

Registrar (Admn.), High Court of Orissa, Cuttack

Vs

Sisir Kanta Satapathy (Dead) By Lrs. and Another

With

Registrar of and for the High Court of Orissa, Cuttack

Vs

Amoy Chandra Das and Another

With

High Court of Orissa through its Registrar (Admn.)

Vs

Alekh Chandra Sarangi and Another

Civil Appeal No. 4751 of 1992

(CJI Dr. A. S. Anand, K Venkataswami, G. B. Pattanaik, S. P. Kurdukar , M. Jagannadha Rao JJ)

16.09.1999

JUDGMENT

K VENKATASWAMI, J.:-

1. An independent judiciary in one of the basic features of the Constitution of the republic. In this case, however, we are not concerned with the various provisions of the Constitution guaranteeing independence of the judiciary but with a limited issue about the scope and extent of control of the High Court over the subordinate judiciary to the exclusion of the executive for maintenance of its independence. Our Constitution has zealously guarded the independence of the judiciary. In *S. P. Gupta v. Union of India* (1981 Supp SCC 87) this Court held that independence of the judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corner s of the Constitution and cannot go beyond the Constitution. The Court in *All India Judges' Assn. V. Union of India* ((1993) 4 SCC 288 : 1994 SCC (L&S) 148 : (1993) 25 ATC 818) held : (SCC p. 297, para 10)

" In view of the separation of the powers under the Constitution, and the need to maintain the independence of the judiciary to protect and promote democracy can the rule of law, it would have been ideal if the most dominant power of the executive and the legislature over the judiciary, viz., that of determining its service conditions had been subjected to some desirable checks and balances. This is so even if ultimately, the service conditions of the judiciary have to be incorporated ultimately, the service conditions of the judiciary have to be incorporated in and declared by the legislative

enactments. But the mere fact the Article 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary, does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary."

2. By way of a note of caution we may add that the control vested in the High Court over the subordinate judiciary through absolute and exclusive, has to be exercised without usurping the power vested in the executive under the Constitution. This necessarily brings us to the consideration of Articles 233, 234 and 235 of the Constitution of India. Those articles read thus:

"233. Appointment of District Judges.- (1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

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234. Recruitment of persons other than District Judges to the judicial service. – Appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. Control over subordinate Courts. The control over District Courts and courts subordinate there to including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of the service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

3. The backdrop in which the interpretation of the above articles comes into focus is given below.

4. The first respondent Civil Appeal No. 4751 of 1992 at the relevant time was officiating as Chief Judicial Magistrate in the Orissa Superior Judicial Magistrate in the Orissa Superior Judicial Service (Junior Branch). The first respondent in Civil Appeals No. 4752 and 4753 were officiating in Class I of the Orissa Judicial Service. The Review Committee constituted by the Full Court of the Orissa High Court met on 30-1-1987 and decided to recommend to the Full Court that the first respondent in each of the appeals be retired prematurely in the public interest. The recommendation of the Review Committee was accepted by the Full Court, which met on 4-2-1987. Pursuant to that, the

first respondent in each of the appeals was retired prematurely as per the notification issued by the High Court on 5-2-1987. That notification was challenged in the High Court mainly on the ground that the High Court was not vested with the power of making an order of compulsory retirement. It was also challenged on the ground that there was no material against them to make the impugned order.

5. That the High Court could not itself have passed an order of compulsory retirement as above, which amounts to termination of service is borne out from the plain language of the above articles and in particular of article 235 read with Article 311. This question has been debated and answered by the this Court in a number of cases.

6. In *State of W.B. v Nripendra Nath Bagchi* (AIR 1966 SC 447 : (1966) 1 SCR 771) a Constitution Bench of the Court while setting aside an order of dismissal of an officiating District and Sessions Judge passed after consulting the State Public Service Commission but without consulting the High Court, elaborately considered the scope of Article 235. Hidayatullah, J., (as his Lordship then was) speaking for the Bench observed that there is nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry of Article 235 vested some power in it. The control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal subject however to the conditions of service, to a right of appeal if granted by the conditions of service, to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of Article 311 unless such an opportunity is dispensed with by the Governor acting under provisos (b) (c) to that clause.

