**(1952) 04 GUJ CK 0004**

**In the Gujarat High Court**

**Case No :** First Appeal No. 56 of 1951

Somchand Karmchand Shah APPELLANT

Vs

The State of Saurashtra RESPONDENT

**Date of Decision :** 21-04-1952

**Acts Referred:**

Bengal Revenue Sales Act, 1859 — Section 14, 29
Constitution of India, 1950 — Article 295(2), 6
Nawanagar State Pension Niyam (Rules) — Rule 14, 2, 4, 5, 6
Specific Relief Act, 1963 — Section 42

**Citation :** (1952) 04 GUJ CK 0004

**Hon'ble Judges :** Shah, C.J;Baxi, J

**Bench :** Division Bench

**Advocate :** M.H. Parekh, for the Appellant; A.R. Bakshi, General and B.R. Joshi, Assistant Govt. Pleader, for the Respondent

## Judgement

Baxi, J.—This appeal arises out of the decree of the Civil Judge, Sr. Dn., Rajkot, dismissing the Plaintiff Appellant''s suit for a declaration of his right to receive pension at the rate of Rs. 300/- per mensem from the Respondent State from 01-02-1937 the date of his retirement from the former Nawanagar State Service.

2. The Plaintiff entered the service of the Nawanagar State in 1903 and retired therefrom on 01-02-1937 after completing more than 33 years'' service. On the date of his retirement he was being paid a salary of Rs. 600/- per mensem. On the eve of his retirement, he submitted an application dated 23-09-1936, for payment of pension under the Nawanagar State Pension Niyam (Rules) which was in due course forwarded for the requisite sanction to the highest authority of the State viz., His Highness the Maharaja Jam Saheb. For some reason which the Plaintiff is unable to state His Highness'' sanction was deferred and after several applications His Highness passed a provisional interim order of payment of Rs. 150/- per month with effect from 01-02-1940 "till he (His Highness) settled the question finally".

Nothing further was done in the matter for full five years though the Plaintiff continued his efforts, but in February 1945, His Highness ordered that the Plaintiff should be paid Rs. 250/- per mensem. Pension was accordingly paid to him at that rate from 1-3-1945. When the Nawanagar State was about to merge in the State of Saurashtra, the Appellant made further representation to His Highness, who by his order dated February 1948, ordered that he should be paid Rs. 300/- per mensem from 1-2-1948. This is the full amount of pension which would be payable to him under the Nawanagar State Pension Rules and the Plaintiff has been receiving this amount from 1-2-1948.

After the merger of the Nawanagar State, the Saurashtra Government agreed to pay the Appellant pension at this rate. There is therefore no dispute about the amount of pension payable to the Plaintiff after 1-2-1948. But the Plaintiff claims to be entitled to pension at this rate from the date of his retirement i.e., from 1-2-1937 to 31-1-1948, and the Saurashtra Government has rejected this claim. According to the Plaintiff the amount of pension due to him at the rate of Rs. 300/- per mensem from 1-2-1937 to 31-1-1948 comes to Rs. 39,000/ -. Deducting Rs. 17900/- already received by him under orders of His Highness the Jamsaheb, he claims that Rs. 21700/- are still due and payable to him. He therefore sued the Respondent State for a declaration of his recurring right to receive pension at this rate from the date of his retirement. However he did not ask for a decree for payment of the arrears though they had become due and paid the fixed Court-fee of Rs. 15/- on the plaint. The Respondent State contended inter alia that the Appellant''s suit for a declaratory decree without asking for consequential relief and paying ad valorem Court-fee thereon could not lie. It was also contended that the Court had no jurisdiction to entertain the suit and lastly it was urged that the Plaintiff had no cause of action.

