



LAW COMMISSION OF INDIA

FIFTY-THIRD REPORT

**EFFECT OF THE PENSIONS ACT,
1871 ON THE RIGHT TO SUE
FOR PENSIONS OF RETIRED
MEMBERS OF THE PUBLIC
SERVICES**

DECEMBER, 1972

**GOVERNMENT OF INDIA
MINISTRY OF LAW AND JUSTICE**

(COPY)

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P. B. GAJENDRAGADKAR

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA
NEW DELHI-110001
December 4th, 1972.

My dear Minister,

I am forwarding herewith the 53rd Report of the Law Commission on the effect of the Pensions Act, 1871, on the right to sue for pensions of retired members of the public services. This Report is made by the Commission *suo motu* by virtue of its terms of reference, particularly those in clauses 2 and 8.

The Commission believes that the recommendations made in its Report are non-controversial and will receive universal acceptance, and hopes that the Union Government will implement the same at an early date by suitable legislation.

Yours sincerely,

(P. B. Gajendragadkar)

Shri H. R. Gokhale,
Minister for Law & Justice,
Government of India,
NEW DELHI.

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Introductory 1. This Report deals with a matter arising under a Central Act which, though not so well known, is of considerable importance, namely,—the Pensions Act, 1871. An examination of the Act revealed that one provision of the Act required amendment, because of a fundamental defect in the principle behind it.

Genesis of the Report. 2. The subject has been taken up by the Law Commission as a part of its *general* function of the revision of Central Acts, first, because the Pensions Act is an Act of general application and importance, and secondly, because the continuance of some of its provisions in the form in which they now exist, appeared to amount to perpetuation of serious injustice and to defeat fundamental rights guaranteed by the Constitution. The nature and extent of the injustice and the effect on fundamental rights will be dealt with in this Report, at the appropriate place.¹ It may be also stated that the Commission received a request from the Maharashtra Pensioners' Association to consider reform of the Act having regard to the fact that its provisions were based on no principle.

Before finally coming to our conclusions, we had put our proposals in the form of a draft Report. The draft Report had been circulated to the Ministries concerned² for comments with a request to send their comments by a specified date.

No comments have been received so far from those Ministries, presumably because they do not see any serious objection to the substance of the amendment proposed.

Legislative Competence 3. Before we proceed to discuss the Act in detail, we should indicate that the application of the Act is excluded from areas formerly comprised in Part B States. This is presumably because of the fact that while "Union pensions"—i.e. pensions payable by the Government of India or out of the Consolidated Fund of India—are within the competence of Parliament³, the subject of "State pensions"—i.e. pensions payable by a State or out of the Consolidated Fund of a State—is within the exclusive competence of the States.⁴

1. See para. 8, *infra*.

2. Ministry of Finance, (Department of Expenditure) and Department of Personnel.

3. Constitution of India, Seventh Schedule, Union List, Entry 71.

4. Constitution of India, Seventh Schedule, State List, Entry 42.

Para. 3
(contd.)

It is not very clear why the application of the Act to Part B States in respect of Union pensions was not decided upon. One possible reason might have been that this would have made the extent clause of the Act, rather complicated, and the distinction, though theoretically justified, would have looked inelegant. It is needless to say that even as regards areas to which the Act extends at present, any amendment now to be made in the Act will be inapplicable to State pensions, because of the relevant legislative entry.¹

Existing laws
relating to
pensions.

4. The scheme of the Pensions Act, 1871, will be examined in detail later.² But it would be of interest to refer to two small statutory provisions relevant to pensions. One is to be found in the Transfer of Property Act,³ which enacts that a pension cannot be transferred by an act of parties. The other is to be found in the Code of Civil Procedure,⁴ whereunder a pension cannot be attached in execution of a decree.

The eligibility for pension, its amount, the conditions for its availability and various other matters of detail are so far as pensions of retired public officers are concerned, regulated by rules made or continued under the Constitution, supplemented in a few cases by Acts passed after the commencement of the Constitution. This Report is primarily concerned with the effect of the Pensions Act, 1871, on the right to sue for a pension for which retired members of the public services (or members of their family) are eligible (though, of course, the Act takes within its sweep various other types of pensions also). We now proceed to examine the scheme of the Act, as such examination is necessary for a proper understanding of the provision to be altered.

Scheme of
the Pensions
Act, 1871.

5. The Pensions Act, 1871, has 14 sections. Section 1 states that the Act extends to the whole of India except areas comprised in Part B States.⁵ Section 2 has been repealed. Section 3 defines "grant of money etc." It is not material for the present purpose.

