

APPELLATE CIVIL

Before Khosla and Harnam Singh, JJ.

THE UNION OF INDIA,—Appellant.

1952

July 10th

versus

SHRI JAI RAM,—Respondent.

Letters Patent Appeal No. 107 of 1951.

Government of India Act (1935), Section 240 (3). Retirement from service, whether amounts to dismissal within section 240 of the Government of India Act—Fundamental Rules, Rule 69 and 72—Scope of—Government Servant whether can withdraw his request to retire after he has actually retired.

J. R. entered Government service on the 7th May 1912. He became 55 years of age on the 26th November 1946, the superannuation age. He could ordinarily be retained in service up to the age of sixty on continued fitness. But on his repeated requests for retirement, he was granted leave preparatory to retirement under Rule 56, Fundamental Rules, on average pay for 6 months with effect from 1st June 1946 to 30th November 1946, combined with leave on half average pay for five months and 25 days from 1st December 1946 to 25th May 1947. On the 16th May 1947, J. R. applied for permission to resume duty under Fundamental Rule 72 and the permission was refused. On the 6th July 1949, J. R. filed the present suit for declaration that the order retiring him from service is void and inoperative and that he should be deemed to be in service. The suit was resisted by the Government, and was dismissed. Appeal to the District Judge was also rejected. On Second Appeal to the High Court the suit was decreed. The Government went up in Letters Patent Appeal.

Held, that retirement from service is not dismissal from service within section 240 (3) of the Government of India

Act, 1935. In the case of retirement from service no dis-qualification for future appointment is entailed and the officer is entitled to the pension. In the case of dismissal from service pension is not admissible.

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Held further, that Fundamental Rules 69 and 72 had no application to this case. Leave granted to J. R. was to continue after the date of retirement under Rule 86, and when he withdrew his request for permission to retire and for permission to return to duty he had retired from service. Clearly under the proviso to Rule 69 a Government servant can withdraw his request for permission to retire before he has actually retired and not after the date of retirement. So also Rule 72 which provides that a Government servant on leave may not return to duty more than 14 days before the expiry of the period of leave granted to him, has no application to the present case as on that date J. R. had retired from service.

Letters Patent Appeal under clause 10 of the Letters Patent, from the decree of the Hon'ble Mr Justice Falshaw, Judge, High Court, dated the 6th August 1951, in R. S. A. No. 884 of 1950, reversing that of Shri J. S. Bedi, District Judge, Ambala, dated the 2nd December 1950, and granting the plaintiff a decree for the declaration which he claims with costs throughout.

S. M. SIKRI, Advocate-General and D. K. MAHAJAN, for Appellant.

C. RAI, for Respondent.

JUDGMENT

HARNAM SINGH, J. In order to appreciate the points arising in L. P. A. No. 107 of 1951, it is necessary to set out the facts of the case in detail.

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Jai Ram, plaintiff, entered the service of the Government of India on the 7th of May, 1912. Jai Ram, plaintiff, reached the age of 55 years on the 26th of November 1946, but it is common ground that the date of his retirement was governed by Fundamental Rule 56 (b) (i), Chapter IX of the Fundamental Rules, according to which a ministerial servant should ordinarily be retained in service if he continues efficient up to the age of 60 years.

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On the 7th of May 1945, Jai Ram wrote letter, Exh. D. 1, to the Director of the Central Research Institute at Kasauli that having completed 33 years' service on the 6th of May 1945, he should be permitted to retire and allowed to take whatever leave was admissible to him. On the 18th of May 1945, Mr H. W. Mulligan, presumably Director of the Institute, passed orders to the effect that Jai Ram, who had 2½ months' leave recently, could not be spared. On the 30th of May 1945, Jai Ram wrote letter, Exhibit D. 2, that owing to the death of his brother, his private circumstances did not permit of his serving in the Institute any longer. In that letter, Jai Ram applied for leave preparatory to retirement four months' leave on average pay and the rest on half average pay with effect from the 1st of June 1945, or the date of availing to the date of superannuation, namely, the 26th of November 1946. On this letter Mr Mulligan ordered on the 31st of May 1945, that Jai Ram could not be spared.

