APPELLATE CIVIL

Before Harnam Singh and Kapur, JJ.

THE UNION OF INDIA,—*Appellant*

versus

SHRI RAM CHAND,—*Respondent*

Regular Second Appeal No. 108 of 1952

1954

Oct., 22nd

Indian Army Act (VIII of 1911) Section 113—Rule 13B, item No. 1(i)(b) and (iii)(b)—Defence services—Viceroy's Commissioned Officer—Order of discharge from service—Whether the legality of such order of discharge can be questioned in a Civil Court—Government of India Act 1858—Section 65—Whether confers right of action—Government of India Act 1935, Section 240—Code of Civil Procedure (V of 1908) Section 9—Whether confers right of action.

Held (*per Harnam Singh J.*), that section 65 of the Government of India Act, 1858, did not give the plaintiff a right enforceable by action. That section was a section relating to parties and procedure in cases where the plaintiff possessed a right enforceable by action. Section 240 of the Government of India Act, 1935, for the first time gave civil servants in the employment of the Crown a right of action against wrongful dismissal, removal or reduction in rank. No such right was given by that Act to persons serving in the Defence services of the Crown, and thus the suit was not maintainable.

Held also, that Section 9 of the Code of Civil Procedure did not confer the right of action as the same was impliedly barred on the principle that Courts are not to countenance matters which are injurious to and against the public weal.

Held (*per Kapur J.*), that section 9 Civil Procedure Code only provides for jurisdiction of Civil Courts but does not give a right of action. If a suit of a Civil nature is competent then Civil Courts will have jurisdiction to try it. Section 9 only gives a right to the Civil Courts to try suits which are not expressly barred. Public policy is a good ground which impliedly bars suits of a civil nature and this would be a bar under section 9 also.

(Case referred by the Hon'ble Mr. Justice Kapur to the Division Bench, consisting of Hon'ble Mr. Justice Harnam Singh and Hon'ble Mr. Justice Kapur.)

Regular Second Appeal from the decree of the Court of Shri Sheo Parshad, Senior Sub-Judge, Gurdaspur, dated the 19th November, 1951, reversing that of Shri Basant Lal, Sub-Judge, 1st Class, Gurdaspur, dated the 24th May, 1951, and granting the plaintiff a decree as prayed for in the plaint but leaving the parties to bear their own costs throughout.

HAR PARSHAD, Assistant Advocate-General, for Appellant.

K. C. NAYAR, for Respondent.

JUDGMENT

Kapur, J.

KAPUR, J. This case involves a question of some importance and I am of the opinion that it should be decided by a Division Bench. The present appeal has been brought by the Union of India against an appellate decree passed by the Senior Subordinate Judge, Mr. Sheo Parshad, dated the 19th November, 1951, reversing the decree of the trial Court dismissing the plaintiff's suit for a declaration to the effect that the discharge of the plaintiff and his removal from the army service as Subedar was invalid, illegal, *ultra vires* and void and was consequently ineffectual and for certain other reliefs.

The facts of the case are that in 1942 the respondent, Ram Chand, who was then a Subedar at Chak Lala, found that his promotion had been stopped without adequate cause. On the 2nd January, 1943, by a letter Ex. D/2 the plaintiff applied for discharge 'on transfer to pension establishent' * * *. The Director of Ordinance Services Army Headquarters passed an order Ex. P/2 on the 30th April, 1943, discharging the respondent, Ram Chand, under Indian Army Act, Rule 13(B), item 1(i)(b). Charge was relinquished by the plaintiff and it is admitted that he did no further work in the army. On the 2nd March, 1944, an order was passed by the General Officer Commanding, Southern Army, under the Indian Army Act, Rule 12(B) discharging the respondent in the interests of service but he also ordered that the plaintiff be paid salary for this period, i.e., from the 30th April, 1943, to the 2nd March, 1944, and this salary was received by the plaintiff. It appears that some doubts arose in the Central Government and an order was consequently passed on the 5th February, 1949 (Ex. P. 4), which seems to have on the

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representation of the plaintiff. The order was that the Central Government changed the order of discharge to one of discharge "at your own request with effect from the 2nd March, 1944".

The plaintiff's suit is that all these orders are void and consequently he wants a declaration to the effect that he is still in the service of the army and he has succeeded in the Court of the Senior Subordinate Judge.

