 2005)—S. 14—Whether barred such a suit—Patiala State Forces Regulations (1930)—Regulation 39—Whether mandatory.

Held, that a suit by a member of the Armed Forces challenging an order prematurely retiring him from service is maintainable under section 9 of the Code of Civil Procedure, 1908. A suit of this kind was not specifically barred by the terms of the Farman-i-Shahi of the erstwhile Patiala State dated 2nd January, 1940, since premature retirement on pension in contravention of a binding regulation is not the same thing as dismissal. Such a suit was also not barred by section 14 of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance XVI of 2005 Bk.

Held, that the Patiala State Forces Regulations of 1930 continued to have the same force in the Patiala and East Punjab States Union after its formation as they had in the erstwhile Patiala State by virtue of Article 3(1) of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, XVI of 2005 Bk. Regulation 39 of these Regulations must be regarded as a mandatory regulation and, according to it, if a member of the Armed Forces was to be called upon to retire or resign his com-

mission for any reason other than misconduct, this could only be in pursuance of a decision of the Army Council. Any order passed retiring a member of the Armed Forces prematurely on pension, in the absence of a decision by the Army Council, will be illegal and ultra vires and a suit challenging such an order is maintainable under section 9 of the Code of Civil Procedure, 1908.

Regular First Appeal from the decree of the Court of Shri M. R. Sikka, Sub-Judge 1st Class, Patiala (B), dated 14th September 1959, dismissing the suit with costs.

J. N. KAUSHAL, ADVOCATE WITH M/s. R. K. DASS AND M. R. AGNIHOTRI, ADVOCATES, for the Appellants.

CHETAN DASS, DEPUTY ADVOCATE-GENERAL, WITH M. R. SHARMA, ADVOCATE, for the Respondents.

JUDGMENT

FALSHAW, C.J.—This is an appeal against the dismissal of a suit of the appellant, the reliefs claimed by whom against the defendant, the Union of India, from his alleged illegal premature removal from service in the Patiala State Army in February, 1949. Falshaw, C.J

The plaintiff's case was that he started his career as a cadet in the Patiala State Army in 1925 and by the 14th of January, 1947, when he had attained the rank of Lt. Colonel, he was placed in command of the First Rajindra Lancers. On the 15th of September, 1948, he was transferred to the Army Headquarters as Director of Cavalry, one Major Gurdial Singh, being appointed at the command of the regiment. On the 5th of February, 1949, he was compulsorily retired from service under an order signed by His Highness the Maharaja of Patiala, who by that time had become the Rajparmukh of the Patiala and East Punjab States Union, on the recommendation of Maj. General Balwant Singh, described as General Officer Commanding, Pepsu Army.

Under the Patiala Army Pension Rules at the time of his retirement the plaintiff was entitled to a pension of Rs. 125 per mensem, the rate fixed for an officer of his rank retiring after 21 years of service, but if he had been made to retire only a few months later, after completing 24 years of service, he would have been entitled to a

Lt. Colonel pension of Rs. 170 per mensem and there is a further development in that by Pepsu Army Order No. 44 dated the 1st of June, 1949, officers retiring from the Pepsu Army became entitled to pension at 80 per cent of the Indian Army Rules for corresponding ranks. In the plaintiff's case this would have been Rs. 430 per mensem.

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The plaintiff made a representation to His Highness the Rajpirmukh pointing out the hardships involved in his case, and particularly drawing attention to the fact that if he had been allowed to take six months' earned leave before retirement which was due to him when he retired, he would have been entitled to the increased pension of Rs. 170 per mensem under the Patiala Rules and even to Rs. 430 per mensem under the new Rules. His representation was forwarded by His Highness to the Government of India with a strong recommendation for favourable consideration, but the only concession from the Government which resulted from this was that his shortage of service of six months was condoned so as to give him the benefit of the increased pension under the Patiala Rules.

The plaintiff instituted his suit in September, 1954, for a declaration that his premature retirement was both illegal and *mala fide* and that he was entitled to Rs. 20,000 as damages, Rs. 6,000 as arrears of pay for the leave which he was not allowed before retirement and that he was entitled to the pension of Rs. 430 per mensem.

