Union Of India And Anr vs Deoki Nandan Aggarwal on 4 September, 1991

Equivalent citations: 1992 AIR 96, 1991 SCR (3) 873, AIR 1992 SUPREME COURT 96, 1991 AIR SCW 2754, 1992 ALL. L. J. 258, (1991) 3 JT 608 (SC), 1992 (1) SCC(SUPP) 323, 1991 (3) JT 608, (1991) 3 SCR 873 (SC), (1993) 1 MAHLR 71, (1991) 2 CURLR 611, (1991) 5 SERVLR 16, (1992) 1 UPLBEC 644, (1992) 1 LAB LN 42, 1992 SCC (L&S) 248

Bench: K.J. Shetty, Yogeshwar Dayal

PETITIONER:
UNION OF INDIA AND ANR.

Vs.

RESPONDENT:
DEOKI NANDAN AGGARWAL

DATE OF JUDGMENT04/09/1991

BENCH:
RAMASWAMI, V. (J) II
BENCH:
RAMASWAMI, V. (J) II
SHETTY, K.J. (J)
YOGESHWAR DAYAL (J)

CITATION:
1992 AIR 96 1991 SCR (3) 873
1992 SCC Supl. (1) 323 JT 1991 (3) 608
1991 SCALE (2)481
CITATOR INFO :
E&D 1992 SC2014 (23)

ACT:
High Court Judges (Conditions of Service) Act, 1954 : Paragraphs 2, 9, Part I of First Schedule, Section 17-A--Pension payable to retired Judge of High Court--Fixing of minimum service of seven years-Fixing of lesser pension to those not eligible--Whether discriminatory-Amending Act of 1986--Whether applicable to all Judges irrespective of their dates of retirement.

Judicial Activism: Invoking of judicial activism to set at naught legislative judgment--Whether subversive of the constitutional harmony and comity of instrumentalities--Court to carry out the obvious intention of legislature--not to legislate itself.

HEADNOTE:

The Respondent retired as Judge of the High1 Court on 3.10.1983 on superannuation and elected to receive his pension under Part I of the First SChedule to the High Court Judges (Conditions of Service) Act, 1954. As a Judge of the High Court, he had put in service of 5 years 10 months and 17 days and his pension was determined at Rs.8,400 p.a. and family pension at Rs.250 p.m.

In 1986, the Act was amended providing for an increased pension from 1.11.1986. Thereafter, the Respondent filed a Writ Petition before the High Court praying for directions that he was entitled to refixation of his pension from the date of his retirement at Rs.9,600 per annum on the basis that the period of his service for pension was fit to be enlarged to six years, by addition of 1 month and 13 days; that from November 1, 1986 his pension may be refixed at Rs.20,580 per annum at the rate of Rs.3,430 for six completed years of service; and that the family pension admissible to his wife be calculated on the basis that he had completed six years of service.

During the pendency of the Writ Petition the Respondent made representations to the Government of India that since the respondent fell short of 6 completed years of service only by 1 month and 13 days, the President may be pleased to allow him to add the period so as to

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caluclate the pension, gratuity and family pension on the basis of 6 completed years of service as a Judge. By its order dated April 16, 1987 the Government of India rejected the representation of the respondent among other grounds that the request was belated.

By its judgment dated March 15, 1988 the High Court allowed the Writ Petition directing the Government to retix his pension, family pension and gratuity treating him as having put in six completed years of service. The Union of India has preferred the present appeal, by special leave against the High Court's order.

It was contended on behalf of the appellants that the High Court has re-written the retirement benefit provisions of the First Schedule to the Act which it was not entitled to and hence the refxation of the pension on that basis was wholly illegal and unconstitutional-

However, during the pendency of the appeal this Court in its proceedings dated December 15, 1988 the Government directed, after obtaining the necessary sanction from the President under Section 16 of the Act, the addition of 1 month and 13 days subject to the final decision of this Court in the appeal. However, it was added that the period shall be disregarded in calculating additional pension. if any, under Part I, Part II and Part III of the First Sched-

ule of the said Act.

Allowing the appeal, this Court.