The question to be decided and which is, in my opinion, of great importance is whether the civil Courts have jurisdiction to give the kind of relief that the plaintiff is praying for and I do not propose to discuss the merits at this stage. As long ago as 1872, Kelly, C. B., in *Dawkins* v. *Lord Rokeby* (1), said at page 271—

> "With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges * * * * are all authorities to show that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law.* * * *."

This judgment was considered by McCardie, J., in *Heddon* v. *Evans* (2). That was a case where a military officer was held to be liable to an action for damages if in excess of his jurisdiction he committed an act which amounted to false imprisonment or wrongful confinement even though he was purporting to act in the course of military discipline and it was also held that if the act was within his jurisdiction and was done in the course of military discipline no action would lie

(1) 8 Q.B. 255
(2) 35 T.L.R. 642

on the ground that the act had been done maliciously and without any reasonable and probable cause. The observations of the learned Judge may here be quoted which may be relevant to the question which has to be decided—

> "It was a settled principle of English law that a man who without lawful authority caused another to be arrested, imprisoned or otherwise injured in his person or property was liable to an action for damages. Did that apply to the acts of military tribunals? On principle, he could see no good reason for exempting military officials from the operation of that law. (*See* Dicey's law of the Constitution, 8th edition, page 304.)".

At another place the learned Judge said —

> "If the doctrine of compact meant that when once a man became a soldier he lost any right whatever to appeal to the civil Courts in respect of any wrongs arising in the course of military discipline, then it went too far. If it meant only that with respect to matters placed within the jurisdiction of military Courts or officers merely exercising powers given to them by the military law the Courts would not interfere, then the doctrine might be sound subject to the question whether an action would lie for a malicious and groundless abuse of authority causing damage to the soldier or officer complaining."

Reference has also been made to Dicey's Law of the Constitution, 9th edition, page 808, where it

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is stated that if a court-martial exceeds its jurisdiction, or an officer, whether acting as a member of a court-martial or not, does any act not authorised by law, the action of the court, or of the officer, is subject to the supervision of the courts. Then there are two passages in the Handbook of Military Law by Sanjeevarow Nayudu, at page 244 which seem to be contradictory of each other—

Control of Superior Courts over Courts Martial.

> "Notwithstanding this, military tribunals are to a great extent subject to the control and supervision of the superior Civil Courts. The proceedings in which such control and supervision are exercised may be either criminal or civil. Criminal proceedings might take the form of a prosecution for "civil offences" whereas civil proceedings may be either preventive in character, i.e., restraining the commission or the continuance of an injury, or they may be remedial, i.e., affording a remedy for an injury actually suffered. Broadly speaking, the civil jurisdiction of the Courts of Law is exercised against a Court-Martial as a tribunal, in applications for "prerogative" writs, as also against individual officers in actions for damages.

Art 136 Cl. (2) of the constitution, and Art 227, cl.(4).

> It is true that under Article 136, clause (2) of the Constitution, the power of the Supreme Court to grant leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter made by a tribunal constituted by or under

> any law relating to the Armed Forces has been excluded. This coupled with the absence of any specific provision in any of the enactments relating to the Armed Forces, leaves the matter beyond doubt so far as a regular appeal is concerned. It is also true that Clause (4) of Article 227 of the Constitution declares that nothing in Article 227 shall be deemed to confer on a High Court powers of *superintendence* over any Court or tribunal constituted by or under any law relating to the Armed Forces."

In this condition of the law it appears to me to be necessary to get a clear and more authoritative pronouncement on the subject and I would, therefore, refer the whole case to a Division Bench and I direct that papers be placed before the Hon'ble the Chief Justice for the constitution of a Bench. Costs will abide the event.

Harnam Singh, J.

HARNAM SINGH, J., In Civil Suit No. 81 of 1950, *Shri* Ram Chand sought declaration to the effect that his discharge from service was wrongful, void and inoperative and that he remained a member of the Defence Service on the date of the institution of the suit.