Certain preliminary objections were raised by the defendant regarding the maintainability of the suit on grounds relating to the validity of the notice under section 80 of the Code of Civil Procedure, the right of the plaintiff to sue for a declaration only and his right to challenge the order of His Highness the Rajpirmukh retiring him from service in a Civil Court. Only the issue regarding the notice under section 80 of the Code of Civil Procedure was decided in his favour and, as was pointed out by the learned Subordinate Judges, who ultimately decided the suit, the decision on the other issues could properly have led to the dismissal of the suit then and there, but nevertheless the plaintiff was allowed to amend his plaint, and in the amended plaint the claim for Rs. 20,000 as damages was dropped, but the claim for Rs. 6,000 on account of

leave salary was retained after paying the necessary court-fee. Otherwise the plaint was much the same as before.

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Eleven issues were framed, but most of them will not arise in the appeal. In addition to the grounds on which the suit could have been dismissed at the preliminary stage it was also held that the compulsory retirement of the plaintiff was neither malicious nor illegal, that he was not entitled to a declaration in respect of the claim to pension at the rate of Rs. 430 per mensem and that in fact he was not entitled to agitate his claim regarding pension in the Civil Court.

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The first question is whether the premature retirement of the plaintiff was malicious or otherwise *mala fide* and whether it was illegal. The first of these allegations has not been pressed, and rightly so, since it appears to rest simply on the fact, regarding which there seems to be no dispute, that Major Gurdial Singh, who was given charge of the regiment when the plaintiff was appointed as ~~Director~~ of Cavalry in Army Headquarters, and whose promotion to the rank of Lt. Colonel was recommended in the same communication in which the retirement of the plaintiff was recommended, was the son of a friend of the officer, who made the recommendation, the G.O.C. Major General Balwant Singh. However, there is no hint of any malice or *mala fides* on the part of His Highness the Rajpramukh, who actually passed the final order.

On the question of legality the relevant regulations in the Patiala State Forces Regulations of 1930 read—

6. "Control of the Army:—His Highness Shri 108 Maharaj Dhiraj Mohinder Bahadur, is the Supreme Head of the Patiala State Forces.
7. Army Council.—The Army Council consists of the Commander-in-Chief as President and the staff Officers at Army Headquarters as members.

The Army Council is a deliberative, consultative, and advisory body summoned as occasions may arise to advise His Highness upon matters of Military Policy, efficiency and control on sudden emergency. The junior member acts as Secretary."

Lt. Colonel In Chapter III dealing with Officers' appointments,
 Gurcharan Singh transfers, promotions and retirement, regulation No. 39
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*"Compulsory Retirement:—*Officers will be retired compulsorily on attaining the following ages:—
 Lieut. Colonel55.

Colonel57.

An Officer of the Patiala State Forces may at any time be called upon to retire or to resign his commission, for reasons other than misconduct, should the circumstances of the case, in the opinion of the Army Council, require it."

It is not in dispute that the plaintiff was only 43 years of age when the order for his retirement was passed and there is no question of his retirement being due to misconduct, since in the recommendation of the G.O.C., P. 2, the order of retirement was recommended simply on the ground of 'the present reorganisation.' It may also be pointed out that there is no suggestion that the recommendation for the plaintiff's retirement was the result of any decision of any Army Council as contemplated by regulation No. 39.

The main contentions advanced on behalf of the appellant are that the Patiala State Forces Regulations have the force of the law, that in respect of the order of retirement His Highness the Rajparamukh of Pepsu was in no different position from that in which he would have been if he had been still the Maharaja of the State of Patiala and that there is no bar to the plaintiff's maintaining the suit.

It certainly appears to be correct that on the 5th of February, 1949, the date on which the Rajparamukh passed the order sanctioning the recommendation of the G.O.C. for the retirement of the plaintiff, his position was no different from what it was when he was the ruler of the State of Patiala. This is apparent from Article VII of the Covenant under which the Union of the States was constituted. It reads—

"(1) Subject to any directions or instructions that may from time to time be given by the Government of India in this behalf, the authority to

raise, maintain and administer the military forces of the Union shall vest exclusively in the Rajparamukh.

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- (2) Nothing in the preceding paragraph of this Article shall be deemed to prevent the Rajparamukh from consulting the Council of Ministers in regard to any of the matters mentioned therein."

