PETITIONER:

STATE OF U.P. & ANR.

Vs.

RESPONDENT:

C.L. AGRAWAL & ANR

DATE OF JUDGMENT: 02/05/1997

BENCH:

CJI, M.M. PUNCHHI, S.C.AGRAWAL, A.S. ANAND, S.P. BHARUCHA

ACT:

HEADNOTE:

JUDGMENT:

WITH

CIVIL APPEAL NO.10596 OF 1996 JU D G ME N T

S.P. BHARUCHA, J.

These civil appeals ariseupon identical facts and may be disposed ofby a common judgment. The principal judgment under appeal is that of a Full Benchof the High Court at Allahabad, in Civil Appeal No. 10568 of1996. The Full Bench judgment was followed by a Division Bench of the High Court and that orderis impugned in Civil Appeal No. 10596 of 1996.

The factsthat we state relate to Civil Appeal No. 10568 of 1996. The first respondent was appointed a Lower Division Assistant in the High Courtat Allahabad on 1st June, 1957. Hewas given, onthe orders of the Justicein office at the relevant time, one premature (or advance) increment in theyear 1989, two premature increments in the year 1990 and one prematureincrement in the year 1991.He retired from service on 31st July, 1994. For the purposes of calculating hispensionary benefits, the appellantsdid not take into account these premature increments. They acted upon thebasis of a letter dated27th June, 1992, which had been addressed by the Joint secretary of the appellant State to the Registrarof the High Court in respectof a premature increment that had been granted to one Nazim Hussain, a Section Officer of the High Court, who 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 theprovisions in this behalf in the Allahabad High Court (Condition of Service of Staff) Rules, 1946, and stated that there was no provision for grantof Premature increment in the 1976 Rules. The letterconcluded, "it shall be anirregularity to approve thepremature increment withoutprior approval of His Excellency the Governor".

The first respondent fileda writ petitionto quash the letter dated 27th June, 1992, and to seek a writ of mandamus to theappellant Stateand itsDirector of Pensions to make payment of the balance of his pensionarydues without reducing the amount of the four premature increments that had been granted to him bythe Chief Justiceof the High Court. The writ petition was referred to a FullBench, and the Full Bench allowed it bythe 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:

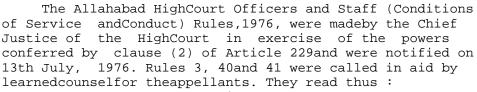
"229. officers andservants and the expenses of High Courts. - (1) Appointments of officers and servants of a High Courtshall be made by the Chief Justice of the Court or such other Judge or officer of the court as he may direct:

Provided that the Governor of
the Statemay by rule require that
insuch cases asmay be specified
inthe rule no person not already
attached to thecourt shall be
appointed to any office connected
with the court save after
consultation withthe State Public
Service Commission.

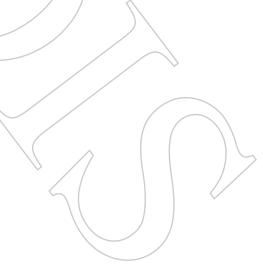
(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service ofofficers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the court authorised by the Chief Justice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

Provided that therules 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 aHigh a Court, including all salaries, allowances andpensions payable to or inrespect of the officers and servants of the court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneystaken by the courtshall form part of that Fund."



"Strength of theestablishment - (1) The number of permanent posts of the various categories in



classes I, II, III and IV, respectively, in the establishment of the High Courtshall be such as may he determined by the Chief Justice from timeto timewith 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 inabeyance any vacant postwithout thereby entitling any person to compensation.
- (4) Thereshall be separate cadre for each category of posts."
- 40. Regulation of other matters (1) All officers and servants of the Courtshall be subject to the superintendence and control of the Chief Justice.
- In respect ofall matters (not provided for in these rules) regarding the conditions of service ofofficers and servants of the Court including matters relating to conduct, control their discipline, the rules and orders for the time being in force and applicableto Governmentservants holding corresponding posts in the Governmentof Uttar Pradesh shall apply to the officers andservants of the Court subjectto such variations, modifications, exceptionsif any, as the Chief Justice may, from time to time, specify.

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

Provided further thatthe 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 officeras hemay, by general orspecialorder, direct.

- (3) If any doubtarises in regard to a particular postin the establishment being corresponding to a postin 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, ashe may, deem fit inregard to all matters incidental orancillary to these rules not specifically provided for herein or inregardto matters as have not been sufficiently provided for:

Provided that if any such order relates to salaries, allowances, leaveor 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 nothave been given to the first respondents in these appeals without the approval of the Governor. Inhis 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 provisors sub rule (2) of Rule 40.

The argument, ona plain reading of Rule 40, is untenable. Thefirst proviso to Sub-rule (2)of Rule 40 speaks of rules or orders relating to salaries, allowances, leave or pensions and states that theseshall 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 rulesand orders of the Government by the Governor. Reading thetwo 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 bythe Governor under the rules and orders of the Government inRespectof matters regarding conditions of service not provided for by the 1976 Rules shall be exercised bythe Chief Justice or bysuch officer as he may direct. Insofar asofficers and servants of the High Court areconcerned, therefore, the Chief Justice or his delegateexercises thepowersexercisable by the Governor undersuch rules andordersof the Government. Insofaras officers and servants of the High Court are concerned, it is enoughthat the Chief justice exercises the powers conferred upon the Governor under such rules and ordersof the Government; no further approval by the Governor is required.

Rule 41 gives the Chief Justiceresiduary powers to make orders inregard to matters incidental orancillary 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 ChiefJustice granting premature increments didnot, therefore, require the approval of the Governor under the aforesaid provisions.