Shortly put, the facts giving rise to Civil Suit No. 81 of 1950, are these : On the 2nd of January, 1943, by letter Exhibit D. 2, *Subedar* Ram Chand complaining that his promotion had been stopped without sufficient cause applied that he should be discharged from service "at his own request on transfer to pension establishment". By order passed on the 30th of April, 1943, Exhibit P. 2, the Director of Ordnance Services, Army Headquarters, discharged *Subedar* Ram Chand

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from service under Rule 13-B, Item No. 1(i)(b) made under section 113 of the Indian Army Act, 1911, hereinafter referred to as the Act. Pursuant to that order Subedar Ram Chand relinquished charge. That discharge was found to be illegal, for the Director of Ordnance Services, Army Headquarters, was not the competent authority to authorise the discharge of *Subedar* Ram Chand under Rule 13-B, Item No. 1(i)(b). On the 2nd March, 1944, *Subedar* Ram Chand was discharged from service under Rule 13-B Item No. 1(iii)(b) 'in the interest of service' by the G.O.C.-in-Chief, Southern Command. In discharging *Subedar* Ram Chand, the G.O.C.-in-Chief ordered that *Subedar* Ram Chand was entitled to receive pay from the date of his illegal discharge by the Director of Ordnance Services to the 2nd of March, 1944, though no duty was performed by him during that period. On the 26th of April, 1948, *Subedar* Ram Chand memorialised the Central Government to alter the cause of his discharge from that stated by the G.O.C.-in-Chief, Southern Command, to one "at his own request on transfer to the pension establishment". That request was granted by the Central Government and communicated to the plaintiff by letter dated the 5th of February, 1949, Exhibit P. 4.

Plainly, *Subedar* Ram Chand being Viceroy's Commissioned Officer could be dicharged from service "at his own request on transfer to pension establishment" by the Officer-Commanding the corps to which he belonged or by any higher authority. That being the position of matters, the G.O.C.-in-Chief, Southern Command, was competent authority to authorise the discharge of *Subedar* Ram Chand within rule 13-B.

In Civil Suit No. 81 of 1950, *Subedar* Ram Chand maintained that the orders passed by the

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Director of Ordnance Services, Army Headquarters, the G.O.C.-in-Chief, Southern Command, and the Central Government were void, illegal and inoperative.

On the pleadings of the parties the Court fixed the following issues :—

(1) Is the order of discharge of the plaintiff from service invalid, illegal, *ultra vires,* void and ineffective ?

(2) Is the suit not maintainable in the present form ?

(3) Is the plaintiff estopped to sue by his conduct ?

(4) Is the suit not properly valued for purposes of jurisdiction and court-fee ?

(5) Is the defendant entitled to special costs under section 35-A, Civil Procedure Code ?

(6) Whether the Civil Courts have no jurisdiction in the matter ?

(7) Relief.

In deciding Civil Suit No. 81 of 1950, the Sub-Judge found—

(a) that the plaintiff was validly discharged from service "at his own request on transfer to pension establishment" ;

(b) that the suit was maintainable in the form in which it was laid ;

(c) that the plaintiff was estopped by his conduct from suing ;

(d) that the suit was properly valued for purposes of court-fee and jurisdiction ;

(e) that special costs under section 35-A of the Code of Civil Procedure could not be allowed on the facts of the case ; and

(f) that the Civil Courts possessed jurisdiction to try the suit.

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Finding that the plaintiff was validly discharged from service "at his own request on transfer to pension establishment" and that he was estopped by his conduct from suing, the Sub-Judge dismissed the suit with costs.

From the decree passed in Civil Suit No. 81 of 1950, the plaintiff appealed under section 96 of the Code of Civil Procedure in the Court of the Senior Sub-Judge, Gurdaspur.

In the Court of the Senior Sub-Judge the plaintiff-appellant objected to the correctness of the findings on issues Nos. 1 and 3 while the defendant-respondent objected to the correctness of the finding given on issue No. 6.

In deciding the appeal the Senior Sub-Judge has found that the discharge of the plaintiff from service was illegal, that he was not estopped from bringing the suit and that the Civil Courts possessed jurisdiction to try the suit. On these findings the Senior Sub-Judge has allowed the appeal decreeing the suit. Parties have been left to bear their own costs throughout.

From the decree passed in appeal the Union of India has come to this Court under section 110 of the Code of Civil Procedure.

In Regular Second Appeal No. 108 of 1952, the questions that arise for decision are—

(i) whether the order authorising the discharge of *Subedar* Ram Chand was wrongful ? and

(ii) whether the wrong suffered by the plaintiff-respondent was actionable ?

Section 16 of the Act provides :—

"The prescribed authority may in conformity with any rules prescribed in this behalf, discharge from service any person subject to this Act".

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For the authorities competent to authorise discharge Rule 13 made under section 133(2)(a) of the Act and the table annexed thereto may be seen. Rule 13-B read with item I(i)(b) of the table provides that Viceroy's Commissioned Officer may "at his own request on transfer to pension establishment" be discharged from service by the Officer Commanding the Corps to which the person to be discharged belongs or by any higher authority.

