V.S. Mallimath vs Union Of India & Anr on 21 March, 2001

Bench: S.N. Phukan, B.N. Agarwal

CASE NO.:
Writ Petition (civil) 203 of 2000

PETITIONER:
V.S. MALLIMATH.

Vs.

RESPONDENT:
UNION OF INDIA & ANR.

DATE OF JUDGMENT: 21/03/2001

BENCH:
G.B. Pattanaik, S.N. Phukan & B.N. Agarwal.

JUDGMENT:

L...I...T.....T.....T.....T.....T.....T.....T..J PATTANAIK,J.

This petition under Article 32 is by the retired Chief Justice of High Court of Kerala. The grievance of the petitioner is that he has been illegally denied of certain monetary benefit when he served as a Member of the National Human Rights Commission. It is the case of the petitioner that after retiring as the Chief Justice of the Kerala High Court on 11th June, 1991, he was appointed as Chairman of the Central Administrative Tribunal on 5.12.1991. On his retirement from the Tribunal he was appointed as a Member of the National Human Rights Commission on 14.9.94 and continued there till he attained the age of 70 years. While he was continuing as a Member of the National Human Rights Commission he was not granted full salary, which he was entitled to under the relevant Rules, and on the other hand deductions were made under the Proviso to Rule 3 of the Rules. The contention of the petitioner is that the said Proviso will have no application. The further grievance of the petitioner is that on his retirement from the Commission he was entitled to retiral benefit of gratuity for the period he rendered service as a Member of the National Human Rights Commission,. but even that was illegally denied. The third grievance of the petitioner is that the leave which he earned as a Member of the Human Rights Commission was not allowed to be encashed on an erroneous interpretation of the Rules and thereby he was illegally denied of his rights. The Union of India in the Ministry of Home Affairs rejected all the claims of the petitioner on the ground that the relevant Rules do not permit the claims of the petitioner.

The National Human Rights Commission has been constituted under the Protection of the Human Rights Commission Act, 1993(for short the Act). Under Section 3(2) of the said Act, the Chairperson would be one who has been a Chief Justice of the Supreme Court and a Member could be appointed who is or has been a Judge of the Supreme Court and another Member to be appointed is, who is or has been, the Chief Justice of the High Court. Apart from these three, two Members are to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights. The term of office of a Member is 5 years from the date on which he assumes charge of office. But no one can be retained after attaining the age of 70 years. Section 8 of the Act provides that the salaries and allowances payable to, and other terms and conditions of service of Members shall be such as may be prescribed. The expression prescribed has been defined in Section 2 (l) to mean prescribed by rules made under this Act. Section 40 confers power on the Central Government to make rules by notification to carry out the provisions of the Act. Section 41 confers power on the State Government to make Rules by notification to carry out the provisions of the Act. In exercise of power conferred under Section 40 of the Act the Central Government has framed the Rules, called, The National Human Rights Commission Chairperson and Members (Salaries, Allowances and other Conditions of Service) Rules, 1993, (hereinafter referred to as The Conditions of Service Rules). Rule 3 provides that there shall be paid to a Member, a salary which is equal to the salary of a Judge of the Supreme Court. Proviso to the said Provision, however, stipulates that the said Member, if is in receipt of the pension other than disability or wound pension, in respect of any previous service under the Government of the Union or the Government of a State, then his salary in respect of a service as a Member shall be reduced. The bone of contention of the petitioner is that the pension he receives as a Retired Chief Justice of Kerala High Court cannot be deducted from his salary as a Member of the National Human Rights Commission under the Proviso to Rule 3(b), inasmuch as the services of the Chief Justice cannot be held to be a service under the Government of the Union or the Government of a State. Thus, Rule 3(b) is required to be interpreted by this Court. The aforesaid Rule 3(b) is extracted herein below in extenso:-

> 3(b) - a Member, a salary which is equal to the salary of a Judge of the Supreme Court:
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> Provided that if the Chairperson or a Member at the time of his appointment was in receipt of, or being eligible so to do, had elected to draw, a pension (other than disability or wound pension) in respect of any previous service under the Government of the Union or Government of a State, his salary in respect of service as a Chairperson or as the case may be a Member shall be reduced:
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> (i) by the amount of that pension;
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> (ii) if he had, before assuming office, received, in lieu of a portion of pension due to him in respect of such previous service, the commuted value thereof by the amount of that portion of the pension; and
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> (iii) by any other form of retirement benefits, being drawn or availed of or to be drawn or availed of by him.

