

**ALFRED EDWARD FAWCETT, PETITIONER AND APPELLEE, VS.
EULOGIO BALAO, (SUBSTITUTED BY JESUS VARGAS, AS SECRETARY
OF NATIONAL DEFENSE), RESPONDENT AND APPELLANT.**

G.R. No. 13791. March 30, 1960

Ponente: LABRADOR, J.

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LABRADOR, J.:

Appeal from a judgment of the Court of First Instance of Manila, Hon. Antonio G. Lucero, presiding, declaring petitioner, Alfred Edward Fawcett, qualified for retirement under Section 22 (g) of Commonwealth Act No. 1 and therefore entitled to the benefits granted under Republic Act No. 340, as amended, effective as of the date of his retirement on June 18, 1947, deducting therefrom whatever gratuity he had received under Act No. 4151; directing respondent to recall and revoke the order retiring petitioner under Act No. 4151 and, in lieu thereof, to retire him under Section 22 (g) of Commonwealth Act No. 1 and to extend to him the benefits of Section 14 (d) of Republic Act No. 340, as amended.

Plaintiff Alfred Edward Fawcett is an American citizen. He attended the Philippine Constabulary Academy on February 1, 1918 and graduated on May 12, 1919 and was commissioned as 3rd Lieutenant regular on May 13, 1919. He continued in said, service receiving promotions to 2nd Lieutenant on February 17, 1920, and to 1st Lieutenant on January 15, 1924. On July 14, 1937 he was commissioned Captain in the regular force of the Philippine Army, being raised as Major on June 17, 1947.

On February 24, 1925, plaintiff filed his application for retirement under Act No. 2589 as amended by Act No. 3189 to take effect at the discretion of the Chief of Constabulary. In his endorsement dated February 24, 1925, the Chief of Constabulary forwarded Fawcett's application to the Director of Civil Service recommending approval, the effective date of which, however, to be indefinitely deferred. His application was then filed in the office of the Governor General subject to future recommendations.

On April 28, 1935 plaintiff again filed an application for retirement this time under Act No. 4151. But this application was placed on file in the office of the Governor General subject to future determination of effective date. Notwithstanding this application, plaintiff continued rendering service.

During the war, plaintiff was interned as a prisoner of war, he being an American citizen and was not released until the liberation. On February 27, 1945 he suffered an accident, having been hit by a running U. S. Army jeep and his lower third fibula, left, was fractured. In view of this and at his request, the Philippine Army Retiring Board No. 1 recommended that plaintiff be retired from future military service due to physical disability. This order is dated January 8, 1946. He was actually released from the service on June 18, 1947.

On January 12, 1946 he applied for retirement for physical disability in addition to gratuity under Act No. 4151. This petition appears to have been granted. But on July 12, 1955 he asked that his retirement under Act No. 4151 be revoked and that he be retired under Section 22 (g) of Commonwealth Act No. 1. The Executive Secretary ruled that his retirement under Act No. 4151 may not be recalled, so his request was denied. Plaintiff admitted that

he had received retirement benefits under the provisions of Act No. 4151, so when his petition for retirement under the provisions of Section 22 (g) of Commonwealth Act No. 1, as amended, reached the Secretary of National Defense, the latter interposed an objection to his application for retirement under this latter act on the ground that an officer already retired cannot be "re-retired".

It will be noted that under Act No. 4151, a retiree only receives upon retirement for each year of service and the proportionate amount of any fraction of a year thereof a gratuity of 7% of the highest annual salary if the period of service is one year to five years; 8% if the period of service is five to ten years, etc. This said act was a special law promulgated for the retirement of citizens of the United States employed in the Philippine Government in view of the policy of Filipinization then being contemplated.

Under Republic Act 340, however, any officer of the Armed Forces separated from the service for disability not due to his misconduct shall receive either (a) a gratuity, payable in one lump sum, equivalent to one month's base and longevity pay multiplied by the years of active service rendered, but which shall not, in any case, be less than three months' base and longevity pay, or (b) an annual retirement pay equivalent to 2-1/2% of the annual base and longevity pay received by him on date of retirement for each year's active service rendered but not exceeding 75% of the total base and longevity pay received by him on the date of retirement, such retirement pay to be paid in equal monthly installments. The court below ruled that plaintiff was retired under Act 4161 by a ruling of the Army Board and was not of plaintiff's own choice. The lower court also held that the objection that plaintiff is estopped from asking for the recall of his retirement under Act 4151 can not be sustained because plaintiff had repeatedly protested to the Adjutant General against his retirement under Act 4151.

In the first error assigned against the decision of the court below claim is made that the court should have declared that the action of plaintiff has prescribed or is now barred by laches, as plaintiff was actually retired in June, 1947, and he brought his suit only in June, 1957, after more than 10 years. In answer to this supposed error, appellee argues that the question of prescription may not be raised in this court as the same has not been raised in the court below and passed upon by said court in its decision. This contention is correct. Prescription as a special defense may not be availed of except expressly. Not having been expressly raised in the court below the same may not be raised before Us for the first time on appeal. Besides, plaintiff had appealed to the President against the action of the Secretary of National Defense retiring him under Act 4151 and his appeal was denied by the President only on August 16, 1955. Hence the ten years period has not lapsed when he filed this action.

The second error assigned to the trial court is its failure to find that the appellee is estopped from applying for the benefits of a law, other than Act 4151, as he had expressly applied for gratuity under said Act. We do not find that this error has been committed by the trial court. As found by the court below, in his request of January 12, 1946, Exh. E, the plaintiff had expressly prayed that aside from his disability retirement, he be granted in addition thereto, gratuity under Act 4151 of the Philippine Legislature. As a matter of fact he appealed the decision to retire him under Act 4151. There is, therefore, no ground to support the contention that plaintiff-appellee is estopped from asking for disability retirement, he having protested his retirement under Act 4151.

