

CASE NO.:  
Appeal (civil) 2327-2328 of 1999

PETITIONER:  
N.D.P. Namboodripad

RESPONDENT:  
Union of India & Ors.

DATE OF JUDGMENT: 16/04/2004

BENCH:  
S. RAJENDRA BABU & P. VENKATARAMA REDDI

JUDGMENT:  
J U D G M E N T

RAJENDRA BABU, J. :  
The appellant was a member of the Higher Judicial Services of the State of Kerala and was elevated as a Judge of the High Court of Kerala in 1972. He retired from service with 23 years of pensionable service; 8 years of which he served as a High Court Judge.

The Pension and other benefits of High Court Judges are determined on the basis of Part III of the 1st Schedule of the High Court Judges (Conditions of Service) Act, 1954, as amended by the Amending Acts, 1986 and 1988. In accordance with these provisions, the basic pension payable to the Appellant was fixed at Rs.17,300/- p.a.

The U.O.I. issued order O.M. dated 16.04.1987 rationalizing the pension structure of employees who retired before 1.1.1986. It is also stated in the said order that separate orders vis-à-vis the Pension of the retired High Court and Supreme Court Judges would be issued. Accordingly the Government of India in a Notification dated 18.12.1987, ordered to revise the ordinary pension admissible to High Court Judges under clause 2(a) of Part III of the 1st Schedule of the Act with effect from 1.1.1986.

In G.O. Ms. 228/89/GAD dated 19.10.1989 the Government of Kerala issued orders extending the benefit of O.M. dated 16.04.1987 to the retired Judges of the High Court with effect from 1.1.1986.

Accordingly, the appellant's pension was revised to Rs.32,720/- per annum with effect from 1.1.1986 to 31.10.1986. Considering the amendment to Para 2(b) of Part III to Schedule I of the Act by Act 38 of 1986, whereby the figures of Rs. 700/- and Rs. 3500/- were substituted with figures of Rs. 1600/- and Rs. 8000/-, there was a further increase in the appellant's pension to Rs. 37,220/- per annum with effect from 1.11.1986.

Aggrieved by this order, the appellant filed O.P. No.203 of 1990 before the High Court of Kerala.

A learned Single Judge vide judgment dated 12.03.1992 allowed the Original petition and directed the Respondents to re-fix appellant's pension at

Rs.35,000/- per annum from 1.1.1986 and at Rs. 47,900/- per annum from 1.11.1986. He also held that the appellant would be entitled to all other consequential benefits according to this re-fixation of pension.

Aggrieved by this judgment, the Respondent No.1 filed W.P./Appeal No.804/1992 before the Division Bench of the High Court of Kerala. The Division Bench vide judgment dated 10.07.1997 allowed the appeal, inter alia, holding that the method used by the U.O.I. in calculating the pension was quite correct and held that the method used by the learned Single Judge in calculating the pension by adding the figures under clauses (a) and (b) of para 2 of Part III of the 1st Schedule of the Act in order to find out the amount of revised pension, was not correct.

Aggrieved, the appellant filed Review Petition No. 299/1997 before the High Court. The High Court vide Order dated 10.11.1997 dismissed the Review Petition, inter alia, holding that the appellant had no case that the order sanctioning pension to the appellant is illegal. Hence these appeals by special leave.

The two issues which arise for consideration are:

- (I) Whether the High Court's fixation of the pension under clause 2(a) is correct?
- (II) Whether the High Court was correct in not adding the figures under para 2 cls. (a) and (b) of Schedule I, Part III of the Act in order to find out the revised amount of pension and whether a ceiling was imposed under clause 2(b) ?

#### ISSUE NO. I

The appellant claims that the decision of the Division Bench regarding the fixation of the pension due to the appellant under cl. 2(a) is incorrect. The appellant claims that G.O. (P) No. 760/89/FW dated 26.12.1989 (Annexure P-7) states that pension has to be determined at 50% of the average emoluments in all cases. Accordingly, he claims that Rs. 4237/- was the last emolument he received prior to his retirement and it is one half of this amount & not the salary of Rs. 3500/- that should be taken for fixation of pension under cl. 2(a). The appellant arrives at this figure of Rs. 4237/- by including dearness allowance and special allowances.