Rule 4 deals with the leave and Rule 4(2) deals with encashment of leave salary in respect of earned leave standing to the credit of the Member. The contention of the petitioner is that the expression maximum of leave encashed under this sub-rule or at the time of retirement from previous service, as the case may be or taken together shall not in any case exceed 240 days would mean his just immediate previous service, and in his case it would be his service as the Chairman of the Central Administrative Tribunal and would not bring within its sweep the encashment of leave which he has made as the Chief Justice of Kerala High Court. Thus Rule 4(2) crops up for interpretation of this Court. Said Rules 4(1) and 4(2) of the Rules are extracted herein below in extenso :-

> 4(1) A person, on appointment as Chairperson or as a Member shall be entitled to leave as follows :
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> (i) earned leave @ fifteen days for every completed calendar year of service or a part thereof;
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> (ii) half pay leave on medical certificate or on private affairs @ twenty days in respect of each completed year of service and the leave salary for half pay leave shall be equivalent to half of the leave salary admissible during the earned leave;
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> (iii) leave on half pay can be commuted to full pay leave at the discretion of Chairperson or a Member if it is taken on medical ground and is supported by a medical certificate from the competent medical authority;
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> (iv) extraordinary leave without pay and allowances upto a maximum of one hundred eighty days in one term of office.
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> (2) On the expiry of his term of office in the National Human Rights Commission, the Chairperson and Members shall be entitled to receive cash equivalent of leave salary in respect of earned leave standing to his credit subject to the condition that the maximum of leave encashed under this sub-rule ior at the time of retirement from previous service, as the case may be or taken together shall not in any case exceed 240 days.

Aforesaid Rule 4(2) has been amended by Notification dated 28th July, 1999, and in place of the words 240 days substitution has been made to the effect the maximum period prescribed for encashment of such leave under the All India Service (Leave) Rules 1955. Though the conditions of Service Rules has no provision for payment of gratuity, but under Rule 10, the conditions of service of the Chairperson and Members for which no express provision is made in the Rules has to be determined by Rules and Orders for the time being applicable to the Secretary to the Government of India belonging to the Indian Administrative Services. By the aforesaid provision the All India Services-death-cum retirement benefit Rules, 1958 applies also to the Members of the Commission in respect of matters for which there is no provision in the Conditions of Service Rules. Under the All India Service Rules, though it has been provided for payment of gratuity for the services rendered, but it has also been stated that no gratuity would be payable on re-employment, as

provided under Central Civil Services (Fixation of Pay of Re-employed Pensioners) Orders, 1986. The stand of the petitioner is that the appointment as a Member in the National Human Rights Commission cannot be termed as re- employment, and therefore, he would be entitled to the gratuity for the period of service rendered by him as a Member, Human Rights Commission. Thus Rule 10 and the relevant provision of All India Service Death-cum- Retirement benefit Rules, 1958, as well as the Central Civil Services (Fixation of Pay of Re-employed Pensioners) Orders, 1986, crop up for interpretation. The relevant Provision of the said Death-cum Retirement Benefit Rules is extracted below:-

> Rule 17(1) Retiring Pension and Gratuity- A retiring pension and death-cum-retirement gratuity shall be granted to a member of the Service who retires or is required to retire under rule 16.
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> Rule 18. Amount of Gratuity or Pension.- (a) In case a member of the Service retires from service in accordance with the provisions of these rules, before completing qualifying service of ten years, gratuity shall be admissible at the rate of half months pay of each completed six monthly periods of qualifying service.
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> (b)(i) In case a member of the service retires from service in accordance with the provisions of these rules, after completing qualifying service of thirty-three years or more, pension shall be admissible to him at the rate of fifty per cent of the average emoluments reckonable for pension. (ii)In case a member of the Service retires from service in accordance with the provisions of these rules after completing 10 years of qualifying service but less than 33 years of qualifying service, the pension admissible, to him shall be such proportion of the maximum pension admissible under clause (a) of this sub-rule as the qualifying service rendered by him bears to the qualifying service of 33 years. (2)An Indian Civil Service member of the Indian Administrative Service shall be entitled to receive an annuity of Rs.13,333,33 : Provided that if any such member for the death-cum-retirement gratuity scheme, his annuity shall be reduced by the annuity equivalent of the amount of gratuity:
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> Provided that the amount of invalid pension shall not be less than the amount of family pension admissible under sub-rule (2) of rule 22B.
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> [Note: A member of the Service retired from service before 1st day of January, 1986, shall be granted such additional relief in pension as may be sanctioned by the Central Government.] Rule 14 of the Central Civil Services (Fixation of Pay of Re- employed Pensioners) Orders, 1986 is quoted herein below:
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> 14. Gratuity/Death/Retirement Gratuity Re-employed officers shall not be eligible for any gratuity/death/retirement gratuity for the period of re-employment except in those cases covered in Rules 18 and 19 of the Central Civil Services(Pension) Rules, 1972, and corresponding rules of the Defence Services Regulations.