On the 18th of September 1945, Jai Ram wrote letter, Exhibit D. 3, to the Director of the Institute for the reconsideration of his application for leave preparatory to retirement. On the 20th of September 1945, Mr Mulligan refused to consider that application. On the 28th of May 1946, Jai Ram wrote letter, Exhibit D. 4, to the Director of the Institute asking for leave preparatory to retirement. In that letter Jai Ram requested that he should be granted leave preparatory to retirement as from the 1st of June 1946, including six months' leave on average pay. That request was allowed but the matter of how much leave and of what kind was due to Jai Ram, was referred to the Accountant-General, Central Revenues. On the 11th July 1946, the Accountant-General, Central Revenues, communicated to the Director of the Research Institute that Jai Ram was entitled to leave preparatory to retirement on average pay for six months with effect from the 1st of June 1946 to the 30th of November 1946, combined with leave on half average pay for five months and 25 days from the 1st of December 1946 to the 25th of May 1947.

From what I have said above, it appears that leave given to Jai Ram was calculated on the basis that he could be compulsorily retired with effect from the 30th of November 1946.

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On the 16th of May 1947, Jai Ram wrote to the Director of the Institute that he may be permitted to resume duty forthwith under Fundamental Rule 72, but the Director of the Institute intimated to him that he *could not be permitted to resume duty as he had retired from service*. Jai Ram made representations, but the matter was concluded as far as the Government of India was concerned by letter, dated the 28th of April 1948, from the Director-General of Health Services, New Delhi, to the Director of the Institute at Kasauli. That letter reads :—

“Reference your memorandum No. 741, dated the 15th January 1948, regarding the continuance in service of Mr Jai Ram, the late Head Clerk, Central Research Institute, Kasauli. The Government of India have held that as Mr Jai Ram has availed himself of the full leave preparatory to retirement due to him *and has actually retired from service of his own volition, the question of his having any right to duty and to continue service till the age of 60 years does not arise*. Mr Jai Ram may be informed accordingly and the case treated as closed.”

On the 6th of July 1949, Jai Ram instituted Civil Suit No. 90 of 1949 for declaration to the effect that the order passed by the Government of India retiring him from service is void and inoperative and that the plaintiff should be deemed to be in service of the Government of India in spite of that order.

Defendant resisted the suit and on the pleadings of the parties the following issues were fixed :—

- (1) Was the plaintiff made to retire from service against the rules of service applicable to him ?

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- (2) Was the plaintiff entitled to resume duty before the expiry of the leave? If so, what is its effect?
- (3) Was it necessary under the rules to give notice or an opportunity to the plaintiff to show cause or make representation against his retirement? If so, what is the effect of not doing so?
- (4) If the order of retirement is held to be illegal or wrongful, then to what relief is the plaintiff entitled?

Finding issues Nos 1 to 3 against the plaintiff the Court of first instance dismissed the suit with costs.

From the decree passed by the Court of first instance on the 28th of February 1950, Jai Ram appealed under section 96 of the Code of Civil Procedure in the Court of the District Judge at Ambala. That appeal failed and was dismissed with costs.

From the decree passed by the District Judge, Jai Ram appealed under section 100 of the Code of Civil Procedure. By judgment, dated the 6th of August 1951, Falshaw, J., has allowed that appeal and granted the plaintiff a decree for the declaration which he claimed with costs throughout.

From the judgment passed by Falshaw, J., on the 6th of August 1951, the Union of India appeals under Clause 10 of the Letters Patent.

In deciding Regular Second Appeal No. 884 of 1950, Falshaw, J., came to the following conclusions:—

- (1) That there was nothing in law or in the Fundamental Rules which would preclude Jai Ram to withdraw his request for permission to retire and from returning to

duty, for he remained in service until the expiry of his leave period and his lien on his post remained in force until that date ;
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- (2) That the retirement of Jai Ram under Fundamental Rule 56 (b) (i) after the age of 55 years but before attaining the age of 60 years either due to want of efficiency or otherwise would attract the provisions of section 240 (3) of the Government of India Act, 1935.

In order to bring the case within section 240 (3) of the Government of India Act, 1935, the plaintiff has to establish that he is either dismissed from service or reduced in rank. No question of reduction in rank arises in the case. That being so, the sole question that arises for decision is whether the retirement of Jai Ram from service is dismissal from service.