HELD: 1. It is a well-known practice in pensionary schemes to fix a minimum period for purposes of pension. What shall be the minimum period for such pension will depend on the particular service, the age at which a person could enter into such service. the normal period which he is expected to serve before his retirement on superannuation, and various other factors. There is nothing in evidence to suggest that the period of seven completed years of service fixed for pension is arbitrary. So far as the Judges of the High Court are concerned even under the Government of India Act a period of seven completed years of service before superannuation was prescribed for eligibility for pension. In fact no pension was provided for those who had not completed seven years of service under pre-constitutional scheme. Thus there are historical grounds or reasons for fixing not less than seven years of service for pension. Part I deals with pensionary scheme. Prescribing a minimum period of service before retirement on superannuation, for pension is the very scheme itself and not a classification. It is a qualification for eligibility. It is different from computation of pension. All those who

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satisfy that condition are eligible to get pension. [885G-H; 886A-C]

2. Even those who had completed seven years of service were not given pension for all the completed years of service at the rate of Rs.1,600 per annum and a maximum limit has been fixed for purposes of pension. If one calculates the maximum amount provided with reference to the rate per year roughly in about 14 years of service one would have reached the maximum amount. Any service above that period is not taken into account. Thus a person who had put in the minimum period for getting the maximum pension could be said to be favourably treated against the person who had put in more number of years of service than needed for the maximum pension and thereby discriminated. [886D-E]

3. It is not correct to state that the amount of pension provided in paragraph 9 is minimum pension. The said paragraph does not use the word 'minimum' but only states that if a Judge retires without being eligible for pension under any of the provisions. notwithstanding anything contained in the other provisions. the pension of a particular amount mentioned therein shall be paid to the Judge. This amount is not calculated or has any reference to any period of service. A Judge who had put in only two years of service before retirement will also receive the same amount as that of a Judge who has completed six years of service. If the provision is struck down as unconstitutional the condition relating to completion of seven years of service in paragraph 2, all those who had put in less than six completed years of service would be seriously affected and paragraph 9

also would become inapplicable. Further, it may be open to those who have put in more than five years or more than four years as the case may be. to contend that they are discriminated against because persons who had put in less than that period will get pension at much higher rate. [886F-H: 887A]

4. The Amending Act 38 of 1980 provided that the amended liberalised pension scheme would apply only to a Judge who has retired on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) Amendment Act. 1986. A similar provision which made the amendment 01 1976 applicable only to those Judges who have retired on or after October 1. 1974 was struck down as ultra vires and it was decided that the benefit of the amendment was available to. all the retired Judges irrespective of the date of retirement but subject to the condition that the enhanced pension was payable only with effect from October 1, 1974. The Amending Act of 1986 could not restrict the applicability of the amended provision to only those who have retired on or after the commencement of the Amending Act. It

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would be applicable to all the Judges irrespective of the dates of retirement and they would be entitled to be paid pension at the rates provided therein with effect from November 1, 1986. [883A-D]

Union of India v. B. Malick. [1984] 3 SCR 550; N.L. Abhyankar v. Union of India, [1984] 3 SCR 552 and D.S., Nakara v. Union of India, [1983] 2 SCR 165, referred to.

5. In the instant case. High Court had exceeded its jurisdiction and power in amending and altering the provisions of paragraph 2 by substituting different minimum period for eligibility for pension in paragraph 2 of Part I. Since the respondent has not put in seven completed years of service for pension he will be eligible for pension at the rates provided in paragraph 9 of Part I of the First Schedule to the Act, that is to say for the period from 4.10.1983 to 31.10.1986 at the rate of Rs.8,400 per annum and for the period on and from November 1, 1986 at the rate of Rs. 15,750 per annum. [887B-C]