Plainly, the G.O.C.-in-Chief, Southern Command, was competent authority to authorise the discharge of *Subedar* Ram Chand. In authorising the discharge of *Subedar* Ram Chand, the G.O.C.-in-Chief acted under Rule 13-B, Item No. 1(iii)(b) "in the interest of service." On the representation of *Subedar* Ram Chand by order passed on the 5th of February, 1949, the Central Government decided that *Subedar* Ram Chand was discharged from service by the G.O.C.-in-Chief on the 2nd of March, 1944, "at his own request on transfer to pension establishment".

From what I have said above, it is plain that the plaintiff was discharged from service "at his own request on transfer to pension establishment" by authority competent to order that discharge. In discharging *Subedar* Ram Chand the G.O.C.-in-Chief specified the date of discharge to be the 2nd of March, 1944. By order passed on the 5th of February, 1949, the Central Government on the request of *Subedar* Ram Chand decided that he was discharged from service by the G.O.C.-in-Chief "at his own request on transfer to pension establishment". In so doing the Central Government modified the order of discharge passed by the G.O.C.-in-Chief, Southern Command, on the 2nd of March, 1944, in one respect.

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That does not make the order authorising the discharge of *Subedar* Ram Chand to be retrospective. In these circumstances I do not think that the order passed by the G.O.C.-in-Chief, Southern Command, on the 2nd of March, 1944, was wrongful.

Assuming that I am wrong in the opinion that I have formed as regards the validity of the order of discharge, I pass on to consider the question of the maintainability of the suit on the facts stated in the plaint.

In arguments it was said that section 65 of the Government of India Act, 1858, gave the plaintiff a right enforceable by action to hold his office till he was discharged in accordance with the procedure prescribed in that behalf.

Section 65 of the Government of India Act, 1858, provides :—

> "65. The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suit, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company ; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

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In section 32(2) of the Government of India Act, 1915, a similar provision was made. Section 32(2) of the Government of India Act, 1915, was replaced by section 176(1) of the Government of India Act, 1935.

In *Venkata Rao* v. *Secretary of State* (1), Lord Roche construing section 32(2) of the Government of India Act, 1919, said :—

> "The reasoning of the Courts below as to section 32 of the India Act, 1919, and its effect and bearing on these actions is another matter to which their Lordships must not be taken to give their assent. As at present advised their Lordships are not disposed to think that this section, *which is a section relating to parties and procedure, has an* effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body if any to be sued."

In my judgment section 65 of the Government of India Act, 1858, did not give the plaintiff a right enforceable by action. That section was a section relating to parties and procedure in cases where the plaintiff possessed a right enforceable by action.

In *Venkata Rao* v. *Secretary of State* (1), Lord Roche construing section 96-B of the Government of India Act, 1935, said :—

> "Section 96-B and the rules make careful provision for redress of grievances by

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

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administrative process and it is to be observed that sub-section 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 appellant exists. It is said that this is to treat the words 'subject to the rules' appearing in the section as superfluous and ineffective. Their Lordships cannot accept this view and have already referred to this matter in their judgment in *Rangachari's case* (1). They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule."

Section 240 of the Government of India Act, 1935, for the first time gave civil servants in the employment of the Crown a right of action against wrongful dismissal, removal or reduction in rank. No such right was given by that Act to persons serving in the Defence Services of the Crown.

Mr. Karam Chand *Nayar* urges that section 9 of the Code of Civil Procedure gave the plaintiff a right enforceable by action.

Section 9 of the Code of Civil Procedure provides :—

> "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

(2) I.L.R. 1937 Mad. 517 (P.C.)

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Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

In order that Courts may have jurisdiction to try a suit two conditions are essential :—

(1) the suit must be one of a civil nature ; and

(2) its cognizance should not have been expressly or impliedly barred.

Indisputably, Civil Suit No. 81 of 1950 was one in which right to an office was contested. If so, the suit was a suit of a civil nature.

In regard to the second condition for the application of section 9 of the Code of Civil Procedure it is common ground that the suit is not expressly barred by any enactment for the time being in force. In these circumstances the question that arises for decision is whether the cognizance of Civil Suit No. 81 of 1950 is impliedly barred.

In several cases reported in books it has been said that a suit may be impliedly barred *by general principles of law or grounds of public policy.* In this connection *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdry and others,* (1) may be seen.