The learned Civil Judge framed issues and decided four of them as preliminary issues of law. He held that he had jurisdiction to entertain the suit but dismissed it on the ground that the Appellant had no cause of action. On the issue of the maintainability of the suit for a declaration without asking for a consequential relief and on the issue of the Court fee, he held that the Plaintiff should have asked for consequential relief by asking for a decree for Rs. 21700/- and should have paid ad valorem Court fee on this amount. He gave the Plaintiff 15 days within which to amend the plaint and pay the deficit Court fee. This order was made subject to his order dismissing the suit. The Plaintiff has appealed against the learned Civil Judge''s decree on both the points decided against him.

3. I shall first deal with the question whether the Plaintiff had any cause of action against the State. The Plaintiff claims that he is governed by the Nawanagar State Pension Niyam (Rules). Rule 2 enacts that the Niyam shall apply to all State servants except servants of certain categories specified therein. Rule 4 leaves the question of retiring the Diwan or Secretaries and the manner of appreciating their services to His Highness the Jamsaheb. Rule 5 declares that the grant of pension or any part thereof cannot be claimed as a matter of right

 

and Rule 6 enumerates cases in which pension may be reduced. Rule 14 prescribes the mode of calculating pension payable to a retired State servant. The rest of the rules are not very material.

4. Now the Plaintiff contends that, as he had put in more than 33 years'' service he was entitled under Rule 14 to receive pension equivalent to half the salary which he was receiving from the State on the date of the retirement. The Appellant is in actual receipt of the pension at that rate from 1-2-1948. The dispute turns round the question whether he can enforce payment of pension at that rate from the date of retirement by a suit or whether such payment is subject to the order of His Highness already passed. This depends upon the construction of Rules 5 and 6 of the Nawanagar State Pension Niyam which are enacted as follows: (After quoting Rules 5 and 6 in Gujarathi script the judgment proceeded:) This means that the grant or continuance of the pension in full or in part depends upon the continued good conduct of the pensioner and may be refused or discontinued in a proper case. The learned Advocate for the Appellant however, contended that the two Rules read together mean that the pension as prescribed by the Rule 14 is payable as of right unless the State is able to make out grounds upon which payment can be refused. We cannot accept this construction. According to Rule 5 no one can claim to receive pension as of right. Its payment is subject to the orders of the sanctioning authority. The circumstances mentioned in Rule 6 under which pension may be refused or discontinued are illustrated and do not exhaust all cases in which payment of pension may be deferred or withheld under the Rules. If we were to adopt the interpretation suggested by the learned Advocate for the Appellant, we would be completely inverting the principle embodied in this rule in clear and unambiguous language. We therefore agree with the learned Civil Judge that the Plaintiff has no right to sue for declaration of his rights to recover arrears of pension under these rules.

5. The learned Advocate, however referred us to Article 930 of the Civil Service Regulations in this connection and argued on the analogy of that article that his client was entitled to receive pension from the date of his retirement. Article 930 reads as follows:

930. Apart from special orders, a pension, other than a Wound or Extraordinary pension under Part VI, is payable from the date on which the pensioner ceased to be borne on establishment, or from the date of his application, whichever is later. The object of this latter alternative is to prevent unnecessary delay in the submission of applications. The rule may be relaxed, in this particular, by the authority sanctioning the pension when the delay is sufficiently explained.

Under this article, pension is ordinarily payable from the date of the retirement if an application has been made before that date, but the grant is subject to special orders. We have our own doubts about the applicability of any article of the Civil Service Regulations to the Nawanagar State which was constituted under completely different conditions and governed by different rules, but assuming that the principle of the above article applies to the Appellant''s case and can be incorporated in the Pension Rules of the State, the Appellant''s claim to receive pension from the date of his retirement is subject to special orders of His Highness the Jamsaheb. The Appellant has himself produced numerous such orders distributed over a period of 11 years which leave no doubt that his was a case in which special orders were passed and the payment of the pension to him must be regulated by these orders.

6. It will be remembered that the Appellant retired on 1-2-1937. In February 1940, His Highness made the following provisional order of payment of pension to him from 1-2-1940. (Appendix 3A):

Let Somchand Shah have one-half (1/2) pension with effect from 1st February 1940 till I finally settle.