7. In *State of Haryana v. Inder Prakash Anand* ((1976) 2 SCC 977 : (1976 SCC (L&S)372) a four-Judge Bench of this Court had an occasion to consider the scope and width of Article 235 of the Constitution. That was a case in which the State Government compulsorily retired a Senior Subordinate Judge though the High Court recommended only for his reversion. The Court held: (SCC pp. 980 and 981, paras 15, 16 and 18)

"15. This Court in *Bagchi* case said that control vested in the High Court is over the conduct and discipline of the members of the judicial service. Orders passed in disciplinary jurisdiction by the High Court and subject to an appeal as provided in the conditions of service. The High Court further deals with members of the judicial service in accordance with the rules and conditions of service. This Court in *Bagchi* case said that the word 'deal' points to disciplinary and not merely administrative jurisdiction. The order terminating the appointment of a member of the service otherwise than upon his reaching the age fixed for superannuation will be passed by the State Government on the recommendation of this High Court. This is because the High Court is not the authority for appointing, removing, reducing the rank or terminating the service.

16. It is true that the fixation of the age of superannuation is the right of the State Government. The curtailment of that period under rule governing the conditions of service is a matter pertaining to disciplinary control as well as administrative control. Disciplinary control means not merely jurisdiction to award punishment for misconduct. It also embraces the power to determine whether the record of a member

of the service is satisfactory or not so as to entitle him to continue in service is vested solely in the High Court. Premature retirement is made in the exercise of administrative and disciplinary jurisdiction. It is administrative because it is decided in public interest to retire him prematurely. It is disciplinary because the decision was taken that he does not deserve to continue in service up to the normal age of superannuating and that it is in the public interest to do so.

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18. The control vested in the High Court is that if the High Court is of opinion that particular judicial officer is not fit to be retained in service the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the appointment. In such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate. It is in public interest that the State will accept the recommendation of the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State. 'The Government will act on the recommendation of the High Court. That is the broad basis of Article 235.'

(emphasis supplied)

8. In *State of U.P. v. Batuk Deo pati Tripathi* ((1978 2 SCC (L&S) 147) a Constitution Bench of this Court again has an occasion to consider the validity of an order of compulsory retirement passed by the State Governor on the recommendation of the Administrative committee of the High Court set aside the order compulsorily retiring the District Munsiff on the ground that the recommendation by the Administrative Committee cannot be construed as the recommendation of the High Court (Full Court). Reversing the judgment of the High Court and approving the procedure of the recommendation through the Administrative committee, this Court observed: (SCC p. 113, para 14)

"Here, the decision to compulsorily retire the respondent was taken by the Judges of the High Court participate in a decision relating to matter which falls within the High Courts' controlling jurisdiction over subordinate courts, the High Court does not efface itself by surrendering its power to an extraneous authority. The procedure adopted by the High Court under its rules is not subversive of the independence of the subordinate judiciary, which is what Article 235 recognises and seeks to achieve."

9. The learned Judges further held that the recommendation made by the Administrative Committee cannot be said to suffer from any legal or constitutional infirmity.

10. In *Chief Justice of A. P. v. L.V.A. Dixitulu* ((1979) 2 SCC 34 : 1979 SCC (L & S) 99) a Constitution Bench of this Court again considered the validity of an order of compulsory retirement passed by the State Governor on the recommendation of the High Court. That order was challenged before the State Administrative Tribunal and this Court while holding that the State Administrative Tribunal had no jurisdiction to

entertain the appeal, observed as follows: (SCC pp. 41, 46-47 and 48, paras 18, 40 and 42)

"18. Respondent 1, Shri V.V.S. Krishnamurthy, in that appeal was, at the material time, a member of the Andhra Pradesh State Judicial Service. He attained the age of 50 years of the High Court. Before the Government passed this order, a Committee of Judges appointed by the High Court, considered the entire service record of Respondent 1 and records of other judicial officers and decided to prematurely retire the first respondent in public interest.