6. Since in compliance with the mandamus issued by the High Court, the President of India was pleased to sanction the addition of one month and 13 days to the service of the respondent to make it six years of completed service subject to the final decision in this appeal, this Court does not go into the question whether the High Court was right in setting aside the earlier rejection for addition of the period. The addition of one month and 13 days does not make any difference in calculation of pension it is relevant only for the purpose of calculating the gratuity under section 17A(3) of the Act. As the period was less than three months and as the President was pleased to sanction the addition in exercise of his power under Section 16 of the Act though subject to the final decision of this Court it is just and necessary

to allow this addition to remain for the purposes of calculation of gratuity, and family pension only though not for pension. The respondent will be entitled to fixation of family pension and for payment of gratuity calculated on the basis of his having completed six years of service. [887D-H]

7.1. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the
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words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law iS. and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. [885A-D]

7.2 Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts some times in order to avoid discrimination. What the High Court has done in this case is a clear and naked usurpation of legislative power. [885F]

P.K. Unni v. Nirmala Industries, [1990] 1 SCR 482; Mangilal v. Suganchand Rathi, [1965] 5 SCR 239; Sri Ram Ram Narain Medhi v. The State of Bombay, [1959] Supp. 1 SCR 489; Smt. Hira Devi & Ors. v. District Board, Shahjahanpur, [1952] SCR 1122; Nalinakhya Bysack v. Shyam Sunder Haldar & Ors., [1953] SCR 533; Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, [1980] 2 SCR 146; S. Narayanaswami v.G. Pannerselvam & Ors., [1973] 1 SCR 172; N.S. Vardachari v. G. Vasantha Pai & Anr., [1973] 1 SCR 886; Union of India v. Sankal Chand Himatlal Sheth & Anr., [1978] 1 SCR 423 and Commissioner of Sales Tax, U.P.v. Auriaya Chamber of Commerce, Allahabad, [1986] 2 SCR 430, relied on.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3674 of 1988.

From the Judgment and Order dated 15.3.1988 of the Allahabad High Court in Civil Misc. Writ Petition No. 20328 of 1986.

V.C. Mahajan, C.V.S. Rao and A. Subba Rao for the Appel- lants.

Deoki Nandan Aggarwal-in-person and Mrs. S. Dixit for the Respondents.

The Judgment of the Court was delivered by V. RAMASWAMI, J. The respondent was elevated as Judge of the Allahabad High Court on November 17, 1977. He retired on October 3, 1983 on superannuation at the age of 62. He had elected to receive his pension under Part I of the First Schedule to the High Court Judges (Conditions of Service) Act, 1954. As he had put in only a period of five years 10 months and 17 days service as a Judge. of the High Court, under paragraph 9 Part I of the First Schedule pension payable was determined at the rate of Rs.8,400 per annum and the family pension in the event of his death earlier than his wife at Rs.250 per month in the letter of Accountant General, Allahabad dated December 2, 1983. The gratuity was worked out at Rs. 11,665.66 P. in lump-sum under Section 17A(3) also on the ground that he had put in only five completed years of service. The pension was payable with effect from October 4, 1983. The Act was amended by the Amending Act No. 38 of 1986 providing for an increased pension with effect from November 1, 1986. On December 10, 1986 the petitioner filed a writ petition before the Allahabad High Court under Article 226 of the Constitution praying for an order or directions declaring (i) that he was entitled to refixation of his pension from the date of his retirement, namely, October 4, 1983 to October 31, 1986 at Rs.9,600 per annum plus dearness allowance admissible under the rules from 'time to time on the basis that the period of his service for pension was fit to be enlarged to six years, by addition of 1 month and 13 days to the 5 years 10 months and 17 days; (ii) for refixa- tion of pension for the period from November 1, 1986 at Rs.20,580 per annum plus dearness allowance or other allow- ances as may be admissible under the rules from time to time, at the rate of Rs.3,430 per annum for six completed years of service as stated above; (iii) to retix the family pension admissible to his wife on the scale allowed under Section 17A as amended by Act 38 of 1986 again taking the period of completed years of service as 6 years and not as total service of 5 years, 10 months, and 17 days. During the pendency of the writ petition the respondent made representations to the Government of India stating that since the respondent fell short for 6 completed years of service only by one month and 13 days, the President may be pleased to allow him to add the period so as to calculate the pension, gratuity and family pension on the basis of 6 completed years of service as a Judge. By its order dated April 16, 1987 the Government of India rejected the repre- sentation of the respondent among other grounds that the request was belated. By its judgment dated March 15, 1988 the High Court allowed the writ petition directing the Government to retix his pension, his family pension and gratuity treating him as having put in six completed years of service and in the manner provided in the judgment. The main grievance of Union of India in this appeal is that the High Court has rewritten the retirement benefit provisions of the First Schedule to tile Act which it was not entitled to and the refixation of the pension on that basis was wholly illegal and unconstitutional. Since the High Court issued the manda- mus directing the Union of India to add one month and 13 days to the total length of service renderred by the re- spondent as Judge of the Allahabad High Court for the com- puting the pension under Section 16 of the Act, during the pendency of the appeal in this Court in the proceedings dated December 15, 1988 the Government directed, after obtaining the necessary sanction from the President under Section 16 of the Act, the addition of one month and 13 days "subject to the final decision of this Court in Special Leave Petition 6798 of 1988 (CA No. 3674 of 1988)." However, they added that the period shall be disregarded in calculat- ing additional pension, if any, under Part I and Part II and Part HI of the First Schedule of the Said Act. In order to appreciate the argument of the learned counsel for the