In *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhry and others* (1), in dealing with a suit to recover damages for defamation of character against witnesses in respect of evidence given by

(1) 17 S.W.R. 283

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them on oath in a judicial proceeding their Lordships of the Privy Council said :—

> "Their Lordships are of opinion with the High Court that, if it had been strictly speaking such an action, it could not have been maintained for they agree with that *Court that witnesses cannot be sued in a civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly* has been recognised by all the *Courts of this country to be one based upon principles of public policy.* The ground of it is this,—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice *should not have before their eyes the fear of being harassed by suits for damages; but* that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

In *Mulvenna* v. *The Admiralty* (1), on review of the case law on the point Lord Blackburn observed :—

> "These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject *to certain qualifications dictated by public policy,* no matter to what service the servant may belong, whether it be naval, military or civil, and no matter

(1) 1926 S.C. 842

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what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that *the rule based on public policy which has been enforced against military servants of the Crown, and* which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant."

In my judgment, Civil Suit No. 81 of 1950 is impliedly barred on the principle that Courts are not to countenance matters which are injurious to and against the public weal.

In arguments *Vishnukrishnan Namboodiri and others* v. *Brigadier K. N. Kripal and others* (1) was cited to support the proposition that Civil Suit No. 81 of 1950 was maintainable in Civil Courts.

From a perusal of that authority it is plain that the case was one under Article 226 of the Constitution of India for the issuance of writ of *mandamus* to enforce fundamental rights. In my opinion *Vishnukrishnan Namboodiri and others* v. *Brigadier K. N. Kripal and others* (1)

(1) A.I.R. 1952 Travancore-Cochin 7

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does not govern the present case for a soldier, a sailor or airman retains all the rights and duties of an ordinary citizen, except in so far as they may be modified by statute. Indeed it is wrong to think that an Indian by taking upon him the additional character of a soldier puts off any of his rights or duties as an Indian.

In the result, I would set aside the decree passed by the Court of first appeal and restore the decree passed in Civil Suit No. 81 of 1950, leaving the parties to bear their own costs throughout.

Kapur, J.

KAPUR, J. On the 21st August, 1953, I referred this case for the decision of a Division Bench because of the importance of the point involved. The facts of this case are stated in my referring order but for the purposes of this judgment I may re-state them very briefly.

The respondent Ram Chand in 1942 was a Subedar at Chaklala near Rawalpindi, now in Pakistan. Finding that his promotion had been stopped without any adequate reason, he by a letter Exhibit D. 2, dated the 2nd January, 1943, applied for discharge "on transfer to pension establishment * * *". The Director of Ordnance Services, Army Headquarters, on the 30th April, 1943, passed an order Exhibit P. 2, discharging the respondent under the Indian Army Act, rule 13(B), item I(i)(b). Ram Chand relinquished charge and it is not disputed that he did no further work in the Army. The General Officer Commanding-in-Chief, Southern Army (Army Commander), under rule 12(B) of the Indian Army Act, discharged Ram Chand in the interests of service but he also ordered that the plaintiff be

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paid his salary for this period, that is, from the 30th April, 1943 to the 2nd March, 1944, and this salary was received by Ram Chand. Some doubt seemed to have arisen and consequently the Central Government passed an order on the 5th February, 1949, Exhibit P. 4, which seems to have been passed on the representation of Ram Chand. By this the order of discharge was changed into one of discharge "at your own request with effect from the 2nd March, 1944".

The plaintiff brought a suit in the Court of a Subordinate Judge, first class, Gurdaspur, for declaration that all these orders were void and consequently that he was still in the service of the Army, and although his suit was dismissed by the trial Court it was decreed by the learned Senior Subordinate Judge, Gurdaspur. The Union of India have appealed to this Court against this decree.

The first question for decision is as to whether such a suit by a discharged soldier lies in a civil Court. The plaintiff's counsel relies on section 9 of the Code of Civil Procedure which provides—

> "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

Now, as I read this section it only provides for jurisdiction of civil Courts but does not give a right of action. If a suit of a civil nature is competent, then civil Courts will have jurisdiction to try it. It can mean nothing more.