Section 4 is the most important section of the Act, and bars suits relating to pensions, grants of money or land revenue, conferred or made by the Government—whatever may have been the consideration

1. State List, entry 42.

2. See para. 5, *infra*.

3. Section 6(g), Transfer of Property Act, 1882.

4. Section 60(1)(g), Code of Civil Procedure, 1908.

5. See para. 3, *supra*.

**Para. 5
(contd.)**

for such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or right may have been substituted. We propose to consider this section at some length, later.¹

Under section 5, claims regarding pension etc., are to be made to the Collector or other authorised officer. If the claim is certified by him, then under section 6, the civil court is empowered to take cognizance of the claim.

Section 7 deals with pensions for lands held under grants in perpetuity. Section 8 provides for payment to be made by the Collector or other authorised officer. Section 9 saves the rights of grantees of land-revenues. Section 10 relates to the commutation of pensions. Section 11 provides for exemption of pensions from attachment. Section 12 provides that assignments, etc., in anticipation of pensions are void. Section 13 provides for reward to informers in certain cases. Section 14 confers power to make rules.

**Section 4
considered
in detail.**

6. The above analysis of the Act² shows that the important provisions are sections 4 and 11. The other provisions of the Act are mostly consequential, or are in the nature of machinery. While section 11 is a beneficial provision saving the pensions and grants mentioned in the section from attachment, section 4 is a disabling provision. We quote it below—

“4. Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the Government or by any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted.”

The section, thus, bars suits relating to—

- (a) any pension conferred by the Government or any former Government;
- (b) any grant of money made by the Government or by any former Government; or
- (c) any grant of land revenue so made.

These three types of claims are barred, *whatever* may have been the consideration for the pension or grant. And they are barred, *whatever* may have

1. See para. 6, *infra*.

2. Para. 5, *supra*.

Para. 6
(contd.)

been the value of the payment, claim or right for which such pension or grant may have been substituted.

7. We are not, in this Report, concerned with the second and third types of claims.¹ But the bar in respect of claims under category (a) creates hardship, in so far as pensions of retired public employees are concerned. On first principles, it may sound anomalous that with all the elaborate provisions found in the service rules as to eligibility for pension and other connected matters, the person eligible is to be barred from suing in court in "a matter relating to any pension conferred by the Government"—as is provided by section 4. No doubt, the next section—section 5—provides a procedure whereunder he can apply to the Collector (or other competent officer), for the grant of a certificate, and, if such certificate is granted, a suit is permissible. But such a provision, leaving the right to sue to the discretion of an executive officer, should require strong reasons to justify its existence.

Proceedings
of the Governor-General
in Council.

8. We made an effort to find out if the proceedings at the time when the Pensions Bill was introduced in the Council of the Governor-General in India disclose any such reasons. The proceedings have been thus recorded²—

"PENSIONS ACT, 1871

SEPTEMBER 1871

The Hon'ble Mr. Cockerell moved for leave to introduce a Bill to consolidate and amend the law relating to pensions. He said that there was on the Statute-book at the present time a considerable number of regulations and Acts relating to this subject. These enactments contained much that was now obsolete, and much in the nature of administrative rules and instructions as to the mode of disbursing pensions, which would be more conveniently and appropriately left to be put in operation by means of executive orders.

"The leading principle of the main provisions of the law was, that as the bestowal of pensions and similar allowances was an act of grace or State policy on the part of the ruling power, the Government reserved to itself the determination of all questions affecting the grant or continuance of these allowances;"³ and the

1. Para. 6, *supra*, categories (b) & (c).

2. Legislative Department, Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations etc. Pensions Bill (National Archives).

3. Emphasis supplied.

*Para. 8
(contd.)*

cognizance of claims relating thereto by the Courts of Judicature was, as between the grantor and grantee, absolutely barred.

"This principle governed claims against the Government by virtue of laws which applied specifically to the Regulation Provinces of the Bengal and Madras Presidencies, and which was also practically in force in the Non-Regulation Provinces. In some parts of the Bombay Presidency also, namely, the Dekhan, Khandeish and Southern Maharatta Divisions, claims against the Government in the matter of the pensionary grants and allowances were declared to be *not within the cognizance* of the ordinary Courts of Judicature; but in other parts of that Presidency, in the absence of any such legal restrictions, the Courts had assumed a jurisdiction expressly denied to them throughout the rest of British India.