appellant-Union of India it is necessary to set out certain provisions relating to pension payable to a Judge of the High Court on his retirement. Clause 17 of the Government of India (High Court Judges) Order, 1937 relating to pension payable to a Judge on his retirement which was in force prior to the coming into force of the Constitution provided that "a pension shall be payable to a Judge on his retirement if, but only if, either:

> "(a) he has completed not less than 12 years' service for pension; or
>
> (b) he has completed not less than 7 years' service for pension and has attained the age of sixty; or
>
> (c) he has completed not less than 7 years' service for pension and his retirement is medically certified to be necessitated by ill-health."

Thus it may be seen that under the provisions then existing a Judge who had completed less than seven years of service was not allowed any pension.

As we are concerned in this case to the provisions applicable to a Judge to whom Part I of the First Schedule of the High Court Judges (Conditions of Service) Act, 1954 is applicable either by reason of his appointment directly to the High Court from the Bar or who has elected to receive pension payable under that part we need to set out only relevant provisions relating to pension in Part I of the First Schedule. Paragraphs 2, 3, 4, 5, and 9 as stood prior to its amendment by Act 35 of 1976 read as follows:

> "2. Subject to the other provisions of this part, the pension payable to a Judge to whom this Part applies and who has completed not less than seven years of service for pension shall be the basic pension specified in para- graph 3 increased by the additional pension, if any, to which he is entitled under para- graph 5.
>
> 3. The basic pension to which such a Judge shall be entitled shall be--
>
> (a) for the first seven completed years of service for pension, Rs.5,000 per annum; and
>
> (b) for each subsequent completed year of service for pension, a further sum of Rs.

1,000 per annum:

> provided that the basic pension shall in no case exceed Rs. 10,000 per annum.
>
> 4. For the purpose of calculating additional pensions, service as a Judge shall be classi-

fied as follows:-

Grade I. Service as Chief Justice in any High Court;

Grade II. Service as any other Judge in any High Court.

5. For each completed year of service for pension in either of the grades mentioned in paragraph 4, the Judge who is eligible for a basic pension under this Part shall be enti-

tled to the additional pension specified in relation to that grade in the second column of the table annexed hereto.

provided that the aggregate amount of his basic and additional pension shall not exceed the amount specified in the third column of the said table in relation to the higher grade in which he has rendered service for not less than one completed year.

TABLE

Service	Additional pension per annum	Maximum aggregate pension per annum
	Rs.	Rs.
Grade I	740	20,000
Grade II	740	16,000

9. Where a Judge to whom this Part applies, retire or has retired at any time after the 26th January, 1950 without being eligible for a pension under any other provision of this Part, then, notwithstanding anything contained in the foregoing provisions, a pension of Rs.6,000 per annum shall be payable to such a Judge.

Provided that nothing in this paragraph shall apply--

(a) to an additional Judge or acting Judge; or

(b) to a Judge who at the time of his appoint-

ment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Union or a State. Note: The Proviso was added by Act No. 46 of 1958."