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Under the Government of India Act, 1935, the services of the Crown in India were dealt with in Part X of the Act, and Chapter I deals with Defence Services and Chapter II with Civil Services. Members of both the Defence Services and the Civil Services held office during the pleasure of the Crown and that has been the theory of English Law throughout the centuries past. The rule that servants of the Crown hold office at the pleasure of the Crown is based on the latin phrase "*durante bene placito*" meaning during pleasure. Therefore the services of a servant of the Crown including a soldier can be terminated at any time without assigning any cause unless it is otherwise provided by statute. As was pointed out by Mahajan, C.J., in *The State of Bihar* v. *Abdul Majid* (1)—

> "The true scope and effect of this expression is that even if a special contract has been made with the civil servant the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, that they cannot claim damages for premature termination of their services. (*See* Fraser's Constitutional Law, page 126; Chalmer's Constitutional Law, page 186; *Shanton* v. *Smith* (2); *Dunn* v. *The Queen* (3)."

In the Government of India Act, 1919, section 96-B was added which gave certain statutory protection to civil services and that was because some element of popular control over some Government Department was introduced by that

(1) 1954 S.C.R. 786 at p. 799
(2) (1895) A.C. 229, 234
(3) (1896) 1.Q.B. 116

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Act. In 1935, a much greater control was given to the Ministers and therefore the Parliament thought it necessary for the protection of civil servants to introduce a greater measure of protection and section 240 was introduced which placed restrictions and limitations on the exercise of the pleasure of the Crown which were of an imperative and mandatory character and thus any breach of that restriction imposed by statute by the Government or the Crown became justiciable and an aggrieved party became entitled to ask for relief from the Courts. Thus the rule of English Law which had become the rule of Indian Law also that the civil servants hold office during the pleasure of the Crown became very much restricted and the relief came within the Code of Civil Procedure and was regulated by it. When the Constitution of India was framed the rule that servants of the Government hold office during the pleasure of the President or the Governor, as the case may be, as the Heads of the Union of India or of a State was re-enacted in Article 310(1) of the Constitution where it was provided—

> 310. (1) Except as expressly provided by this Constitution, every person who is a member of a defence serivce or of a civil service of the Union * * * holds office during the pleasure of the President * * *."

But in the case of civil servants the restriction on the exercise of pleasure which was introduced by section 240 of the Government of India Act, 1935, was re-enacted in Article 311 of the Constitution, but no such restriction was provided for in regard to the Defence Services of the Union and there was none in regard to the Defence Services of the Crown before the Constitution came into force.

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In two cases decided by the Privy Council before section 240 was introduced in the Government of India Act, 1935, it was held under section 96-B of the Government of India Act, 1919, civil servants hold office during pleasure and the terms of that section which contain a statutory assurance that the service, though at pleasure, will not be capriciously or arbitrarily put an end to but will be regulated by rules do not import a special kind of employment with an added contractual term that the rules are to be observed, and therefore the dismissal of a civil servant in utter disregard of the procedure prescribed by the rules framed under that section does not give a right of action for wrongful dismissal: See *Venkata Rao* v. *Secretary of State for India* (1) and *Rangachari's case* (2). Lord Roche delivering the judgment in the former case said at page 541—

> "* * * it can hardly be doubted that the suggested procedure of control by the Courts over Government in the most detailed work of managing its services would cause not merely inconvenience but confusion."

After referring to section 96-B his Lordship said—

> "These considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the appellant exists (page 542)."

And at page 543 it was said—

> "To give redress is the responsibility, and their Lordships can only trust will be the pleasure, of the Executive Government."

(1) I.L.R. 1937 Mad. 532 (P.C.)
(2) I.L.R. 1937 Mad. 517 (P.C.)

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After the enactment of section 240 in the Government of India Act of 1935, the Privy Council had occasion to interpret that section in *The High Commissioner for India* v. *I. M. Lall* (1), where it was held that provisions of section 240 are mandatory and necessarily qualify the right of the Crown in regard to the exercise of pleasure concerning its civil servants, and, as was said by the Supreme Court in *Satish Chandra Anand* v. *The Union of India* (2), under section 240 statutory guarantee and safeguards against arbitrary dismissal or reduction in rank were provided.

But the law in regard to the Defence Services has remained the same. At no time in the constitutional history of India has any similar protection against arbitrary dismissal, removal or reduction in rank been provided in regard to these Services. On the other hand they continued to hold office during the pleasure of the Crown and now they hold office during the pleasure of the President, and therefore, the law as was stated by the Privy Council in *Venkata Rao's case* (3), would continue to apply to them. The question whether their dismissal or removal is arbitrary or not is not justiciable issue and it must be taken that this matter is by implication barred even if an extended meaning is to be given to section 9 of the Civil Procedure Code. Lord Blackburn in the Scottish case *Mulvenna* v. *The Admiralty* (4) after reviewing these authorities said—

> "These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of

(1) A.I.R. 1948 P.C. 121
(2) 1953 S.C.R. 655
(3) I.L.R. 1937 Mad. 532 (P.C.)
(4) 1926 S.C. 842

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service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown * * *."