This issue was not addressed by the Division Bench in the Writ Petition and in the Review Petition it rejected it on the ground that in the case of M.L. Jain vs. Union of India, 1985 (2) SCC 355) Rs. 3500/- was taken as the amount for calculating the pension. Further, it states that the learned Single Judge in O.P. No. 203 of 1990 had also taken the same amount for purposes of calculation.

The appellant, however, places reliance on Rule 62 of Part III of the Kerala Service Rules, which reads as follows :-  
"Rule 62. The term emolument when used in

this part means the emolument which the employee was receiving immediately before his retirement and includes :

(a) pay as defined in Rule 12(23) in Part I of these rules and for pay of the appointed under rule 9 or rule 31 of the Kerala State and Subordinate Service Rules.

(b) The dearness pay the employee was actually in receipt of."

It is the respondents' contention that the appellant was getting dearness allowance and special allowance and not dearness pay, to attract Rule 62. In fact, the respondents rely on this very Rule to justify why dearness allowance and other special allowance were not added to the last salary of Rs. 3500/- for the purposes of calculating the appellants pension.

The appellant, however, contends that since the first part of the rule means "emolument which the employee was receiving immediately before his retirement" any such emolument cannot be taken away by the inclusive definition contained in clause (b) of Rule 62.

The appellant's contention seems to be correct in law. The phrase "and includes" in Rule 62 cannot be taken to mean "and only includes". The first part of the definition cannot be taken away by the inclusive definitions contained in clause (a) and (b) of Rule 62.

Therefore, the respondents are not justified inasmuch as the dearness allowance and special allowance drawn by the appellant was not taken into account for the calculation of the appellant's pension. It is true that in the Ist M.L. Jain case, 1985 (2) SCC 355, the calculations were adopted taking the last salary into consideration. However, the above point of whether the last received emoluments inclusive of dearness allowance and other special allowances should be taken for the purposes of calculating pension or the last salary drawn should be taken was not addressed in that case.

Accordingly, the calculations should adopt Rs.4,237/-, which is inclusive of dearness allowance and special allowances and not Rs.3,500/- as the basic amount.

#### ISSUE NO. II

With regard to the issue as to whether the two amounts covered by Cls. (a) & (b) of para 2 of Part III of the 1st Schedule to the Act can be put together to find out the revised rate from the table attached to the order dated 16.4.1987, which rationalised the pension structure of employees who retired before 1.1.1986; the Division Bench held that

such a course is not permissible.

Cl. (a) of para 2 deals with the pension to which a Judge is entitled under the ordinary rules of his service. Cl. (b) refers to a special additional pension per annum in respect of each completed year of service to be paid to the retired High Court Judge.

The notification/order dated 18.12.1987 clearly states that the "ordinary pension admissible to High Court/Supreme Court Judges under para 2(a) of Part III of the 1st Schedule to the High Court/Supreme Court Judges (Condition of Service) Act, 1954/1958 respectively may be revised with effect from 1.1.1986\005.."

Thus, it is evident that what is revised under the order is ordinary pension under para 2(a) and not the special additional pension under para 2(b) and each of them have different characteristics.

Therefore, the view of the Division Bench that the figures under clauses (a) and (b) of para 2 of Part III of the 1st Schedule of the Act cannot be added for the purposes of finding out the revised pension is correct,

The appellant further contends that the Division Bench in its calculation of pension makes the error of restricting it to the ceiling of Rs. 8000/- laid down in clause (b).

The ceiling was categorically rejected by this Court in the third case filed by Shri M.L. Jain, 1991 (1) SCC 644. This contention of the appellant is correct. However, even though the Division Bench makes an order while imposing the ceiling, it can be seen that the respondents have however authorised the appellant the amount of Rs.12,800/-. Therefore, despite the High Court's judgment the respondents have actually not imposed the ceiling of Rs.8,000. Hence there is no requirement to pass any specific direction in this regard.

Taking into consideration the above, these appeals are partially allowed and order under appeal stands modified with the following directions :-

- (a) For the purpose of calculations the emoluments received as last payment including dearness allowance and other special allowances be considered and not merely the last salary of Rs. 3500/-
- (b) Clauses 2 (a) and (b) of Part II of 1st Schedule of the Acts and Rules governing the service condition of the High Court Judges should not be taken into account in order to find out the amount of revised pension.
- (c) There should be no ceiling imposed on the amount the appellant can receive

under cl. (b) of the Act.

(d) The respondents shall recalculate the pension as indicated above within a period of three months and pay, if any, arrears are due within three months thereafter.

JUDIS