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40. The interpretation and scope of Article 235 has been the subject of several decisions of this Court. The position crystallized by these decisions is that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters, Among other, it includes:

(a)-(f) * * *

(g) Premature or compulsory retirement of judges of the District courts an of Subordinate Court.

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42. In the last-mentioned case (Inder Prakash Anand) (1979) 2 SCC 34 : 1979 SCC (L&S) 99) the government servant was officiating in the cadre of District Judges. The High Court recommended that the should be reverted to his substantive post of Senior Subordinate Judge/Chief Judicial Magistrate and, as such allow to continue in service till the age of 58 years. Contrary to the recommendation of the High Court, the State Government passed an order under Rule 5.32(c) of the Punjab Civil Service Rules, compulsorily retiring him from service at the age of 55 years. Holding that the order of compulsory retirement was invalid, this Court stressed that the power of deciding whether a judicial officer should be retained in service after attaining the age of 55 years up to the age of 58 years, vests in the High Court, and to hold otherwise ' will seriously affect the independence of the judiciary and take away the control vested in the High Court.' The formal order of retirement, however, is passed by the governor acting on the recommendation of the High Court, that being 'the broad basis of Article 235'. It was explained that 'in the High Court'. The formal order of retirement, however, is passed by the Governor acting on the recommendation of the High Court, that being 'the broad basis of Article 235'. It was explained that 'in such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court'. It was concluded that 'the vesting of complete control over the subordinate judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State'. In other words, while in from, the High Court's decision to compulsorily retire a subordinate judicial officer in the exercise of its administrative or disciplinary jurisdiction under Article 235 is advisory, in substance and effect, it is well-nigh peremptory."

(emphasis supplied)

11. In *Tej Pal Singh V. State of U.P.*((1986) 3 SCC 604 : 1986 SCC (L&S)688) a Division Bench of this Court had occasion to consider a question whether the impugned order of premature retirement passed by the Governor without having before him the recommendation of the Administrative Committee or of the Full court was void and ineffective. The learned Judge, after referring to earlier judgment of this Court, held as follows: (SCC pp.608 & 614, paras 4 & 13)

"4. Article 235 of the Constitution provides that the control over district courts and courts subordinate thereto including the posting and promotion of the State of holding any post inferior to the post of District judge shall be vested in the High Court. It has been held in *State of U.P. v. Batuk Deo Pati Tripathi* that permute retirement of Judges of District Courts and of Subordinate Courts is a matter which falls squarely within the power of control vested in the High Courts by Article 235 of the Constitution, Without he recommendation of the High court it is not open to the Governor to issue an order retiring prematurely judges so District Courts and of Subordinate Courts.

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13... In the instant case the Government had sought the opinion of the High Court regarding the question whether the appellant could be prematurely retire d and that question was certainly a very important matter from the point of view of the subordinate judicial service. The Administrative Judge before giving this opinion in support of the view expressed by the Government should have either circulated the letter received from the Government amongst the members of the Administrative Committee or placed it before them at a meeting, He did not adopt either of the two courses. But he on his own forwarded his opinion to the Government stating that the appellant could be prematurely retired. That he could not do. Ordinarily, it is for the High Court, on the basis of assessment of performance and all other aspects germane to the matter to come to the conclusion whether nay particular judicial officer under its control is the be prematurely retired and once the High Court comes of the conclusion that there should be such retirements, the Court comes to the conclusion that there should be such retirement, the Court recommends to the Governor to do so. The conclusion is to the of the High Court since the control vests therein. Under the rules obtaining in the Allahabad High Court, the Administrative Judge could not have. Therefore, his agreeing with the government proposal was of no consequence and din to amount satisfaction of the requirement of Article 235 of the Constitution. It was only after the Governor passed the order on the basis of such recommendation, the matter was placed before the Administrative Committee before the order of retirement was actually served on the appellant. The Administrative Committee may not have dissented from the order of the Governor or the opinion expressed by the Administrative Judge earlier. But it is not known that the Administrative Committee would have done if the matter had come up before it before the Governor had passed the order of premature retirement. In any event the deviation in this case is not a mere irregularity which can be cured by the ex post facto approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed. The error committed in this case amounts to an incurable defect amounting to an illegality. We may add that while is may be open to the

Government to bring to the notice of the High Court all materials having a bearing on the conduct of a District Judge or a subordinate judicial officer, which may be in its prematurely a District Judge or a subordinate judicial officer. Such initiative should rest with the High Court."