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It is also clear that whatever force the Patiala State Forces Regulations had before the formation of the Union was still maintained. This arises from the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, XVI of 2005 BK. Article 3(1) of which reads—

"As from the appointed day, all laws and rules, regulations, bye-laws and notifications made thereunder, and all other provisions having the force of law, in Patiala State on the said day, shall apply, *mutatis mutandis*, to the territories of the Union and all laws in force in the other Covenanting States immediately before that day shall cease to have effect."

One ground on which the plaintiff's suit has been held to be liable to dismissal is clearly erroneous. This was based on the second part of clause 278 of the Patiala State Regulations, the relevant portion of which reads—

"The State reserves to itself the right to retire any of its employees on pension on political or other reasons."

The lower Court appears to have assumed, and rightly so, that these Regulations remained in force under the provisions of Article XVI, but it is clear that generally speaking they refer only to Civil Servants and not to army personnel although some clauses in the volume specifically deal with matters of leave and pension regarding the army. That the Regulations generally, except where specific clauses deal with the army, refer to civil servants is clear from the provision regarding compulsory retirement in Chapter IX, clause 125 of which provides with certain exceptions that on attaining the age of 55 gazetted

Lt. Colonel officers shall retire on the pension to which the rules entitle them. Different regulations, however, regarding the retirement of military personnel are contained in the Patiala State Forces Regulations and I have already cited Regulation No. 39 which applies in the present case. I cannot see any reason for supposing that any less sanctity is to be attached to the Patiala State Forces Regulations than the Patiala State Regulations on one of which the lower Court has relied.

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A more debatable question is whether suit by a member of the Armed Services challenging an order prematurely retiring him is maintainable at all. On this point the lower Court held that such a suit was not maintainable on the strength of the decisions of Harnam Singh and J. L. Kapur, JJ., in *Union of India v. Ram Chand Beli Ram* (1), and of Desai J., in *Chhandra Bhan Varma v. Union of India* (2). The basis of both these decisions was that prior to the enactment of the Government of India Act of 1935 no Government servant, whether in the civil services or the Armed Services, could maintain a suit against the Government challenging the termination of his services, all officers alike holding their posts at the pleasure of the Crown, but the position was altered as regards members of the civil services by section 240 of the Government of India Act of 1935, which for the first time introduced with regard to civil servants the same rights as have now been embodied in Article 311 of the Constitution, and this was held to give civil servants the right of action if the principles of section 240 of Article 311 were violated. The view, however, prevailed that the position of members of the Armed Services remained unchanged and that, therefore, in spite of the wide terms of section 9, Civil Procedure Code, no action could be brought by such a person to challenge the termination of his services.

The learned counsel for the appellant has sought to distinguish these decisions on the ground that although when the present suit was instituted against the Union of India in 1954, that Government was the only possible defendant, the law applicable is that which applied first to the State of Patiala and then, after the merger, to the

(1) I.L.R., 1955, Punj. 840 = A.I.R., 1955, Punj. 166.

(2) A.I.R., 1956, Bom. 601.

State of Pepsu to which on its inception all laws, regulations, etc., in force in the State of Patiala were made applicable by Article 3(1) of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance which I have already cited.

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Particular stress has been laid on the terms of the Firman-i-Shahi, dated the 2nd of January, 1940, which was still in force when the Patiala and East Punjab States Union was created and, therefore, retained the force of law. The relevant portion of this reads—

“Whereas doubt have arisen as to the maintainability of suits instituted against the State or State officers for any act purporting to be done by them in their official capacity;

And whereas it is necessary to resolve these doubts;

Now, therefore, we are hereby pleased to order that henceforth, notwithstanding any Hidayat or Rule of procedure to the contrary, suits by private individuals against the State, or any State officer in respect of any act purporting to be done by such State Officer in his official capacity shall be maintainable subject, however, to the reservation that no suit shall be instituted by any private individual against the State or any State Officer in respect of any act which may have been done or intended to have been done in good faith, or, which may have been done in pursuance of the provisions of any enactment, Hidayat, Ijlas-i-khas order, or rules and regulations framed by a competent authority or in respect of which remedy may be available to such individual through the executive authority and, specially in respect of the causes of action arising with to:—

- (1) An ‘Act of State’,
- (2) State property, Jagirs and other grants,
- (3) Rights to the officers connected with religious or charitable institutions under State Control,
- (4) Dismissal from State service.”