"It was thought that this state of things should not be allowed to continue, and that it was expedient to assimilate the law as regards this portion of the Bombay Presidency to that which prevailed in all other parts of the Empire. There were no exceptional circumstances which called for the exercise by the Civil Courts, in any particular province or provinces, of a jurisdiction which, under the operation of a principle of universal application, was not accorded to them elsewhere."

"The object of the present Bill, therefore, was to re-enact, in a consolidated form, the operative provisions of the law in regard to the grant of pensions and similar allowances, and to apply the consolidated enactments to the whole of British India".

"The motion was put and agreed to."

9. The later discussion in the Council is not material for the present purpose.

*Justifiability
of the rule
considered.*

10. Thus, the Pensions Bill, apart from implementing the objective of simplification and consolidation of pre-existing Acts, was based on the leading principle¹—

(i) that the bestowal of such pensions was an act of grace or State policy on the part of the ruling power; and

(ii) that the Government reserved to itself the determination of all questions affecting the grant or continuance.

Now, whatever be the merits of such a principle as regards pensions granted on political grounds or in view of loyalty to the Government and similar consi-

1. Para. 8, *supra*.

Para. 10 (contd.) derations, the principle fails to impress one as a just one when applied to pensions of retired public servants.

To call the provision for such pensions "an act of grace or State policy", is hardly in conformity with the accepted understanding on the subject. A public servant, while in employment, looks forward to his pension as a legitimate and well-earned remuneration for his service, and, indeed, he regards it as part of his emoluments, though payable in future. He does not view it as an act of grace. In fact, even though by way of precaution the rules regulating his service may empower the Government to withhold pension, such withdrawal is rarely, if ever, ordered.

In any case, it is one thing to give a power of withholding pension in extra-ordinary circumstances and for reasons which are relevant in a particular case, and quite a different matter to bar a suit by a general and drastic provision of the nature referred to in section 4 of the Act.¹ Broadly stated, the true constitutional position appears to be that a person becomes entitled to receive the pension prescribed by the rules provided he has performed service for the requisite period.

Possible origin of the rule.

11. It may be that the provision in the present Act (and its predecessors) was suggested by the general rule of the common law that a civil servant cannot sue the Crown for pay.²

Once engaged, in law, the civil servant holds his position at pleasure.³ The legal nature of the civil servant's engagement is ambiguous.⁴

It may be that to some extent the English rule was derived from the immunity of the Crown from proceedings in Court (as it existed before the Crown Proceedings Act, 1947).

Criticism in England.

12. The propriety—and even the correctness—of the English rule as to disabilities of civil servants has been criticised in modern times. The view that a

1. Para. 6, *supra*.

2. Richardson, "Incidents of the Crown Servants Relationship", (1955) 33 Can. Bar Rev. 459.

3. *Riordan v. The War Office*, (1959) 3 All. E.R. 552; (1960) 3 All. E.R. 774n. (C.A.), noted by Grunfield in (1960) 23 Modern Law Review 194.

4. (a) *I.R.C. v. Hambrook*, (1956) 2 Q.B. 641, and the cases there cited;

(b) *Marks v. The Commonwealth*, (1964) 111 C.L.R. 549; and Blair in (1958) 21 M.L.R. 265.

Para 12
(contd.)

civil servant has no enforceable right to salary for services rendered, has been stated to be "contrary to principle and against the weight of authority."¹

A leading text book on English Constitutional law,² after noting that it has been held that no debt is owed by the Crown to a civil servant in respect of his salary,³ observes--

"But it is hard to see why this need be so, and in one House of Lords case⁴ petition of right proceedings to determine the entitlement of a former civil servant to supplementary payments was successful."

As has been pointed out,⁵ the denial at law of a right to sue for his salary does not represent the true position of the civil servant.

Position as to superannuation in England.

13. As regards claims based on superannuation, it appears that in England, a suit by a civil servant for claims based on superannuation is not maintainable.⁶ The civil servant in England enjoys no legal right to superannuation.⁷ In numerous decisions, this has been held⁸ to be the correct interpretation of section 30 of the Superannuation Act⁹ of 1934, taken together with section 2 of the Superannuation Act^{10,11} of 1859.

