

CASE NO.:
Appeal (civil) 2664 of 1999

PETITIONER:
UNION OF INDIA

RESPONDENT:
JUSTICE (RETD.) S.N. SAXENA AND ORS.

DATE OF JUDGMENT: 20/02/2003

BENCH:
V.N. KHARE CJ & S.B. SINHA & DR. A.R. LAKSHMANAN

JUDGMENT:
JUDGMENT

WITH
W.P.(C) No. 480/2000, C.A. Nos. 6583-6584/99, 7133/2001, 1924 and 8322 of 2002

2003(2) SCR 282

The following Order of the Court was delivered :

These Civil Appeals and the Writ Petition involve a short question as regard interpretation of Rule 20B of the All India Services (Leave) Rules, 1955 read with Rule 2 of the High Court Judges (Condition of Service) Rules, 1956.

The respondents herein who were the writ petitioners before the High Court as also the writ petitioners before us were appointed as Judges of the High Court. They have since retired. They were elevated to the High Court from Judicial Service quota. Most of them were to reach the age of superannuation in Higher Judicial Services of the respective State a few days or a few months prior to their elevation to the High Court. It is not in dispute that in terms of the rules governing the conditions of service framed by the respective States; retirement benefits as also the leave encashment benefits are deposited in their account. It was so done in the case of all the writ petitioners. After their elevation most of them expressed their desire to deposit the said amount in the Treasury. Curiously enough, whereas in the cases of some of the Judge such request was acceded to but in the case of the writ petitioners the same had been turned down. As despite demand they were not paid the balance of the amount by way of difference of the leave encashment, writ petitions came to be filed before the Allahabad High Court. The said writ applications have been allowed. Aggrieved, the Union of India is in appeal before us.

An application under Article 32 of the Constitution of India has been filed by the petitioners herein, who are retired Judges of the Calcutta High Court, as their requests for payment of the balance sum and/or permitting them to deposit the amount drawn by them in the Treasury was turned down on the ground of pendency of the special leave petitions before this Court.

The contention of Union of India in all these appeals as also writ petition is that the amount in question having been withdrawn by the writ petitioners, keeping in view the concept of "one time settlement" engrafted in Rule 20B of the All India Services (Leave) Rules, 1955, they are not entitled to any further amount.

It is not in dispute that the conditions of service of a Judge of High Court is governed by the High Court Judges (Conditions of Service) Act, 1954. No specific provision exists therein as regards encashment of the unavailed leave. The said benefit, however, is conferred upon the High Court Judges in terms of Rule 2 of the High Court Judges (Conditions of

Service) Rules, 1956 read with Rule 20B of the All India Services (Leave) Rules, 1955.

Rule 2 of the High Court Judges (Conditions of Service) Rules, 1956 reads thus :

"2. The conditions of services of a Judge of a High Court for which no express provision has been made in the High Court Judges (Conditions of Service) Act, 1954, shall be and shall from the commencement of the Constitution be deemed to have been, determined by the rules for the time being applicable to a member of the Indian Administrative Service holding the rank of Secretary to the Government of the State in which the principle seat of the High Court is situated:

Provided that, in the case of a Judge of the High Court of Delhi and a Judge of the High Court of Punjab & Haryana the conditions of service shall be determined by the rules for the time being applicable to a member of the Indian Administrative Service on deputation to the Government of India holding the rank of Joint Secretary to the Government of India stationed at New Delhi:

Provided further that, in respect of facilities for medical treatment and accommodation in hospitals the provisions of the All India Service (Medical Attendance) Rules, 1954, in their application to Judge, shall be deemed to have taken effect from January 26, 1950:

Provided also that where at the request of the President, any Judge undertakes to discharge any function outside his normal duties in any locality away from his headquarters, the President may, having regard to the nature of such functions and 'locality, determine the facilities that may be afforded to such Judge including accommodation, transport and telephone so long as he continues to discharge such function, either without any payment or at a concessional rate."

Rule 20-B of All India Services (Leave) Rules, 1955 reads thus:

"20-B. Payment of cash equivalent of leave salary-(1) The Government shall suo motu sanction to a member of the service who retires from the service under sub-rule (1) of Rule 16 of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 having attained the age of 58 years on or after September 30, 1977 the cash equivalent of leave salary in respect of the period of earned leave at his credit on the date of his retirement, subject to a maximum of 180 days.

(2) The cash equivalent of leave salary payable to a member of the service under sub-rule (1) above shall also include dearness allowance admissible to him on the leave salary at the rates in force on the date of retirement, and it shall be paid in one lump-sum, as a one-time settlement.

(3) The city compensatory allowance and the house rent allowance shall not be included in calculating the cash equivalent of leave salary under this rule.

From the cash equivalent so worked out no deduction shall be made on account of pension and pensionary equivalent of other retirement benefits."

It is also relevant to notice Clause (2) of Article 221 of the Constitution, which reads thus:

"Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule....."

