

## **State Of U.P. & Anr vs C.L. Agrawal & Anr on 2 May, 1997**

**Author: S.P. Bharucha**

**Bench: Jagdish Saran Verma, M.M.Punchhi, S.C.Agrawal, S.P.Bharucha**

CASE NO.:

Appeal (civil) 10568 of 1996

PETITIONER:

STATE OF U.P. & ANR.

RESPONDENT:

C.L. AGRAWAL & ANR.

DATE OF JUDGMENT: 02/05/1997

BENCH:

JAGDISH SARAN VERMA CJI & M.M.PUNCHHI & S.C.AGRawal & A.S.ANAND & S.P.BHARUCHA

JUDGMENT:

JUDGMENT Delivered By:

S.P.BHARUCHA S.P. BHARUCHA, J.

These civil appeals arise upon identical facts and may be disposed of by a common judgment. The principal judgment under appeal is that of a Full Bench of the High Court at Allahabad, in Civil Appeal No. 10568 of 1996. The Full Bench judgment was followed by a Division Bench of the High Court and that order is impugned in Civil Appeal No. 10596 of 1996.

The facts that we state relate to Civil Appeal No. 10568 of 1996. The first respondent was appointed a Lower Division Assistant in the High Court at Allahabad on 1st June, 1957. He was given, on the orders of the Chief Justice in office at the relevant time, one premature (or advance) increment in the year 1989, two premature increments in the year 1990 and one premature increment in the year 1991. He retired from service on 31st July, 1994. For the purposes of calculating his pensionary benefits, the appellants did not take into account these premature increments. They acted upon the basis of a letter dated 27th June, 1992, which had been addressed by the Joint secretary of the appellant State to the Registrar of the High Court in respect of a premature increment that had been granted to one Nazim Hussain, a Section Officer of the High Court, who had then retired. The letter stated, "As the power to create the post is vested with the Governor, so under Fundamental Rule 27 it is mandatory for His Excellency the Governor to exercise aforesaid powers. There is similar provision in Article 229 of the Constitution and Allahabad High Court (Condition of service of

Staff) Rules, 1976". The letter referred to a communication dated 30th May, 1955, addressed by the Accountant General of the appellant State explaining the provisions in this behalf in the Allahabad High Court (Condition of Service of Staff) Rules, 1946, and stated that there was no provision for grant of Premature increment in the 1976 Rules. The letter concluded, "it shall be an irregularity to approve the premature increment without prior approval of His Excellency the Governor".

The first respondent filed a writ petition to quash the letter dated 27th June, 1992, and to seek a writ of mandamus to the appellant State and its Director of Pensions to make payment of the balance of his pensionary dues without reducing the amount of the four premature increments that had been granted to him by the Chief Justice of the High Court. The writ petition was referred to a Full Bench, and the Full Bench allowed it by the judgment and order now impugned.

Article 229 of the Constitution deals with the officers and servants and the expenses of High Courts. It reads thus :

"229. officers and servants and the expenses of High Courts. - (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the court as he may direct:

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the court shall be appointed to any office connected with the court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the court authorised by the Chief Justice to make rules for the purpose :

Provided that the rules made under this clause shall, so far as they relate to salaries allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the Consolidated Fund of the State, and any fees or other money taken by the court shall form part of that Fund."

The Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, were made by the Chief Justice of the High Court in exercise of the powers conferred by clause (2) of Article 229 and were notified on 13th July, 1976. Rules 3, 40 and 41 were called in aid by learned counsel for the appellants. They read thus :

"Strength of the establishment - (1) The number of permanent posts of the various categories in classes I, II, III and IV, respectively, in the establishment of the High Court shall be such as may be determined by the Chief Justice from time to time with the approval of Governor of Uttar Pradesh.

The Chief Justice may from time to time, create such temporary posts as may be considered necessary with the approval of the Governor.

(3) The Chief Justice may leave unfilled or may hold in abeyance any vacant post without thereby entitling any person to compensation.

(4) There shall be separate cadre for each category of posts."

#### 40. Regulation of other matters -

(1) All officers and servants of the Court shall be subject to the superintendence and control of the Chief Justice.

(2) In respect of all matters (not provided for in these rules) regarding the conditions of service of officers and servants of the Court including matters relating to their conduct, control and discipline, the rules and orders for the time being in force and applicable to Government servants holding corresponding posts in the Government of Uttar Pradesh shall apply to the officers and servants of the Court subject to such modifications, variations, and exceptions if any, as the Chief Justice may, from time to time, specify.

Provided that no order containing modifications, variations or exceptions in rules or orders relating to salaries, allowances, leave or pensions shall be made by the Chief Justice except with the approval of the Governor.

Provided further that the said powers exercisable under rules and orders of Government of Uttar Pradesh by the Governor shall be exercised by the Chief Justice or by such officer as he may, by general or special order, direct.

(3) If any doubt arises in regard to a particular post in the establishment being corresponding to a post in the State Government, the matter will be decided by the Chief Justice.