1. D.W. Logan, "The Civil Servant and his pay", (1945), 61, L.Q.R. 240, 258, Proposition—C.
2. Wade and Bradley, English Constitutional Law, (1970), page 682.
3. *Lucas v. Lucas and High Commissioner for India*, (1943), P. 68.
4. *Sutton v. Attorney-General*, (1923), 39, T.L.R. 294. (H.L.)
5. Mitchell, Constitutional Law, (1968), pages 211-213.
6. *Nixon v. A.G.* (1931), A.C. 184 (H.L.).
7. In preparing the discussion as to the position as to superannuation in England, assistance has been taken from Leo Blair, "The Civil Servant" (1958) Public Law 32, 40.
8. E.g., (a) *Edmunds v. Att.-Gen.*, (1878) 47 L.J. Ch.;
(b) *Cooper v. R.*, (1880) 14 Ch. D. 311;
(c) *Yorke v. R.*, (1915) 1 K.B. 852;
(d) *Re Transferred Civil Servants, (Ireland) Compensation*, (1929) A.C. 242;
(e) *Nixon v. Att.-Gen.* (1931), A.C. 184.
9. "...nothing in this Act shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Commissioners of His Majesty's Treasury, and the heads or principal officers of the respective departments of their power to dismiss any person from the public service without compensation". (Section 30, Superannuation Act, 1834).
10. "The decision of the Treasury on any question which arises as to the application of any section of this Act... shall be final."
11. See also (a) Section 9, Superannuation Act, 1887, and
(b) Section 4, Superannuation Act, 1909.

Rule an
anachro-
nism

14. But the rule is an anachronism so far as India is concerned. A suit to recover arrears of pay of a civil servant is maintainable in India,¹ and it is hardly logical to continue the bar in respect of suits for pensions. Considerations of State policy may justify the rule that (subject to certain reservations) a public servant holds office at the pleasure of the head of the State. But such considerations do not justify a general bar against suits for pensions.

In the discussion on the Pensions Bill, Mr. Cocker-² ell observed—"the fundamental principle of the Bill", (which in this respect was, as regards its application to the whole of British India, with the exception of a portion of the Bombay Presidency, a mere recapitulation of the existing law), was that "as the bestowal of pensions, money-grants or assignments of land-revenue was a pure act of grace on the part of the ruling power, so the latter justly and necessarily reserved to itself absolute freedom, of action in regard to the disposal of all claims respecting such allowances; hence no power could be left to the Civil Courts to act adversely to the interests or policy of the Government in such matters".

Today this principle cannot be accepted as sound.

Whether
pension is
"property".

15. In fact, decisions on the question whether the pension granted to a public servant is "property" thereby attracting Article 31(1) of the Constitution, afford ample evidence of the judicial attitude in this matter. The question came up for consideration before the Punjab High Court in *Bhagwat Singh v. Union of India*.³ It was held that a right to pension constitutes "property", and any interference with it will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot, by an executive order, curtail or abolish altogether the right of the public servant to receive pension. On a Letters Patent Appeal,⁴ the Bench approved the decision that the pension granted to a public servant on his retirement is "property" within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as "property" cannot possibly undergo such mutation at the whim of a particular person or authority.

1. *State of Bihar v. Abdul Majid*, A.I.R. 1954 S.C. 245.

2. Mr. Cockerell in Proceedings of the Governor-General-in-Council, 8th August, 1871.

3. A.I.R. 1962 Punj. 503.

4. *Union of India v. Bhagwat Singh*, I.L.R. (1965) 2 Punjab 1.

Para. 15
(contd.)

The matter again came up before a Full Bench of the Punjab and Haryana High Court¹ and the majority took the same view.

16. The Supreme Court has recently held² that a pension is not a bounty payable at the pleasure of the Government, but on the contrary, the right to pension is a valuable right vesting in a Government servant.

Further, the right to receive pension is property under Article 31(1) of the Constitution, and the State has no power by a mere executive order to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) of the Constitution. Accordingly, though a Civil Court may be barred from entertaining a suit with reference to the matters mentioned in section 4, such bar does not stand in the way of the issue of a writ of mandamus to the State to consider a claim for pension, according to law.

Decisions of
High Courts

17. We ought to emphasise that the relevant reasoning adopted in the judgment indicates that the Supreme Court assumed that a suit for the recovery of pension may be barred under section 4 of the Pensions Act. The assumption thus made by the Supreme Court is fully justified by the fact that High Courts have unanimously construed section 4 as referring not only to political pensions, but also to pensions of retired Government servants, and have, on this basis, refused to entertain suits even by retired Government servants, in respect of pensions.³

Points summarised.