Mr C. Rai appearing for the plaintiff-respondent urges that no ministerial servant to whom Fundamental Rule 56 (b) (i) applies and who has attained the age of 55 years but has not attained the age of 60 years, can be required to retire from service unless he has been given a reasonable opportunity to show cause against the proposed retirement and unless any representation that he may desire to make in that connection has been duly considered before final orders in the matter are passed. In my opinion this argument cannot be accepted unless it is found that retirement from service is dismissal from service.

That retirement from service is not dismissal from service within section 240 (3) of the Government of India Act, 1935, is not open to serious challenge. In deciding Civil Writ No. 134 of 1951, I considered a similar question and came to the conclusion that retirement from service is not dismissal from service within section 240 (3) of the Act. In the case of retirement from service no disqualification from

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future appointment is entailed and the officer is entitled to pension. In the case of dismissal from service pension is not admissible, though in fit cases compensatory allowance may be given.

In the present case Jai Ram was retired from service on his own request. If so, no notice was necessary to be given to Jai Ram to show cause why he should not be retired from service.

For the reasons given in Civil Writ No. 134 of 1951, decided on the 8th of April 1952, I am of the opinion that section 240 (3) of the Act has no application.

As stated above, Jai Ram made repeated applications for permission to retire from service and it was on his application that he was allowed to retire from service. On the 28th May 1946, Jai Ram wrote letter, Exhibit D. 4, to the Director of the Institute asking for leave preparatory to retirement. On that application Jai Ram was given leave preparatory to retirement on average pay for six months with effect from the 1st of June 1946 to the 30th of November 1946, combined with leave on half average pay for five months and 25 days from the 1st of December 1946 to the 25th of May 1947. In deciding issues Nos 1 and 2 Falshaw, J., thought that there was no rule on the point whether a person who has proceeded on leave preparatory to retirement can withdraw his request for permission to retire and return to duty. Indeed, no such rule was pointed out to us in arguments.

Fundamental Rule 69 permits a Government servant who has proceeded on leave preparatory to retirement to withdraw his request for permission to retire and to return to duty. The proviso to Fundamental Rule 69 reads :—

“ Provided that a Government servant who has been granted permission to take any

service or accept any employment under this rule, during leave preparatory to retirement shall be precluded, save with the specific consent of the Governor-General in Council, or any lower authority empowered to appoint him, from withdrawing his request for permission to retire and from returning to duty."

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Prima facie it appears that the rules do not preclude a Government servant who has proceeded on leave preparatory to retirement to withdraw his request for permission to retire and to return to duty unless the Government servant has been granted permission to take any service. In the present case Jai Ram was granted leave which was to continue after the date of retirement within Fundamental Rule 86 and when he wrote to the Director of the Research Institute withdrawing his request for permission to retire and for permission to return to duty he had retired from service. Clearly, under the proviso to Fundamental Rule 69 a Government servant can withdraw his request for permission to retire before he has actually retired and not after the date of retirement. If so, the authorities were right in refusing permission to Jai Ram to rejoin duty on the 16th of May 1947. In this view of the matter issues Nos 1 and 2 were rightly decided by the Court of first instance and the Court of First appeal against the appellant.

Reliance is placed on Fundamental Rule 72 which provides that a Government servant on leave may not return to duty more than fourteen days before the expiry of the period of leave granted to him. In my judgment the rule has no application to the present case for prior to the 16th of May 1947, Jai Ram had retired from service.

Basing himself on *Venkata Rao v. Secretary of State* (1), counsel for the appellant urges that the

(1) A.I.R. 1937 P.C. 31.

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remedy of the plaintiff was not by suit but by way of appeal of official kind. In that case Lord Roche said :—

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“ Section 96-B and the rules make careful provision for redress of grievances by administration process and it is to be observed that subsection 5 in conclusion re-affirms the supreme authority of the Secretary of State in Council over the Civil Service. These considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the appellants exists.”

Finding as I do against the plaintiff on issues Nos 1 to 3, I do not think it necessary to decide the point whether the plaintiff had remedy by way of suit.

For the foregoing reasons, I allow the appeal and dismiss the suit leaving the parties to bear their own costs throughout.

Jai Ram asks for leave to appeal to the Supreme Court of India from the judgment in Letters Patent Appeal No. 107 of 1951, which I refuse.

KHOSLA, J. I agree.