Mr. T.V.L. Iyer, learned senior counsel appearing for the petitioner contends that the post of Chief Justice of a High Court is a constitutional post and, therefore, services rendered as the Chief Justice of a High Court cannot be held to be a service under the Government. Since Proviso to Rule 3(b) of the Conditions of Service Rules stipulates that pension received by a Member in respect of any previous service under the Government of Union or Government of a State could be deducted from the salary, the pension which the petitioner was receiving as Chief Justice will not come within the sweep of the Proviso to Rule 3 (b) and, therefore, the petitioner was entitled to receive the salary equal to the salary of a Judge of the Supreme Court and no deduction could be made. The stand of the Union Government, on the other hand is, that the word Government in the proviso to Rule 3 (b) should not be interpreted narrowly to mean, the Executive Government but should be interpreted in a broader sense to include the three organs of the State, namely, the Executive, the Legislature and the Judiciary and such an interpretation being given the pension received by the petitioner as Chief Justice of Kerala High Court has to be deducted from the salary receivable as a Member of the Commission in terms of the Proviso to Rule 3(b). Mr. Iyer appearing for the petitioner relied upon the decision of this Court in Union of India and Ors. vs. Pratibha Banerjee and Anr. - (1995) 6 Supreme Court Cases, 765, where this Court has held that the Judge of a High Court is a holder of constitutional office and not a Government servant. In the aforesaid case one Pratibha Banerjee, who retired as a Judge of a Calcutta High Court with effect from 16.2.1989 was appointed as a Vice-Chairman of the Central Administrative Tribunal on 3.3.1989 and relinquished said post on 16.2.1992, the question for consideration was for the aforesaid period from 3.3.89 till 16.2.92 what would be her pension. While she had claimed that she was entitled to pension admissible under Part I of the First Schedule to the Act, it was the contention of the Union Government that pension would be admissible under Part III of the First Schedule to the Act. The salary and allowances of the Vice-Chairman and Member of the Central Administrative Tribunal is determined under a set of Rules, called, Central Administrative Tribunal (Salaries and allowances and conditions of Service of Chairman, Vice-Chairman and Members) Rules, 1985. Rule 15(A) provides that the conditions of service and other perquisites available to the Chairman, Vice-Chairman of the Central Administrative Tribunal shall be the same as admissible to a serving Judge of the High Court as contained in the High Court Judges (Conditions of Service) Act, 1954, and the High Court Judges (Travelling Allowances) Rules, 1956. Under the High Court Judges Conditions of Service Act, 1954 a Judge of a High Court is entitled to pension under Chapter III of the Act and Section 14 provides that every Judge on retirement be paid a pension in accordance with the scale and provisions in Part I of the First Schedule provided he is not a member of a ICS or has not held any other pensionable post under the Union or the State. Section 15, however, provides that a Judge who is not a Member of ICS but has held any other pensionable civil post under the Union or the State, shall, on retirement be paid a pension in accordance with the scale and provisions in Part III of the First Schedule. On interpretation of the aforesaid provisions this Court held that the provisions of Part III would apply to a Judge who has held any pensionable post under the Union or State but is not a Member of ICS and who has not elected to receive the pension payable under Part I. Pratibha Banerjee having been appointed as a Judge of a High Court from the Bar, on her retirement she became entitled to pension under Part I of the First Schedule. When she was appointed as Vice Chairman of Central Administrative Tribunal she was already drawing pension as Judge of the High Court under Part I of the First Schedule. The question for consideration was whether for the services rendered as Vice Chairman of the Tribunal she would get pension under Part I or Part III. It was the