These observations received reinforcement by their being approved in Lord Thankerton's judgment in *I. M. Lall's case* (1), and therefore the qualifications to which the service of a public servant is subject are dictated by public policy and it makes no difference whether that public servant is a civil servant or a military servant of the Crown. Of course, in India the civil servants have received an added guarantee under section 240 of the Government of India Act, 1935, and under Article 311 of the Constitution and public policy requires and more so in the case of military servants of the Crown or the Unions as the case be that in the absence of any special provision to the contrary the pleasure of the Crown or the President should not be interfered with by Courts and should not become the subject-matter of litigation.

(1) A.I.R. 1948 P.C. 121

In *Dawkins* v. *Lord Rokeby* (1), Kelly, C. B., observed—

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> "With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton* v. *Johnstone* (2), and the cases *In re Mansergh* (3) and *Grant* v. *Gould* (4), *Barwis* v. *Keppel* (5), *Keighly* v. *Bell* (6), *Dawkins* v. *Lord Rokeby* (7), *Dawkins* v. *Lord F. Paulet* (8), are all authorities to show that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law."

In this case the opinion of Lord Cockburn, C.J., in *Dawkins* v. *Lord F. Paulet* (8), was not followed.

Counsel for the respondent drew our attention to a Judgment of McCardie, J., in *Heddon* v. *Evans* (9), which I mentioned in my referring order. The importance of that case lies in the fact that where a person is arrested without lawful authority or is otherwise injured in his person or property he has a right to bring an action for damages and there was no reason for exempting military officials from the operations of that law, and McCardie, J., went on to say—

> "If the doctrine of compact meant that when once a man became a soldier he lost any right whatever to appeal to the civil Courts in respect of any wrongs arising in the course of military discipline, then it went too far. If it

(1) 8 Q.B. 255 at p. 271
(2) 1 T.R. 493
(3) 1 B. and S. 400
(4) 2 H.Bl. 69
(5) 2 Wile. 314
(6) 4 F. and F. 763
(7) 4 F. and F. 806
(8) Law Rep. 5 Q.B. 94
(9) 35 T.L.R. 642

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meant only that with respect to matters placed within the jurisdiction of military Courts or officers merely exercising powers given to them by the military law the Courts would not interfere, then the doctrine might be sound, subject to the question whether an action would lie for a malicious and groundless abuse of authority causing damage to the soldier or officer complaining."

Whether cases of false imprisonments or other common law wrongs purported to have been done in the course of military discipline are justiciable in a Court of law is not the question before us. The only question is whether the Crown in India as it was before the Constitution could exercise this pleasure in the matter of dismissing the plaintiff who held office during the pleasure of the Crown or not and whether he can get this matter adjudicated in a Court of law. No case has been cited which would give to such a person such a right. On the other hand the Privy Council in *Venkata Rao's* case (1), and in *Shenton's case* (2), and the English Courts in *Dunn* v. *The Queen* (3), have in the case of civil servants held otherwise and this was quoted with approval by Mahajan, C.J., in *The State of Bihar* v. *Abdul Majid* (4), and by the Privy Council in *Venkata Rao's case* (1).

I may quote here the observations of Lord Goddard, C.J., in *R.* v. *Metropolitan Police Commissioner, Ex parte Parker* (5), where his Lordship said—

"......Where a person, whether he is a military officer, a police officer, or any

(1) I.L.R. 1937 Mad. 532 (P.C,)
(2) (1895) A.C. 229, 234
(3) (1896) 1 Q.B. 116
(4) 1954 S.C.R. 786 at p. 799
(5) (1953) 2 A.E.R. 717

> other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of *certiorari* and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has."

And these observations were quoted with approval in *Ex parte Fry* (1), where it was held that the Court will not interfere by an order of *certiorari* with the exercise of a disciplinary power in a service such as a fire brigade.

Counsel for the respondent, however, relies on section 65 of the Government of India Act of 1858 and submits that that gives him a right of action. This section ran as under :—

> "65. The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company ;
> * * * *"

In subsection (2) of section 32 of the Government of India Act, 1915, a similar provision was made which was replaced by section 176(1) of the Government of India Act, 1935, substantially reproducing those provisions. Dealing with these

(1) (1954) 2 A.E.R. 118 (C.A.)