Though the order was made full three years after the Appellant''s retirement apparently his case must have presented special features which did not allow His Highness to make up his mind whether the Appellant should receive full pension from the date of his retirement. The matter remained in suspense for five years thereafter and in February 1945, His Highness made the following order (Appendix 4a.):

Give him Rs. 250/- p.m.

This is not a provisional order. The words "till I finally settle" which appeared in the previous order (Appendix 3A) are absent nor is there any indication that the order is other than a final order. There is also nothing in the order to show that pension was to be paid retrospectively from the date of the Appellant''s retirement. The Plaintiff alleged in paragraph 6 of his plaint that the question of the final determination of the Plaintiff''s right to receive full pension from the date of his retirement was all along kept hanging in the air until January 1948, when the merger of the Nawanagar State into the Saurashtra State took place. We do not find any support for this contention in the language of the order (App. 4a) which clearly shows that the question of the Appellant''s pension was finally settled. But on the eve of the merger he applied to His Highness by a petition dated 3-2-48, requesting him "to settle the whole outstanding question" before handing over his administration to the Respondent State. His Highness thereupon passed the following order in February 1948 (App. 5):

Give pension Rs. 300/- from 1-2-48.

This order removes whatever doubts the Appellant might have entertained about the nature of the previous orders. It made it clear above everything else that the Appellant was to receive full pension from 1-2-1948, and not retrospectively. There is thus no doubt that the question of the Appellant''s pension had become the subject of His Highness'' special orders who decided that he was to receive full pension from 1-2-1948 and, therefore, if his right to receive pension is to be governed by the principle mentioned in Article 930 of the Civil Service

 

Regulations, that right is subject to the special orders of His Highness noted above and the Appellant cannot ask for payment of pension retrospectively from the date of his retirement in contravention of these orders.

7. It was urged that His Highness the Jamsaheb was of the opinion that the Appellant was entitled to receive full pension retrospectively as claimed by him. Reference was made to two letters App. Nos. 7 and 9 in support of this contention. App. 7 is a letter from the Personal Assistant to His Highness the Jamsaheb addressed to the Collector, Halar Division and is dated 25-4-1949. The writer of the letter informs the Collector that orders passed from time to time on the subject of the Appellant''s pension were duly forwarded to the Diwan''s office and all particulars regarding his services should be available from the, Revenue Department or the Account Department. The letter adds that "if arrears claimed by the Appellant are given, His Highness will be pleased to hear about it." App. 9 is a copy of an endorsement from the Secretary to His Highness the Rajpramukh forwarding the Appellant''s application for payment of full pension retrospectively to the Chief Secretary Saurashtra Government for direct disposal. His Highness'' Secretary observes as follows in this endorsement:

His Highness considers that in this matter justice appears to be on the side of Shri Somchand Shah (Appellant).

App. 7 does not support the Appellant''s contention nor does it give any indication of His Highness'' personal views on the justice of the Appellant''s claim. App. 9 supports the Appellant''s statement but the orders of His Highness the Jamsaheb on the subject are very clear and the Appellant cannot ask for a decree in a Court of law on the strength of this letter (app. 9) which does no more than express His Highness Rajpramukh''s views. These letters therefore, do not advance the Appellant''s case.

8. The learned Advocate for the Appellant next referred to Article 6 of the Covenant and Article 295(2) of the Constitution and argued that the liability of the former Nawanagar State to pay full pension to him from the date of retirement, was enforceable against the Saurashtra State. The only liability of the Saurashtra Government is to pay pension in accordance with the orders of His Highness. This pension is being paid to him. He could not have sued the former Nawanagar State for arrears because Rule 5 would have barred the suit by reason of the special order of His Highness the Jamsaheb. The Plaintiff-Appellant ultimately succeeded in getting full pension but even then the Jamsaheb did not think it proper to give retrospective effect to his order. The State of Saurashtra is, therefore, under no liability to pay the Appellant any sum on account of the alleged arrears of pension.