By the Amending Act 35 of 1976 the First Schedule was amended by substituting paragraphs 2 and 9 and deleting paragraphs 3, 4 and 5. The substituted paragraphs 2 and 9 read as follows:

"2. Subject to the other provisions of this Part, the pension payable to a Judge to whom this Part applies and who has completed not less than seven years of service for pension shall be--

(a) for service as Chief Justice in any High Court, Rs.2,400 per annum; and

(b) for service as any other Judge in any High Court, Rs. 1,600 per annum:

provided that the pension shall in no case exceed Rs.28,000 per annum in the case of a Chief Justice and Rs.22,400 per annum in the case of any other Judge.

9. Where a Judge to whom this Part ap-

plies, retires or has retired at any time after the 26th January, 1950 without being eligible for pension under any other provision of this part, then, notwithstanding any- thing contained in the foregoing provi-

sions, a pension of Rs.8,400 per annum shall be payable to such a Judge.

Provided that nothing in this paragraph shall apply--

(a) to an additional Judge or acting Judge; or

(b) to a Judge who at the time of his appoint-

ment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Union or a State." These amended provisions Were held applicable in respect of all the Judges of the High Court who have retired irre- spective of their dates of retirement in the decisions of this Court in Union of. India v. B. Malick, [1984] 3 SCR 550 and N.L. Abhyankar v. Union of India, [1984] 3 SCR 552. However the increased pension was payable only with effect from October 1, 1974, Part I of the First Schedule was further amended by Act 38 of 1986 with effect from November 1, 1986 and the amended paragraph 2 reads as follows:

"2. Subject to the other provisions of this Part, the pension payable to a Judge to whom this Part applies, and who has completed not less than seven years of service for pension shall be---

(a) for service as Chief Justice in any High Court, Rs.4,500 per annum for each completed year of service;

(b) for service as any other Judge in any High Court, RS.3,430 per annum for each completed year of service:

provided that the pension shall in no case exceed Rs.54,000 per annum in the case of a Chief Justice and Rs.48,000 per annum in the case of any other Judge."

The Act further amended paragraph 9 by substituting Rs. 15,750 for the figure Rs.6,000- At this stage itself, we may note that this Amending Act 38 of 1986

provided that the amended liberalised pension scheme would apply only to a Judge "who has retired on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) Amendment Act, 1986." A similar provision which made the amendment by Act 35 of 1976 applicable Only to those judges who have retired on or after October 1, 1974 was held ultra vires and struck down in the two decisions of this Court above referred to and it was held that the benefit of the amendment was available to all the retired judges irrespective of the date of retirement but subject to the condition that the enhanced pension was payable only with effect from October 1, 1974. That was also ratio of the decision of the Constitution Bench of this Court in D.S. Nakara v. Union of India, [1983] 2 SCR 165. On the same reasoning and logic we have to hold that Amending Act. 38 of 1986 could not restrict the applicability of the amended provision to only those who have retired on or after the commencement of the Amending Act. The resultant position would be that the provisions of pension in Part I of First Schedule as amended by Act 38 of 1986 would be applicable to all the Judges irrespective of the dates of retirement and they would be entitled to be paid pension at the rates provided therein with effect from NOvember 1, 1986, As already stated, the respondent retired from service on October 3, 1983. For the period from October 4, 1983 till October 31, 1986 the respondent claimed that he is entitled to be paid at the rate of Rs.9,600 and at the rate of Rs.20,580 per year from November 1, 1986 when the Amending Act 38 of 1986 came into force, plus the usual dearness allowance admissible from time to time. This claim was made on the ground that the power of the President under Section 16 of the Act though discretionary could not be exercised arbitrarily or on extraneous or other unsupportable grounds that on the facts and circumstances the refusal to include the period of one month and 13 days to the length of his service by the order of 'the Government dated April 16, 1987 was illegal and on the facts and circumstances, his case is a fit one for enlarging the period of his service to six years. On the assumption that he is entitled for such en-