41. Residuary powers-Nothing in these rules shall be deemed to affect the power of the Chief Justice to make such orders, from time to time, as he may deem fit in regard to all matters incidental or ancillary to these rules not specifically provided for herein or in regard to matters as have not been sufficiently provided for :

Provided that if any such order relates to salaries, allowances, leave or pension, the same shall be made with the approval of the Governor of U.P." Learned counsel for the appellants submitted that the premature increments could not have been given to

the first respondents in these appeals without the approval of the Governor. In his submission, the orders granting the premature increments were orders relating to salaries that required the approval of the Governor by reason of the provisions of the first proviso to sub rule (2) of Rule 40.

The argument, on a plain reading of Rule 40, is untenable. The first proviso to Sub-rule (2) of Rule 40 speaks of rules or orders relating to salaries, allowances, leave or pensions and states that these shall not be made by the Chief Justice except with the approval of the Governor. The second proviso to sub rule (2) of Rule 40 refers to the powers exercisable under rules and orders of the Government by the Governor. Reading the two provisos together, it is apparent that the rules and orders that are referred to are rules and orders of a general nature and not orders made in exercise thereof in individual cases.

The second proviso to sub-rule (2) of Rule 40 is of importance for a more fundamental reason. It states that the powers which are exercisable by the Governor under the rules and orders of the Government in respect of matters regarding conditions of service not provided for by the 1976 Rules shall be exercised by the Chief Justice or by such officer as he may direct. Insofar as officers and servants of the High Court are concerned, therefore, the Chief Justice or his delegate exercises the power exercisable by the Governor under such rules and orders of the Government. Insofar as officers and servants of the High Court are concerned, it is enough that the Chief Justice exercises the powers conferred upon the Governor under such rules and orders of the Government; no further approval by the Governor is required.

Rule 41 gives the Chief Justice residuary powers to make orders in regard to matters incidental or ancillary to the 1976 Rules and if the orders relate to salaries, allowances, leave or pension, they are to be made with the approval of the Governor. Once again, clearly, the reference is to the making of general orders in regard to matters incidental or ancillary to the 1976 Rules and not in regard to orders in individual cases.

The orders of the Chief Justice granting premature increments did not, therefore, require the approval of the Governor under the aforesaid provisions.

Learned counsel for the appellants then based his case upon Rule 27 of the Financial Hand Book, Vol. II, Part II to IV, which reads thus :

"27. An authority may grant a premature increment to a Government servant on a time scale of pay if it has power to create a post in the same cadre on the same scale of pay."

Learned counsel submitted that it was the Governor who had created the posts which the first respondents in these appeals had occupied and, therefore, it was only the Governor who could

have approved the grant of premature increments to them.

Article 229 does not state that posts in the High Court are to be created by the Governor; it does not even deal with the creation of posts. Clause (1) thereof empowers the Chief Justice to make the appointments of officers and servants of a High Court. Clause (2) empowers the Chief Justice to make rules prescribing the conditions of service of officers and servants of a High Court with the proviso that so far as these rules relate to salaries, allowances, leave or pensions, they require the Governor's approval. Clause (3) requires the administrative expenses of the High Court to be charged upon the Consolidated Fund of the State.

Rule 3 of the 1976 Rules requires that the number of permanent posts of the various categories in classes I to IV in the High Court's establishment shall be determined from time to time by the Chief Justice with the approval of the Governor. It is, therefore, the Chief Justice who has the power to create posts in the High Court. That he may do so with the approval of the Governor does not detract from this position. The creation of a post precedes and is different from the approval of its creation. In any event, by reason of the provisions of the 1976 Rules referred to above, the powers of the Governor under the rules and orders of the Government are exercisable by the Chief Justice in respect of matters not covered by the 1976 Rules.

Since, then, it is the Chief Justice who has the power to create posts in the High Court, it is the Chief Justice who may grant premature increments under the aforesaid Rule 27 to the officers and servants of the High Court. Moreover, even if the power under the aforesaid Rule 27 be exercisable by the Governor, by virtue of the second proviso to sub-rule (2) of Rule 40 of the 1976 Rules, the power is exercisable by the Chief Justice.

It needs to be noted that the appellants had before them an analysis of the power of Chief Justice to grant premature increments in the communication dated 30th May, 1955, addressed by the Additional Deputy Secretary of the appellant State to its Accountant General, with a copy to the Registrar of the High Court. The letter dated 27th June, 1992, which has been quashed by the impugned Full Bench decision, refers to it. The communication of 30th May, 1955, stated :

"Rule 7 of these rules provides that the rules and orders for the time being in force and applicable to Government servants of corresponding classes in the service of the State shall regulate conditions of service (other than those covered by the Rules) of persons serving on the staff attached to the High Court provided that the powers exercisable under the said rules and orders by the Governor shall be exercisable by the Chief Justice or by such person as he may direct. Accordingly, the power exercisable by the Governor under Fundamental Rule 27 Financial Hand Book Vol. II regarding grant of premature increments is vested in the Chief Justice in so far as the High Court staff is concerned. I am further to invite your attention to the explanatory Note to the Financial Hand Book, Vol. II Part II-IV and to say that in the circumstances the Chief Justice was fully competent to grant three premature increments to Sri Laloo Lal Jauhary. These orders are being issued with the concurrence of Finance Department.