9. The next objection against the Plaintiffs suit is that his suit for a mere declaration without asking for consequential relief and paying Court fee thereon cannot be maintained. In the view that we take of the Plaintiff''s right to sue it becomes unnecessary to decide the issue but the question has been argued on

 

both sides and a decision has been given by the learned Civil Judge. We shall therefore give our decision on this issue also.

10. The Plaintiff has asked for the following relief by his plaint:

The Plaintiff therefore prays:

(1) That a declaration be made against the Defendant that the Plaintiff is entitled to his periodically recurring right of receiving from the Defendant Rs. 300/- per month as his pension right from the date of his retirement viz., 1st February 1937 and

(2) that the Plaintiff''s cost of suit be paid by the Defendant or

(3) that such other relief be granted as is deemed just and proper by the Hon''ble Court."

The relief is cast in the form of declaration. It is however completely inappropriate, for the Plaintiff claims payment of a definite sum off money due, as arrears of pension and the relief therefore is in substance for a declaration of his right to be paid a specific sum. This is made very clear by paragraph 13 of the plaint which reads as follows:

The Plaintiff therefore herein claims that he is, as of right in law and equity entitled to receive his full pension at the rate of Rs. 300/- per month right from the date of his retirement viz., 1st February 1937 and that the arrears accruing therefrom due to the Plaintiff from the Defendant would be as under.

* * * *

The amount works out at Rs. 21700/ -. Paragraph 13 of the plaint therefore amounts to an averment of the Plaintiff''s right to receive Rs. 21700/- from the Defendant State.

(11) Now Section 42 of the Specific Relief Act reads as under:

Any person entitled to any legal character or any right as to property may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the Plaintiff need not in such suit ask for any further relief. Provided that no Court shall make any such declaration where the Plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. * * *

This section enables a person who is entitled to any right as to property to institute a suit against Anr. denying or interested to deny his right and in such a case he is not to ask for further relief. But the grant of declaratory decree is discretionary and may be refused, if Anr. appropriate remedy is available to the Plaintiff. Similarly, if the Court is satisfied that the real object of the suit is to obtain an opinion on title or is a cloak to conceal the real relief then also the Court will refuse to give a declaratory decree. In our opinion the Plaintiff should more appropriately have asked for a decree for Rs. 21700/- either with or without declaration. The relief which the Plaintiff has asked appears to have been framed with a view to conceal the real relief. We cannot, therefore, grant the declaratory decree to him. Section 42 is further subject to the proviso that the Court shall not make a declaration of title where the Plaintiff being able to seek further relief than a mere declaration omits to do so. The Plaintiff-Appellant who is able to seek a further relief in the shape of a decree for the payment of arrears has omitted to ask for that relief and, therefore, there is a statutory bar against the grant of declaration sought by him. Under the circumstances, we are not inclined to interfere with the learned Civil Judge''s order refusing to grant the declaratory decree asked by the Plaintiff.

12. It was however urged on behalf of the Appellant that the suit did not come within the purview of Section 42 of the Specific Relief Act, and would be governed by the ordinary provisions of CPC and consequently if he was entitled to a mere declaration without asking for a consequential relief, the Court should grant the declaration to him without insisting upon the consequential relief being prayed for. Reference was made in support of this argument to the Privy Council case of-Robert Fischer v. Secy. of State 22 Mad 270 (PC) and the case of-Choudhury Mohammad Manjural Haque and Others Vs. Shebait of Sri Sri Iswar Lakshmi Narayan Jew Thakur, Sri Sri Iswari Saradia Durga Debi Thakurani and Sri Sri Iswari Jagadhatri Debi Thakurani, Bisseswar Banerjee, . In the Privy Council case the Collector had ordered separate registration of property which had been transferred to the Plaintiff. This order was cancelled by the Governor-in-Council. The Collector''s order was consequently deprived of "legal force and effect under a local Regulation". The Plaintiff, therefore, sued for a declaration that the order of the Governor-in-Council was null and void. He did not however ask for the possession of the property.