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It certainly cannot be said that premature retirement on pension in contravention of a binding regulation is the same as dismissal and in my opinion a suit of this kind was not specifically barred by the terms of the above Firman-i-Shahi. Section 13 of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance provides that the Government may sue or be sued by the name of the Government of the State or in such other manner as may by notification be directed by the Government, but the provisions of section 14 are relied on by the defendant. This section reads—

“(1) Subject to the provisions of sub-section (2) the Rajparmukh or any authority authorised in this behalf by the Rajparmukh, may—

(a) regulate the recruitment and conditions of service of persons appointed to public services, and to posts in connection with the affairs of the Government, or

(b) make rules or regulations for the conduct of Government servants, who are members of the public services or are holding posts in connection with the affairs of the Government, or for any other matter relating to them.

(2) No person who is a member of a civil service of the State or holds any civil post in the State shall be dismissed from service or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him:

Provided that this section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.”

This section is undoubtedly similar to section 240 of the Government of India Act of 1935 and Article 311 of the Constitution, and it is argued on behalf of the respondent that on this account the principles underlying the decisions of this Court and the Bombay Court are applicable, and that the same distinction may exist in relation to the erstwhile State of Pepsu as applied in the erstwhile British India between civil servants and members of the Armed Services in respect of any right of action regarding termination of their services.

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I do not, however, think that this argument can be accepted, since the basis of the decisions relied on was that no Government servant could challenge the termination of his services by a civil action before the Government of India Act of 1935 and a right restricted to civil servants was conferred by that Act whereas in the present case, if my interpretation of the Firman-i-Shahi is correct, a suit of the present nature was not barred before the Patiala and East Punjab States Union was created and, therefore, not being expressly barred, thereafter, continued to be maintainable.

Once the suit is held to be maintainable, in my opinion it must succeed, at least to the limited extent of the only relief now claimed by the learned counsel for the appellant, namely a declaration that the order retiring him on pension was invalid and illegal. It is certainly very unfortunate case from the point of view of the plaintiff who was retired at the age of 42 as against the age of 55 provided by Regulation No. 39 and who, if his retirement had been deferred by only three months, would have been entitled under the Pepsu Army Order No. 44 of the 1st of June, 1949, to a pension of Rs. 430 per mensem as against Rs. 170 which he has been getting. In my opinion Regulation No. 39 must be regarded as a mandatory regulation and according to it, if he was to be called upon to retire or resign his commission for any reason other than misconduct, this could only be in pursuance of a decision of the Army Council, which was never obtained in this case. If any authority is needed for the proposition that a ruling prince can restrict his powers to deal with State's servants at his pleasure and if he does so, it is binding even on the successor Government, it is to be found in the case of *Bholanath J. Thaker v. The State of*

Lt. Colonel Saurashtra (3). This was a case of an employee of Gurcharan Singh Wadhwan State which subsequently became merged in the State of Saurashtra. There the prince had made an enactment applicable to the plaintiff which fixed his retiring age at 60 and after the merger the State Government retired him under the 55-years' rule with three months' salary as compensation. It was held that even though the tenure of the plaintiff's service with the Ruler of the Wadhwan State was initially during the pleasure of the Ruler, the Ruler put a fetter upon his powers to dispense with the services when *Dhara* No. 29 of *Samat* 2004 was enacted by him and this obligation of the Ruler passed to the Saurashtra State and the Saurashtra State also could not dispense with the services or compulsorily retire the plaintiff before he attained 60 years of age and if the Saurashtra State chose to compulsorily retire him, it could only do so on payment of reasonable compensation. In my opinion, the right conferred by Regulation No. 39 was mandatory and so could be enforced. The result is that I would accept the appeal to the extent of granting the appellant a declaration that the order by which he was retired on pension on the 5th of February, 1949, was illegal and *ultra vires*. Since the plaintiff had claimed certain reliefs which he could not be granted, I would leave the parties to bear their own costs.

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A. N. GROVER, J.— I agree.

B.R.T.

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