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sections Mahajan, C.J., in *The State of Bihar* v. *Abdul Majid* (1), at page 802 said—

> "From these provisions it is clear that the Crown in India was liable to be sued in respect of acts, which in England could be enforced only by a petition of right. As regards torts of its servants in exercise of sovereign powers, the company was not, and the Crown in India was not, liable unless the act had been ordered or ratified by it. Be that as it may, that rule has no application to the case of arrears of salary earned by a public servant for the period that he was actually in office. The present claim is not based on tort but is based on *quantum maruit* or contract and the court is entitled to give relief to him."

Counsel submits that this passage in the judgment of his Lordship gives to him a right of action against the Governor-General before the Constitution and against the Union now. I am, however, unable to agree with this submission. The case which his Lordship was dealing with was for recovery of arrears of salary due from Government and an argument was raised that no suit is competent because in England no such suit was possible because what is paid to a civil servant is by way of bounty of the Crown and is not a contractual debt, and it was in regard to this that it was held by the learned Chief Justice that the rule in India is different and it is negatived by the provisions of the statute law in India, and dealing with section 240 of the Government of India Act, 1935, his Lordship was of the opinion that wherever there is a breach of restrictions imposed by

(1) 1954 S.C.R. 786

the statute the matter is justiciable and an aggrieved Government servant like any other person is entitled to relief which is regulated by the Code of Civil Procedure. *Punjab Province* v. *Pandit Tara Chand* (1) was approved and *High Commissioner for India and Pakistan* v. *I. M. Lall* (2) was distinguished. In the former case it was held by the Federal Court that assuming that under English Law a servant of the Crown cannot maintain an action against the Crown for arrears of salary it must be presumed to have been abandoned in the case of India in view of the provisions of the Code of Civil Procedure relating to attachment of salaries.

Even if section 65 of the Act of 1858, section 32(2) of the Act of 1915 and section 176(1) of the Government of India Act of 1935, give to the respondent a right of action it will only lie if a similar suit lay against the East India Company and it has not been shown that against the Company any such action was competent.

The provisions of section 9 of the Code of Civil Procedure were pressed to our attention and it was submitted that there is no express provision by which a suit of the kind which the plaintiff has brought is barred. As I have said, section 9 only gives to the civil Courts jurisdiction to try suits which are not expressly barred, but even if it were to be read in the manner that the plaintiff is wishing us to read, public policy is a good ground which impliedly bars suits of a civil nature and this would be a bar under section 9 also. I have already referred to Lord Blackburn's dictum that the reason why a suit cannot be brought against the Crown by its servants is, apart from everything else, one of public policy

(1) 1947 F.C.R. 89
(2) A.I.R. 1948 P.C. 121

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and therefore even under section 9 no such suit is competent against the Governor-General or the Union of India. I am, therefore, of the opinion that no suit of the type brought by the plaintiff against the Governor-General or now against the Union of India is competent and I would therefore allow this appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. In view of the circumstances of this case I would leave the parties to bear their own costs throughout.

I have read the judgment prepared by my learned brother and for reasons which I have given above I agree with him.

CIVIL REFERENCE

Before Bhandari, C. J., and Falshaw, J.

THE COMMISSIONER OF INCOME-TAX, DELHI, AJMER, RAJASTHAN AND MADHYA BHARAT, DELHI,—*Petitioner*

versus

TEJA SINGH,—*Respondent*

Civil Reference No. 15 of 1953

1954

Nov., 4th

Income-tax Act (XI of 1922)—Sections 18A(3) and 28(1)—Whether a person who fails to comply with sections 18A(3) can be punished under section 28(1)—Interpretation of statutes—Taxing statutes—Rules of interpretation stated

Held, that a person who fails to comply with the provisions of section 18A(3) cannot be punished under the provisions of section 28.

Held also, that jf a statute enumerates the circumstances under which liability to punishment is to arise, it can arise only if those circumstances exist and in no other. Where a statute imposes a tax which is in effect a penalty it should be strictly construed; if it is capable of two reasonable but contradictory constructions, one in favour of the tax-payer and other in favour of the State then the contruction which operates in favour of the tax-payer should be preferred. The Court should be slow in enlarging the scope of a provision by implication or analogy; and if a well-founded doubt arises whether a particular act is or is not an offence, the doubt should, if possible, be resolved in favour of the tax-payer.