In the Calcutta case a share in a certain estate was ordered to be sold by the Collector under the Bengal Revenue Sales Act 1859 for arrears of land revenue. It was purchased by a cosharer with the permission of the Collector and he was declared the purchaser of the defaulting share. No appeal was preferred against the Collector''s order and it. was consequently confirmed and a sale certificate was issued to the, Plaintiff by the Collector. The Collector even ordered delivery of the possession to the Plaintiff. An appeal to the Commissioner against the Collector''s order having been dismissed as time-barred, the Defendants approached the Board of Revenue against the Commissioner''s order which set aside the sale. The purchaser filed a suit for a declaration, that the Board''s order was null and void, but did not ask for possession of the estate. In both these cases the Plaintiff was deprived of a right to property which was conferred upon him by an order of a competent authority and that order was wrongly set aside by a superior authority. The following observations of Rau J. in the Calcutta case describe the position in a nut-shell: (205)

Let us remember that the act or order sought to be pronounced null and void in

 

26 Ind. App 16 : 22 Mad 270 (PC), as in this suit was one which deprived the Plaintiff of certain present rights of property. In-''26 Ind. App 16 (PC)'', the order of the Governor in Council by cancelling the separate registration of the property which had been transferred to the Plaintiff robbed the transfer of all legal force and effect under a local regulation. In the present suit, similarly, the order of the Board of Revenue by setting aside the sale to the Plaintiff, deprived him of his title and his right to get immediate possession of the property from the Collector. In each case, therefore, the Plaintiff stood deprived of certain present rights of property, and the declaration of the offending order as null and void restored or would restore those rights. We venture to suggest that a declaration of this kind is not ''a merely declaratory decree'' since it has the effect of giving relief besides serving to define rights.

* * *

Having expressed the above opinion that the suit did not properly come within the ambit of Section 42 Rau J. proceeds to examine the validity of the Plaintiff''s claim to a declaratory decree on the assumption that the Specific Relief Act applied to it in the following terms (206):

We now come to the provision: Provided that no Court shall make any such declaration where the Plaintiff being able to seek further relief than a mere declaration of title, omits to do so.

In considering this proviso with reference to this case, we have to bear in mind that long before the Board''s order of September 1937, the Collector had already passed an order for on (sic) or possession to the Plaintiff. Once the Boards order is pronounced ultra vires and the Plaintiff''s unimpaired title declared, the Collector''s order of 7th April 1937 would revive, and it would be his statutory duty to proceed to give effect to it u/s 14 and Section 29), Bengal Land Revenue Sales Act 1859. The Plaintiff was not able to seek further relief in his plaint for the simple reason that he needed no more. The annulling of the Board''s order would give him all that he wanted. The circumstances are very similar to those in-"26 Ind. App 16 (PC)'', where the Privy Council made a declaratory decree, holding that no further relief was required. The proviso to Section 42, Specific Relief Act, is no more a bar to a declaration of the Plaintiff''s title in the present suit than it was in that suit."

13. In this case there is no order of a competent authority directing payment of arrears of pension to the Plaintiff and the Court is not called upon to declare as null and void any order of a superior authority which if set aside would automatically revive any previous order under which the Plaintiff has a present right to receive the pension. The Plaintiff''s case is not at all advanced, if a declaratory decree is granted to him unless of course the Government of their own accord pay up arrears in view of the declaration of the Court. We were told that no Government would think of acting contrary to the Court''s decision and therefore the Plaintiff''s purpose would be served by a mere declaratory decree.

This may be so, but the Court has also a duty to act in conformity with law and it cannot grant a declaratory decree in a wholly inappropriate case and contrary to the express provisions of Section 42 of the Specific Relief Act. We may observe before we close that the learned Civil Judge should have decided this question first and reserved the decision of the issue about the cause of action alter the Plaintiff had complied with his order directing him to amend the plaint and pay ad valorem Court fees on the consequential relief.

14. The appeal fails and is ordered to be dismissed with costs.

Shah, C.J.

15. I agree.