largement and the had completed six years of service, the further case of the respondent was that he is entitled for calculation on the pension at the rate of Rs. 1,600 for each completed year of service and for six.years at Rs.9.600 per annum for the period prior to November 1, 1986. He further contended that in paragraph 2 of Part I of the First Sched- ule the words "who has completed not less than seven years of service for pension'' shall be read as "who has completed more than five years of service for pension" on the ground that while a Judge who has completed seven years of service is permitted to calculate at the rate of Rs. 1,600 for each completed years of service, a person who had not completed seven years of service could not be denied that benefit. But finding that a person who had completed only five years of service or less than five years of serv- ice, if the pension is to be calculated at the rate of Rs. 1,600, would get Rs.8,000 or less than Rs.8,000 though Rule 9 provided for a fixed pension of Rs.8,400 per annum for those who had not completed seven years of service, he wanted to read "not less than five years" of service in paragraph 2 as "more than five years" of service. This argument was accepted by the High Court on the ground that there is no rational basis for depriving a Judge who had put in six completed years of service to calculate the benefit of pension at the rate of Rs. 1,600 per year of service which was provided for those who had

completed seven years of service. The High Court was of the view denying the benefit of calculation at the rate of Rs. 1,600 per year would lead to the striking down of the provision as a discriminatory piece of legislation and that however the provi- sion can be saved by "reading down paragraph 2 of Part I of the First Schedule to the Act and reading 'more than five years' in the place of not less than seven years." In that view the High Court amended paragraph 2 so to say by substituting the words "not less than 7 years" as "more than 5 years" and allowed the claim for payment of pension at Rs.9,600 per annum for the period from 4.10.1983 to 31.10.1986.

As already stated as per the Amending Act 38 of 1986 the pension payable for those who have completed 7 years of service was to be calculated at the rate of Rs.3,430 for each completed year of service and for those who have not completed 7 years of service a sum of Rs.15,750 was payable as pension. On the same reasoning which prompted the High Court to read "less than seven years" as "more than five years" in the provision which was in force prior to November 1, 1986 the High Court further held that since in four years service the Judge would have earned Rs. 13,720 and on completion of five years service he would have earned Rs.17,150 calculated at the rate of Rs.3430 per annum as against a sum of Rs.15,750 provided in paragraph 9, necessarily paragraph 2 will have to be read down by providing instead of "not less than seven years" as "more than four years". The learned Judges read the provisions in the manner as was amended by them and calculated the pension payable to the respondent at Rs.20,580 per annum for the period November 1, 1986. Consequential relief relating to the payment of the gratuity and family pension in the light of the relief granted relating to pension was also directed to be given.

We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to November 1, 1986 as "more than five years"

> and as "more than four years" in the same paragraph for the period subsequent to November 1, 1986. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot re- write, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. Vide P.K. Unni v. Nirmala Industries, 1990 1 SCR 482 at 488; Mangilal v. Suganchand Rathi, [1965] 5 SCR 239; Sri Ram Ram Narain Medhi v. The State of Bombay, [1959] Supp. 1 SCR 489; Smt. Hira Devi & Ors. v. District Board, Shahjahanpur, [1952] SCR 1122 at 113 1; Nalinkhya Bysack v. Shyam Sunder Haldar & Ors., [1953] SCR 533 at 545; Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdaor Sabha, [1980] 2 SCR 146; S. Narayanaswa- mi v. G. Pannerselvam & Ors., [1973] 1 SCR 172 at 182; N.S. Vardachari v. G. Vasantha Pai & Anr., [1973] 1 SCR 886;