We may notice the factual matrix of the matter from Civil Appeal No. 2664 of 1999.

One of the petitioners, Justice (Retd.) S.N. Saxena joined Subordinate Judiciary as Munsif in 1959. He in course of time was promoted as District Judge. In January, 1992, he applied for grant of pensionary and other retiral benefits including leave encashment in terms of the extant rule applicable to his case in expectancy of his retirement as District Judge. The date of his superannuation as District Judge would have been 15.7.1992 had he been not elevated as a High Court Judge. He was elevated as High Court Judge with effect from 7.7.92. Most of the benefits of the post of District Judge were sanctioned to him in ignorance of his elevation as a High Court Judge. The papers and cheques etc. were sent to the last place of his posting being District Judge to as member of U.P. Public Service Tribunal No.II Lucknow. His Staff deposited the cheque in his account. Shri Saxena on his retirement as a High Court Judge submitted papers asking for retiral benefits including leave encashment of 8 months/maximum of 240 days as High Court Judge as per Rules. On 16/17.5.96 a recommendatory letter was issued by the Accountant General. He retired as a High Court Judge on 15.7.96. In the month of September, 1996 certain queries were made by the Union Government and the Accountant General UP replied thereto. On 16.12.96 major part of the gratuity and other retiral benefits were sanctioned to be paid, except leave encashment of 240 days. The writ petition was, therefore, filed:

It is not in dispute that in terms of the Rules, leave encashment benefit from 30th September, 1977 till 30th June, 1986 was for 180 days whereas for the period 1st July, 1986 to 30th June, 1997 the same was raised to 240 days. Yet again on and from 1st July, 1997 the period of leave encashment has been raised to 300 days.

Concededly a retired Judge of a High Court is entitled to payment of cash equivalent of leave salary for the period of earned leave at his credit on the date of his retirement in terms of Rule 20B of the All India Services (Leave) Rules, 1955 read with Rule 2 of the High Court Judges (Conditions of Service) Rules, 1956.

It was so held in Union of India v. Gurnam Singh, [1982] 3 SCR 700 in the following terms:

"It is true that rule 20-B revolves around the concept of earned leave, and the expression 'earned leave' has been specifically defined by clause (b) of Rule 2 of the All India Service (Leave) Rules, 1955 as "leave earned under Rule 10." But Rule 10 merely lays down the rate and amount of earned leave. The principle in which 'earned leave' is rooted must be discovered from Rule 4, which provides that "except as otherwise provided in these rules leave shall be earned by duty only". Their performance of duty is the basis of earning leave. That concept is also embedded in the High Court Judges (Conditions of Service) Act, 1954. Under that Act, the time spent by a judge on duty constitutes the primary ingredient in the concept of 'actual service' (Clause (c), sub-section (1) of Section 2), which is the reason for crediting leave in the leave account of a Judge (Section 4). Although the expression 'earned leave' is not employed in the Act, the fundamental premise for the grant of leave to a Judge is that he has earned it. He has earned it by virtue of the time spent by him on actual service. That a Judge earns the leave which is credited to his leave account is borne out by the proviso to Section 6 of the Act, which declares that the grant under Section 6 of leave not due will not be made "if the Judge is not expected to return to duty at the end of such leave and earn the leave granted". The concept then on which Rule 20-B proceeds is familiar to and underlies the statutory scheme relating to leave formulated in the Act. It bears a logical and reasonable relationship to the essential content of that scheme. On that, it must be regarded as a provision absorbed by Rule 2 of the High Court Judges Rules, 1956 into the statutory structure defining the conditions of service of a Judge of a High Court."

It is beyond any cavil that the Government of India had also issued a circular letter addressed to Chief Secretaries of the State Governments to the effect that the retired Judges of the High Court are entitled to the payment of cash equivalent to unutilized earned leave standing to their credit at the time of their retirement.

Having regard to the constitutional scheme as also the decision of this Court, there cannot be any doubt whatsoever that the cash equivalent in lieu of unavailed leave would be payable at the time of retirement of the Judge of the High Court and not prior thereto. A member of the Higher Judicial Service cannot anticipate the date by which his elevation to High Court would come through. So is the State Government. Pursuant to or in furtherance of the statutory rules applicable to the case of the members of the Higher Judicial Service, the respective State Governments had deposited the amount of pension and other retiral benefits credited in the account of the officer concerned, which, in our opinion, would not mean that on his elevation as a High Court Judge he would be deprived of the benefits of a retired High Court Judge to which he is otherwise entitled to not only under the statutory rules but also under the Constitution. The crucial expression employed in Rule 20B of the All India Service (Leave) Rules is "A member of the service who retires from the service". Therefore, retirement is sine qua non for payment of leave encashment.