Learned counsel for the appellants then based hiscase upon Rule 27 ofthe Financial Hand Book, Vol. II, Part II to IV, which readsthus:

"27. Anauthority maygrant a premature increment to a Government servant on a time scale of pay if ithas power to create a post in the same cadre on the samescale of pay."

Learned counsel submittedthat itwas the Governor who

had created the postswhich the firstrespondents 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 statethat posts in the High Court are tobe created by the Governor; it does not evendeal with the creation of posts. Clause (1)thereofempowers the Chief Justice to makethe appointments of officers and servants of a High Court. Clause (2)empowers the Chief Justiceto 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 postsof 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 postsin the High Court. Thathe 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. Inany 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 aforesaidRule 27 to the officers and Servantsof the High Court. Moreover, even if the power underthe aforesaid Rule 27 be exercisable by the Governor, by virtue of the second proviso to sub-rule (2) ofRule 40 of the 1976 Rules, the power is exercisable by the Chief Justice.

Itneeds 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 30thMay, 1955, addressed by the Additional Deputy Secretary of the appellant State to its Accountant General, with a copy to the Registrar of theHigh Court. The letter dated27th June, 1992, which has been quashed by the impugnedFull Bench decision, refers to it. The communication of 30thMay, 1955, stated:

"Rule 7 of these rulesprovides that the rules and orders for the time being in force and applicable Government servants corresponding classesin service of the State shallregulate conditionsof service (other than these covered by the Rules) of persons servingon the attached to the High Courtprovided that the powers exercisable under the said rules and orders by the Governor shall be exercisable by the Chief Justice or by such person ashe maydirectAccordingly, the power exercisableby theGovernor under Fundamental Rule 27 Financial Hand BookVol. II regarding grant ofpremature increments is vested inthe Chief Justice in so far as

the High Court staff is concerned. Iam further to invite your attention to the explanatory Note tothe Financial Hand Book, Vol. II Part II-IV and to say that in the circumstances the Chief Justice was fully competentto grant three premature increments to Sri Lalloo Lal Jouhary. Theseorders are being issued with the concurrence of Finance Department.

The letter dated 27th June, 1992, seeks to distinguish the analysis on the basis that therewas 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.

Itwill have been noted that the appellants did not directly challenge theordersof the Chief Justice giving the premature increments to the first respondents. They employed a side wind, by refusing totake 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 nobetter 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 theConstitution the only course open to the Government, ifit wanted tochallenge those orders, was to take appropriate proceedings either byway of persuading the Chief Justice to rescind or amend his order on the administrative side or to file a his writ petition challenging orders inthe High Court. But the Governmenttook the extraordinary and somewhat unusual step directingthe Accountant General not to issue anypay slip to the appellant until final orders of the Governmentwere issued."

During the courseof thehearing of these appeals we noticedthat an orderdated 27th October, 1995, madeby 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 thepaper 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 hisbehalf prayed that the Division Bench hearing the said writ petition follow the impugnedFull 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 ofIndia & Others, A.I.R. 1990 S.C.334, and inH.C. Puttaswamy& others vs. The

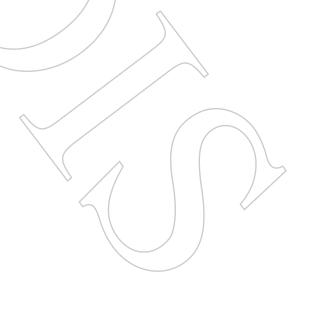
Hon'ble Chief Justice of Karnataka High Court & others A.I.R. 1991 S.C. 294. Further, these decisions appear to havenot been brought to the notice of the Full Bench inadvertently as the Full Bench has not referred to these two above mentioned Apex Court decisions which have binding effect. Itis, therefore, necessary toexamine the issue involved in this petition in the light of the above referred decisions of the Apex Court as the aforesaid decision of theApex Court are binding on this court notwithstandingthe aforesaid pronouncement of the FullBench in C.L. Agarwal's case in this regard. Sri Padiahas prayed for and is granted time.

List thiscase on 15th December, 1995."

Weasked learned counsel for the appellants whether he desired 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 SupremeCourt Employees' Welfare Association that, in the contextof the matters before us, deserves to be set out. We endorsewhat is observed and commendit to the States so that they may deal with proposals made bytheir Chief Justices with due deference andrespect.

"57. So far as the Supreme Court and the High Courts are concerned, the ChiefJusticeof India and the Chief Justice of the concerned High Court, areempowered to frame rules subject tothis that when the rules are framed by the Chief Justice of India or by the Chief Justice of High Court relating salaries, allowances, leave pensions, the approvalof President of Indiaor the Governor, asthese may be, is required. It is apparent that theChief 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 conditionsof service. It is true that the President of India cannot becompelled to grant approval to the rules framed by the Chief relating Justice of India 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 viewthat the approval cannotbe granted, he cannot straightway refuseto grant such approval, but before doing so, there mustbe exchange of thoughts between the President of India and the Chief Justice of India."

Weare dismayed that theDivision Benchhearing the said writ petition should have proposed examine the issue "notwithstanding the aforesaidpronouncement of theFull Bench judgment". If the judgments inthe cases of Supreme Court employees' welfare Association and M.C. Puttaswamy were cited and the respondents to the said writ petition submitted thatthe Full Benchjudgment 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 saidwrit 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 HighCourt.

The High Court shall now proceed to expeditiouslyhear 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 payableto thefirst respondents in the appeals takinginto accountthe premature increments that had so farbeen excluded and shall pay them all arrears in this behalf within 12 weeks from today.

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