The letter dated 27th June, 1992, seeks to distinguish the analysis on the basis that there was no provision for grant of premature increment in the 1976 Rules. The distinction was not justified for the substance of the relevant provisions in the 1946 Rules remains unaltered in the 1976 Rules, as has already been pointed out.

It will have been noted that the appellants did not directly challenge the orders of the Chief Justice giving the premature increments to the first respondents. They employed a side wind, by refusing to take these premature increments into account for the purposes of calculating the first respondents' pensionary benefits and, accordingly, compelled the first respondents to file the writ petitions challenging the orders in this behalf. The appellants' approach must be deplored. We can do no better than to refer to the observations of a Constitution Bench in *M. Gurumoorthy vs. Accountant General Assam & Nagaland & Ors.*, 1971 Supp. S.C.R. 420, thus :

"Once an order had been passed by the Chief Justice of the High Court in exercise of his power under Article 229 of the Constitution the only course open to the Government, if it wanted to challenge those orders, was to take appropriate proceedings either by way of persuading the Chief Justice to rescind or amend his order on the administrative side or to file a writ petition challenging his orders in the High Court. But the Government took the extraordinary and somewhat unusual step of directing the Accountant General not to issue any pay slip to the appellant until final orders of the Government were issued."

During the course of the hearing of these appeals we noticed that an order dated 27th October, 1995, made by a Division Bench of the High Court (in Writ Petition No. 32987 of 1993, *S.D. Dixit vs. State U.P. & Ors.*) had been included in the paper books and asked about it. It appears that the said writ petitioner is in the same position as are the first respondents in the appeals before us. Learned counsel on his behalf prayed that the Division Bench hearing the said writ petition follow the impugned Full Bench judgment. The Division Bench observed :

"The submission made above by Dr. Padia appears to be contrary to the Apex Court decisions rendered in *Supreme Court Employees Welfare Association vs. Union of India & Others*, A.I.R. 1990 S.C. 334, and in *H.C. Puttaswamy & others vs. The Hon'ble Chief Justice of Karnataka High Court & others* A.I.R. 1991 S.C. 294. Further, these two decisions appear to have not been brought to the notice of the Full Bench inadvertently as the Full Bench has not referred to these two above mentioned Apex Court decisions which have binding effect. It is, therefore, necessary to examine the issue involved in this petition in the light of the above referred decisions of the Apex Court as the aforesaid decision of the Apex Court are binding on this court notwithstanding the aforesaid pronouncement of the Full Bench in *C.L. Agarwal's* case in this regard. Sri Padia has prayed for and is granted time.

List this case on 15th December, 1995."

We asked learned counsel for the appellants whether he desired to rely upon the aforementioned judgments of this Court in the cases of the Supreme Court Employees' Welfare Association and M.C. Puttaswamy. Learned counsel stated that they were not relevant having regard to the interpretation of the Rules that has appealed to us.

There is a passage in the judgment in the case of Supreme Court Employees' Welfare Association that, in the context of the matters before us, deserves to be set out. We endorse what is observed and commend it to the States so that they may deal with proposals made by their Chief Justices with due deference and respect.

"57. So far as the Supreme Court and the High Courts are concerned, the Chief Justice of India and the Chief Justice of the concerned High Court, are empowered to frame rules subject to this that when the rules are framed by the Chief Justice of India or by the Chief Justice of the High Court relating to salaries, allowances, leave or pensions, the approval of the President of India or the Governor, as these may be, is required. It is apparent that the Chief Justice of India and the Chief Justice of the High Court have been placed at a higher level in regard to the framing of rules containing the conditions of service. It is true that the President of India cannot be compelled to grant approval to the rules framed by the Chief Justice of India relating to salaries, allowances, leave or pensions, but it is equally true that when such rules have been framed by a very high dignitary of the State, it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted. If the President of India is of the view that the approval cannot be granted, he cannot straightway refuse to grant such approval, but before doing so, there must be exchange of thoughts between the President of India and the Chief Justice of India."

We are dismayed that the Division Bench hearing the said writ petition should have proposed to examine the issue "notwithstanding the aforesaid pronouncement of the Full Bench judgment". If the judgments in the cases of Supreme Court employees' welfare Association and M.C. Puttaswamy were cited and the respondents to the said writ petition submitted that the Full Bench judgment was erroneous by reason thereof, the proper course for the Division Bench to follow, if it found any merit in the submission, was to refer the said writ petition to a Full Bench. Judicial discipline requires that a Division Bench should not examine de novo an issue that is concluded by the decision of a Full Bench of that High Court.

The High Court shall now proceed to expeditiously hear and dispose of the said writ petition and the three or four other similar writ petitions that are stated to be pending before it in the light of this judgment.

The appeals are dismissed. The appellants shall finalise within 6 weeks from today the pensionary benefits payable to the first respondents in the appeals taking into account the premature increments that had so far been excluded and shall pay them all arrears in this behalf within 12 weeks from today.

The appellants shall pay to the first respondents in each of these appeals the costs thereof fixed at Rs.10,000/-.