The third and fourth errors imputed to the judge below are that there is no statutory provision allowing plaintiff-appellee to be re-retired under the provisions of Republic Act No. 340, and that he cannot be declared qualified for retirement under Section 22 (g) of Commonwealth Act No. 1.

The third error above mentioned finds no justification in the evidence submitted by the appellant or by the appellee. While plaintiff had filed his application for retirement as early as February 24, 1925 and reiterated his application for retirement under Act 4151 on April 28, 1935, no positive action on his application for retirement under said Act 4151 was taken, before he applied for disability retirement in his letter of January 12, 1946. We

should not overlook the fact that in plaintiff's letter of January 12, 1946, Exh. D, he asked for retirement for physical disability suffered in line of duty, and, in addition thereto for gratuity under Act 4151. The letter clearly shows that he applied to be retired for physical disability and in addition to such retirement, to be retired also under the provisions of Act 4151. But the army ignored his retirement for physical disability and instead retired him only under Act 4151. And this error of the Army is now interposed as defense to the action on the ground that plaintiff once retired cannot be re-retired. The error of the Army is not of plaintiff's own making. Why should the Army's error be used as an impediment to what plaintiff is entitled.

The correct procedure for the Army would have been to determine if plaintiff-appellee is entitled to retire because of his physical disability, as requested by him, instead of retiring him under Act 4151. As found by the court below, which appears to Us as correct, the law applicable in 1946 to officers and enlisted men of the Philippine Army, including appellee, were Commonwealth Act No. 190, known as the Philippine Army Retirement Act, and Commonwealth Act No. 1. Appellee could have been considered retired under the provisions of both laws. However, it does not appear that the Army ever retired him under said Act No. 190. The reason is that said law, as appellant himself admits, does not cover retirement for disability incurred in line of duty, which circumstance (disability) attended appellee's separation. Neither could he be retired under Commonwealth Act No. 150 because this Act refers to commissioned officers of the Army of the United States (See Sec. 1) and appellee was not an officer of the Army of the United States. The only other law under which appellee could be retired is Commonwealth Act No. 1, Sec. 22 (g) as amended by Commonwealth Act 385, which expressly provides:

"SEC. 22 (g). Until superseded by laws formulated by the National Assembly for specific application to the Army of the Philippines, all regulations, courts-martial procedure and provisions of law now pertaining to the punishment, discharge, dismissal, resignation, administration and retirement of officers and enlisted men of the Philippine Constabulary shall, as modified by provisions of this and other laws, apply to all officers and enlisted men on active duty in the army * * *."

Note that all provisions of law then in force applicable to the retirement of officers and enlisted men of the Constabulary are made applicable to all officers and enlisted men on active duty in the Army. Appellee was transferred from the Constabulary to the regular force of the Army on July 14, 1937. It was under the above-quoted provision, therefore, that appellee was retireable. The law that fixed the benefits due him for his retirement, it is true, is Act No. 4151 of the Philippine Legislature. But this does not mean that he is retiring under and by virtue of said Act exclusively. Act No. 4151 fixed his retirement rights, but the application of said Act to him is because he was an officer of the Army on active duty. This is in accordance with the express provision of Section 22 (g) of Commonwealth Act No. 1 above-quoted.

It is, therefore, under the above-quoted provision of law that appellee was actually retireable. It is argued by appellant that Commonwealth Act No. 1 is not a retirement Act. It is not so but retirement laws were by its express mandate extended to officers of the Philippine Army to which appellee pertained. It is a retirement law in the sense that it makes the retirement law applicable to Philippine Army officers; it incorporates in itself the retirement laws by reference. Section 14 (d) of Republic Act No. 340 as amended by Republic Act No. 803, expressly recognizes that it (Commonwealth Act No. 1, Sec. 22 (g)) is a retirement law when it extends its benefits to "disabled officers" separated from the service under section 22 (g) thereof.

As herein before stated, by express provision of Section 14 (d) of Republic Act No. 803, amending Republic Act No. 340, which was approved June 21, 1952, the benefits of Sections 2 and 3 of Republic Act No. 340 were extended to the appellee because he was separated for disability incurred in line of duty after December 8, 1941 and is entitled to retirement in accordance with Section 22 (g) of Commonwealth Act No. 1. Said Section 14 (d) of Republic Act No. 803, amending Republic Act No. 340, provides:

"(d) Disabled officers and enlisted men who were separated from the service under subsection (g) of section twenty-two of Commonwealth Act Numbered One after December eight, nineteen hundred and forty-one, for physical disability incurred in line of duty: Provided, That their ranks shall be adjusted in the same manner as the ranks of all officers in the Armed Forces were adjusted in nineteen hundred and forty-seven: Provided, further, That if they select the first option mentioned in section two hereof, there shall be deducted from the gratuity to be paid them in one lump sum under said section whatever gratuity may have been given them under subsection (g) of section twenty-two of Commonwealth Act Numbered One: Provided, finally, That if they select the second option mentioned in section two hereof, they shall be paid their monthly pensions under said section from the date on which they were separated, but there shall be deducted from the amount of the pensions due them from such date whatever gratuity they may have received under subsection (g) of section twenty-two of Commonwealth Act Numbered One."

The benefits of the above provision of law should have also been extended to appellee as he had applied for it and he was entitled thereto.

We find no error in the findings and conclusions arrived at by the court below and we affirm the judgment appealed from. Without costs. So ordered.

Paras, C. J., Bengzon, Montemayor, Bautista Angelo, Concepcion, Reyes, J. B. L., Barrera, and Gutierrez David, JJ., concur.

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