Union of India v. Sankal Chand Himatlal Sheth & Anr., [1978] 1 SCR 423 and Commissioner of Sales Tax, U.P.v. Auriaya Chamber of Commerce, Allahabad, [1986] 2 SCR 430 at 438. Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts some times in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power. The view of the High Court that paragraph 2 discrimi- nates between those who have completed seven years of serv- ice and those who have not completed that much service is in our opinion not correct. It is a well-known practice in pensionary schemes to fix a minimum period for purposes of pension. What shall be the minimum period for such pension will depend on the particular service, the age at which a person could enter into such service, the normal period which he is expected to serve before his retirement on superannuation, and vari-

ous other factors. There is nothing in evidence to suggest that the period of seven completed years of service fixed for pension is arbitrary. So far as the Judges of the High Court is concerned as we have noticed earlier even under the Government of India Act a period of seven completed years of service before superannuation was prescribed for eligibility for pension. In fact no pension was provided for those who had not completed seven years of service under preconstitu- tion scheme. Thus we have history or historical grounds or reasons for fixing not less than seven years of service for pension. Part I deals with a pensionary scheme. Prescribing a minimum period of service before retirement on superannua- tion, for pension is the very scheme itself and not a clas- sification. It is so to say a qualification for eligibility. It is different from computation of pension. All those who satisfy that condition are eligible to get pension.

Even those who had completed seven years of service were not given pension for all the completed years of serv- ice at the rate Rs. 1,600 per annum and a maximum limit has been fixed for purposes of pension. If we calculate the maximum amount provided with reference to the rate per year roughly in about 14 years of service one would have reached the maximum amount. Any service above that period is not taken into account. Thus a person who had put in the minimum period for getting the maximum pension could be said to be favourably treated against the person who had put in more number of years of service than needed for the maximum pension and thereby discriminated. Thus the reasonableness of the provision in the pensionary scheme cannot be consid- ered in this line of reasonings. It is not impossible to visualise a case where the pension payable would be more than the last drawn pay if the maximum limit had not been fixed.

It is also not correct to state that the amount of pension provided in paragraph 9 is minimum pension. The said paragraph does not use the word 'minimum' but only state that if a Judge retires without being eligible for pension under any of the

provisions, notwithstanding anything con- tained in the other provisions, the pension of a particular amount mentioned therein shall be paid to the Judge.. This amount is not calculated or has any reference to any period of service. For instance a Judge who had put in only two years of service before retirement will also receive the same amount as that of a Judge who have completed six years of service. Again if we run down the provision and strike as unconstitutional the condition relating to completion of seven years of service in paragraph 2 all those who had put in less than six completed years of service would be seri- ously affected and paragraph 9 also would become inapplicable. Further if we amend paragraph 2 of Part I of the First Schedule of the Act as done by the High Court it may be open to those who have' put in more than five years or more than four years as the case may be to, contend that they are discriminated against because persons who had put in less than that period will get pension at much higher rate.

We have, therefore, no doubt that the High Court had exceeded its jurisdiction and power in amending and altering the provisions of paragraph 2 by substituting different minimum period for eligibility of pension in paragraph 2 of Part I. Since the respondent has not put in seven completed years of service for pension he will be eligible for pension at the rates provided in paragraph 9 of Part I of the First Schedule to the Act, that is to say for the period from 4.10.1983 to 31.10.1986 at the rate of Rs.8,400 per annum and for the period on and from November 1, 1986 at the rate of Rs. 15,750 per annum.

We have already noticed that during the pendency of the appeal in this Court in the proceedings dated December 15, 1988 the Government of India communicated to the Chief Secretary, Government of Lucknow, in compliance with the mandamus issued by the High Court, that the President of India was pleased to sanction the addition of one month and 13 days to the service of the respondent to make it six years of completed service subject to the final decision in this appeal. In the circumstances however and in the view we have expressed earlier on the question of pension, we do not want to go into the question whether the High Court was right in setting aside the earlier rejection for addition of the period. Since the addition of one month and 13 days does not make any difference in calculation of pension as we have already stated, this Presidential sanction has become rele- vant only for the purpose of calculating the gratuity under section 17A(3) of the Act. As the period is less than three months and as the President was pleased to sanction the addition in exercise of his power under Section 16 of the Act though subject to the final decision of this Court we would consider it just and necessary to allow this addition remain in force for the purposes of calculation of gratuity, and family pension only though not for pension. The appeal is accordingly allowed and the order of the High Court is set aside. The respondent will however be entitled to fixation of family pension and for payment of gratuity calculated on the basis of his having completed six years of service. There will be no orders as to costs.

G.N. Appeal al-

lowed.