18. In our view, therefore, the present provision in section 4 is—

- (a) unjust on principle;⁴
- (b) based apparently on a common law rule which itself is of doubtful validity;⁵
- (c) anachronistic;⁶
- (d) unrealistic;⁷ and
- (e) inconsistent with the basic legal character of the pensioner's right, and, in that sense, opposed to Article 19(1)(f) of the Constitution.

1. *K. R. Erry v. The State of Punjab*, I.L.R. (1967) 1 Punj. & Har. 278 (F.B.).

2. *Deoki Nandan Prasad v. The State of Bihar*, A.I.R. 1971 S.C. 1409, 1420, Paragraphs 32 and 34 (July issue).

3. (a) *Shaukat Hussain v. State*, AIR 1959 All. 769;

(b) *Baldeo Jha, v. Ganga Prasad* A.I.R. 1959 Pat. 17;

(c) *V. K. Namboodri v. Union of India*, A.I.R. 1966 Ker. 185 (Joseph & Raghavan JJ.) (reviews cases).

(d) *Udho Ram v. Secretary of State* A.I.R. 1936 Lah. 85;

(e) *Sajjanam v. State*, A.I.R. 1963 Mad. 49.

4. Para. 10, *supra*.

5. Para. 11 and 12, *supra*.

6. Para. 14, *supra*.

7. Para. 16, *supra*.

Private Member's Bill.

19. It may be of interest to note that a few years ago, a Bill to consolidate and amend the law relating to the grant of pensions etc.,¹ payable by the Central Government, was introduced in Parliament, it also provided for repeal of the Pensions Act. But the Bill did not become law.

Provision in Civil Service Regulations.

20. It is refreshing to find the correct position recorded in the Civil Service Regulations :—²

"Pensions are not in the nature of rewards, but there is a binding obligation on the Government which can be claimed as a right. Their forfeiture is only on resignation, removal or dismissal from service. Before a pension is sanctioned, the sanctioning authority can reduce the amount due under article 470 of the Civil Service Regulations, and after it is sanctioned its continuance depends on future good conduct vide Article 351 C.S.R., but it cannot be stopped for other reasons."

Need for change.

21. For the above reasons, the drastic provision excluding the right of suit, contained in section 4 of the Pensions Act,³ should not apply to pensions of retired employees of the Government, and a change in the law is required in the interests of social justice and in view of the constitutional status of the right to pension⁴ under Article 19(1)(f) of the Constitution.

Recommendation.

22. We, therefore, recommend that the following Exception should be added to section 4 of the Pensions Act, 1871 :—

"Exception. —Nothing in this section applies to a pension payable to or in respect of any person⁵ appointed to a public service or post in connection with the affairs of the Union."

Having regard to the position as to legislative competence,⁶ State pensions cannot, of course, be brought within the purview of the proposed change,—though we do recommend that the Union Government should draw the attention of State Governments

1. The Indian Pensions Bill, 1968 (No. 32 of 1968) (Lok Sabha) (11 April, 1968), (Shri Chaudhary Nitiraj Singh, then Member of Parliament).

2. Government of India, Ministry of Finance, U.O. No. D. 2776-E.V. 52 dated the 8th May, 1952, printed as a Government of India's decision below Article 351, Civil Service Regulations.

3. Para. 6, *supra*.

4. Para. 18(f), *supra*.

5. Cf. article 366(17) of the Constitution, as to the words "to or in respect of".

6. Para. 3, *supra*.

to the constitutional status of the right to pension and impress upon them the desirability of passing legislation similar to that proposed in this Report.

Other points
not consid-
ered

23. In making our recommendation as to section 4, we have not thought it necessary to consider whether the other provisions of the Pensions Act need modification or repeal. Our limited object in making this report is to remove the existing anomaly as regards the right to sue in respect of pensions earned by public servants in the employ of Government.

We should, before we part with this Report, place on record our warm appreciation of the assistance we have received from Mr. Bakshi, Secretary of the Commission, in dealing with the problem covered by the Report. As usual, Mr. Bakshi first prepared a draft which was treated as the Working Paper. The draft was considered by the Commission point by point, and, in the light of the decisions taken tentatively by the Commission, Mr. Bakshi prepared a final draft for consideration and approval by the Commission. Throughout the study of this problem, Mr. Bakshi took an active part in our deliberations, and has rendered very valuable assistance to the Commission.

P. B. Gajendragadkar	Chairman
V. R. Krishna Iyer	Member
P. K. Tripathi	Member
S. S. Dhavan	Member
P. M. Bakshi	Secretary

Dated : New Delhi.
the 4th December, 1972.