contention of the Union Government that since she was holding a pensionable post under the Union/State at the time when she retired as Vice-Chairman of the Tribunal her case would be governed by Part III. This contention, however, was rejected by this Court and the Court held that it cannot be said that a Judge of the High Court holds a post under the Union or the State. The Court then went on examining the scheme of the Constitution and how the Constitution makers were keen to ensure that the Judiciary was independent of the Executive and an independent, impartial and fearless Judiciary is our constitutional creed. The Court also took note of Articles 233 to 237 and pointed out how even the subordinate judiciary has been insulated from any executive influence and ultimately came to the conclusion that there is no relationship of master and servant between the Government and the Judges of the High Court, and consequently, it cannot be said that a Judge of the High Court holds a post under the Union/State. Though certain broad observations made in the aforesaid case might support the contention of Mr. Iyer, but we find it difficult to accept the contention of Mr. Iyer that the pension received by a Judge of the High Court shall not be taken into account for determining his salary as a Member of the Human Rights Commission as the services of a Judge of the High Court by no stretch of imagination, even though pensionable, can at all be intended to be excluded for determining the salary which such Member on retirement as a Judge or Chief Justice of a High Court is entitled to receive under Rule 3(b) of the Rules. In Pratibha Banerjees case (1995(6) SCC 765) this Court on interpreting Articles 50, 214, 217, 219 and 221 of the Constitution, did come to the conclusion that a Judge of a High Court belongs to the third organ of the State, which is independent of the other two organs namely the Executive and the Legislature. It is in that sense the Court further observed that a Judge of the High Court occupies a unique position under the Constitution. But conferring that status to a Judge of the High Court, so as to enable him to discharge his duties without fear or favour, affection or ill will, has got nothing to do in interpreting a particular provision of the Rules governing the service conditions of the Chairman and Members of the Human Rights Commission, when such Judge on retirement as Chief Justice, is appointed as a member of the Human Rights Commission. We are also not in a position to accept the contention that by interpreting, that pension received by a retired Chief Justice of a High Court is to be deducted from the salary which he is entitled to, as a Member of the Human Rights Commission, under the proviso to Rule 3(b) would in any way affect the independence of the judiciary nor would it affect the constitutional scheme and the unique position, a Judge occupies under the Constitution, as discussed in Pratibha Banerjees case. It would be appropriate at this stage to notice an earlier Judgment of this Court in Pashupati Nath Sukul vs. Nem Chandra Jain and Ors., 1984(2) SCC 404 where the Court was considering the question whether the Secretary of a State Legislative Assembly can be held to be qualified to be appointed as Returning Officer for election to Rajya Sabha and it is in that context, Articles 102(1)(a), 191(1)(a) and several other relevant provisions came up for consideration before the Court. The word Government in Article 102(1)(a) and Article 191(1)(a) of the Constitution was construed by the Court and it was held that the expression an officer of Government in Section 21 of the Representation of the People Act, 1951, should be interpreted liberally so as to include within its scope the Legislature, the Executive and the Judiciary and the Court further observed that an officer of the State Legislature, though belongs under Article 187 to the staff of the State Legislature, is still an officer of Government in the sense the expression Government is used in Articles 102(1)(a) and 191(1)(a). In the aforesaid case, this Court had observed that all the three organs, the Legislature, the Executive and the Judiciary are concerned with the governance of the country and in this sense, all the three organs together

constitute the Government at their respective level. The Court had also noticed the fact that the Comptroller and Auditor-General of India, though is assigned an independent status, is an officer under the Union Government, as was held in the case of Gurugobinda Basu vs. Sankari Prasad Ghosal, 1964(4) SCR 311. The Court further observed that the Comptroller and Auditor-General of India and the Judges of the Supreme Court and of a High Court are not eligible to contest elections to Parliament and the State Legislatures in view of Article 102(1)(a) and Article 191(1)(a) of the Constitution, as the case may be, because they are serving in connection with the affairs of the Union [see Article 360(4)(b) of the Constitution] and are, therefore, holding offices of profit under the Central Government. The expression Government used in proviso to Rule 3(b) has, therefore, to be construed in the wider sense and the services rendered by a Judge or Chief Justice of a High Court must be held to be as a service in connection with the affairs of the Union and as such the proviso to Rule 3(b) of the Rules would govern the case of such retired Judge or Chief Justice in determining the salary, which he would be entitled to, on being appointed as a Member of the Human Rights Commission. The question can also be considered from yet another angle. Under the provisions of the Human Rights Commission Act, 1993, the Chairperson would be one who has been a Chief Justice of the Supreme Court and a Member could be appointed who is or has been a Judge of the Supreme Court and another Member, who is or has been the Chief Justice of the High Court. In the Rules, when the Rule Making Authority provided for a salary to be paid to a member under Rule 3(b), a proviso was inserted for deduction from such salary, the amount of pension other than disability or wound pension, which such Member was in receipt of, in respect of any previous salaries. The intention of the Rule making authority is crystal clear that any pension which a Member has been in receipt of, for the services rendered earlier, has to be deducted from the salary, which under the Rules has been indicated to be equal to the salary of the Judge of the Supreme Court. The contention of the petitioner to the effect that the previous service as Chief Justice of a High Court not being one under the Government of the Union, must be held to be not covered by the proviso, cannot be accepted, reading the rules as a whole. We have, therefore, no hesitation in coming to the conclusion that the proviso to Rule 3(b) would apply to the retired Chief Justice of India or the retired Chief Justice of a High Court and the pension which they are in receipt of, apart from the disability or wound pension, has to be deducted from their salary, which they are entitled to under the Rules. The contention of Mr. Iyer, appearing for the petitioner, on this score, therefore cannot be sustained.