It is not in dispute that elevation of a Member of a Higher Judicial Service to the post of a Judge of High Court would not amount to his retirement or cessation of service. On his elevation Judicial Officer carries with him all the benefits accrued to him during his past service. The services rendered by the writ petitioners as judicial officers as also a High Court Judge would be a continuing one. It is, therefore, axiomatic that a High Court Judge on attaining the age of superannuation would be entitled to all the retiral benefits in terms of the High Court Judges (Conditions of Service) Act and the Rules framed thereunder.

In Shiv Dayal Shrivastava v. Union of India, [1984] 1 SCC 724 this court held:

"6. Chapter II of the Act deals with leave. Section 3 provides the kinds of leave admissible to a Judge. Section 4 makes provision for a leave account to be maintained. Section 5 deals with aggregate amount of leave which may be granted. Section 5-A makes provision for commutation of leave on half allowances into leave on full allowances while Sections 6, 7 and 8 deal with grant of leave of specific kinds. These provisions in the Act deal with leave which has to be asked for and taken during the tenure of working as a Judge. Leave necessarily implies authorised absence from duty or employment (see Webster's Third New International Dictionary). Rule 20-B makes provision for payment of cash equivalent of leave due under the appropriate provisions but subject to a maximum of 180 days. We have already indicated that the ratio of Gurnam Singh case [1982] 3 SCR 700: [1982] 2 SCC 314: 1982 SCC (L&S) 236: AIR 1982 SC 1265 has not been disputed. It would necessarily mean acceptance of the position that the Act did not make provision for payment of the retirement benefit contemplated under Rule 20-B; otherwise Rule 20-B could not have been applied. The scheme in Rule 20-B is that the payment would be made suo motu and without any application for it. Leave referred to under the Act is one which has to be asked for and is intended to meet a different situation. For calculating the benefits under Rule 20-B, Section 5(3) of the Act is not relevant and in case in the leave account maintained under Section 4 of the Act leave is due, the benefit under Rule 20-B has to be worked out subject to the upper limit of 180 days, equal to six months, the claim made by the petitioner that he was entitled to the benefit of six months is, therefore, justified subject, of course, to admissibility of leave to the extent of 180 days in the leave account. No dispute was raised before us that as a fact petitioner had to his credit more than 180 days of leave."

In Satish Chandra v. Union of India and Ors., [1987] Supp SCC 592 following Gurnam Singh supra it was held:

"2. Coming to the question of the cash equivalent of leave to the credit of the petitioner, the learned Additional Solicitor General has placed before us the latest government order dated July 23, 1987, in which it is stated that the maximum limit for payment of cash equivalent of leave to the credit of the judges of the High Courts and the Supreme Court has been raised to 240 days from 180 days with effect from July 1, 1986 as in the case of those governed by Rule 20-B of the All India Services (Leave) Rules. We only wish to point out that as a result of the judgment of this Court in Union of India v. Gurnam Singh, AIR (1982) SC 1265: [1982] 2 SCC 314; 1982 SCC (L&S) 236, the maximum limit of 240 days becomes automatically applicable to judges as soon as it was made applicable to those governed by All India Services (Leave) Rules. It was not necessary for the Accountant Generals and the Pay and Accounts Officers to seek fresh instructions from the Government. We also point out that it has already been clarified in Shiv Dayal Shrivastava v. Union of India, [AIR (1984) SC 465 : [1984] 1 SCC 724 : , 1984 SCC (L&S) 179] that in calculating the leave to the credit of a judge the provisions of Section 4 alone were relevant and not those of Section 5 of the High Court Judges (Conditions of Service) Act. Since the leave account is maintained in terms of leave on half allowances, the leave is first to be converted to leave on full allowance by dividing by 2 the total amount of leave on half allowances standing to the credit of the judge in the leave account. After this is done the judge is entitled to be paid the cash equivalent up to a maximum of 180 days in the case of a judge who has retired on or before June 30, 1986 and 240 days in the case of a judge who has retired on or after July 1, 1986. What applies to judges of the High Court applies mutatis mutandis to judges of the Supreme Court. A direction will issue to the respondent to calculate the amount of cash equivalent of leave to be paid to the petitioner in accordance with what we have now said."

There cannot thus be any doubt whatsoever that the writ petitioners would be entitled to the reliefs claimed for by them in their respective writ petitions. We are in agreement with the views expressed by the High Court.

So far as the Writ Petition under Article 32 of the Constitution of India filed by retired Judges of the Calcutta High Court is concerned, we may further point out that request made by three other Judges of the said High Court for revised payment had been sanctioned and despite the fact that the case of the writ petitioners stand on the same footing and they are similarly circumstanced, no such order of sanction has been passed in their case despite requests on the ground that the Union of India had filed application for special leave before this Court against the judgment of the Allahabad High Court. The action on the part of the Union of India is thus clearly discriminatory in nature.

For the foregoing reasons, we are of the opinion that the stand taken by the Union of India cannot be accepted.

Accordingly, Civil Appeals are dismissed and the Writ Petition is allowed. In this facts and circumstances of this case, however, the parties shall pay and bear their own costs.