Coming to the question whether a Member of the Human Rights Commission, is entitled to gratuity for the period he serves the Commission, it appears that there has been no such provision in the Rules, entitling a Member to claim gratuity. Rule 10 of the Rules, however stipulates that the conditions of service of the Chairperson and the Members for which no express provision is made in the Rules, shall be determined by the rules and orders applicable to a Secretary to the Government of India belonging to Indian Administrative Service. So far as the service conditions of a Secretary to the Government of India belonging to the Indian Administrative Service is concerned, the same is governed by a set of Rules framed under Section 3(1) of the All India Services Act, 1951 called the All India Services(Death-cum- Retirement Benefits) Rules, 1958. Under the aforesaid Rules, retirement gratuity is granted to a Member of the Service, who retires or is required to retire under Rule 16, as provided in Rule 17 of the Rules. The amount of gratuity is computed under Rule 18. The enabling provisions contained in Rules 16, 17 and 18 do not provide for payment of gratuity for a re-employed

person. The President of India, however in supersession of all the earlier orders in relation to fixation of pay of re-employed pensioners, promulgated an Order called the Central Civil Services (Fixation of Pay of Re-employed Pensioners) Orders, 1986. The aforesaid order applies to all the persons who are re-employed in Civil Services and posts in connection with the affairs of the Union Government, after retirement on getting pension, gratuity and/or Contributory Provident Fund benefits. Rule 14 of the aforesaid orders, stipulates that re-employed officers shall not be eligible for any gratuity/death/retirement gratuity, for the period of re- employment, except in those cases covered in Rules 18 and 19 of the Central Civil Services (Pension) Rules, 1972. The petitioners case is not covered under the aforesaid provisions of the Central Civil Services (Pension) Rules, 1972. Therefore, the question for consideration is whether the appointment of the petitioner as a Member of the Human Rights Commission would tantamount to re-employment. In the absence of any definition of the expression re- employment and applying the common parlance theory, the conclusion is irresistible that the said appointment would tantamount to re-employment and, therefore, for such period of service as Member of the Human Rights Commission, no gratuity would be payable.

The only other question that remains for consideration is the claim of encashment of leave. Under the Rules, Rule 4 entitles a person, on appointment as Chairperson or as a Member for earned leave and half pay leave on medical certificate and extraordinary leave. Rule 4(2) is relevant for our purpose which unequivocally indicates that on the expiry of the term of office in the National Commission, the Chairperson and Members shall be entitled to receive cash equivalent of leave salary in respect of earned leave, standing to his credit subject to the condition that the maximum of leave encashed under this sub-rule or at the time of retirement from previous service, as the case may be or taken together shall not in any case exceed 240 days. The petitioner did encash the cash equivalent of leave for the period of 240 days, when he retired as the Chief Justice of Kerala High Court. In accordance with Rule 4 of the Rules, he had earned, earned leave for 68 days. But he has not been allowed to encash the same, since he had already encashed the maximum period of 240 days under sub-rule (2) of Rule 4, which sub-rule provides for encashment of leave. The petitioners contention however is that the expression previous service in sub-rule (2) must refer to the preceding service, which the petitioner had served as Chairperson of the Central Administrative Tribunal and since he had earned only 161 days of earned leave as Chairman of the Central Administrative Tribunal, the maximum period provided under sub-rule (2) will not apply to his case, even though he has encashed the leave for 240 days, as the Chief Justice of Kerala High Court. On a bare reading of the aforesaid provisions contained in sub-rule (2) of Rule 4, we are unable to accept this contention inasmuch as what is intended in the aforesaid rule is that no-one would be allowed to encash leave for a period more than 240 days and since the petitioner did encash the earned leave for 240 days as the Chief Justice of Kerala High Court, he would not be entitled to further encashment for the period of 68 days of earned leave, which he might have earned as a Member of the Human Rights Commission under Rule 4(1) of the Rules. The petitioner, therefore, has rightly not been allowed to encash his leave in question. In view of our conclusions on the three items of claim made by the petitioner, we do not see any violation of fundamental rights of the petitioner and as such this petition under Article 32 is dismissed.