(emphasis supplied)

12. In Registrar, High Court of Madras v. Rajiah ((1988) 3 SCC 211 : 1988 SCC (L&S) 743) this Court had an occasion to consider the validity of an order of compulsory retirement passed by the High court. The learned Judges held that the proper procedure for the High Court was to recommend the case for compulsory retirement and it was for the Governor on whom the recommendation of the High Court was binding, to pass the formal order. This Court in the said case observed as follow: (SCC pp. 217-18, 219 and 220, paras 12, 16 and 18)

"12. The test of control is not the passing of an order against a member of the subordinate judicial service, but he decision to take such action. It may be that so far as the members of the subordinate judicial service are concerned, it is the Governor, who being the appointing authority, has to pass an order of compulsory retirement or any order of punishment against such a member. But passing or signing of such orders by the Governor will not necessarily take away the control of the High Court vested in it under Article 235 of the Constitution. As action against nay government servant consists of two parts. Under the first part, a decision will have to be made whether an action will be taken against the government servant. Under the second part, the decision will be carried out be a formal order. The power of control envisaged under Article 235 of the Constitution related to the power of making a decision by the High Court against a member of the subordinate judicial service. Such a decision I arrived at by holding an enquiry the by the High Court against the member concerned. After the High Court comes to the conclusion that some action either in the nature of compulsory retirement or by the imposition of a punishment, as the case may be, has to be taken against the member concerned, the High court will make a recommendation in the that regard to the Governor and the Governor will act in accordance with such recommendation of the High Court will make a recommendation in that regard tot he Governor and the Governor will act in accordance with such recommendation of the High Court. The Governor cannot take any action against any member of a subordinate judicial service without, and contrary to, the recommendation of the High Court.

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16. It is apparent from the observation extracted above that this Court also understood the power of control of the High Court as the power of taking a decision against a member of the subordinate judicial service. The High Court is the only authority that can take such e a decision. The High Court will hold an enquiry and decide on the result of such enquiry whether any action will be taken against a member of the subordinate judicial service. It comes to the conclusion that such an action is required to be taken, it will make a recommendation in that regard to the State Governor who will make an order in accordance with the recommendation of the High Court.

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18. The control of the High Court, as understood, will also be applicable in the case of compulsory retirement in that the High Court will, upon an enquiry, come to a conclusion whether a member of the subordinate judicial service should be retired prematurely or not. If the High Court comes to the conclusion that such a member should be prematurely retired, it will make a recommendation in that regard to the Governor inasmuch as the Governor is the appointing authority. The Governor will make a formal order of compulsory retirement in accordance with the recommendation of the High Court."

13. No doubt, the learned Judges also found that there was no sufficient material warranting an order of compulsory retirement in that case.

14. In *High Court of Judicature for Rajasthan v. Ramesh Chand Paliwal* (1998) 3 SCC 72 : 1998 SCC (L&S) 786) a two Judge Bench of this Court while construing the scope and extent of Articles 233 to 235 of the Constitution, held as follows: (SCC pp. 86-87, para 34)

"34. This article shows that the High Court has to exercise its administrative, judicial and disciplinary control over the members of the judicial service of the State. The word 'control', referred to in this article, is used in a comprehensive sense to include general superintendence of the working of the Subordinate Courts and to recommend the imposition of punishment of dismissal, removal and reduction in rank of compulsory retirement. 'Control' would also include suspension of a member of the judicial service for purposes of holding a disciplinary enquiry, transfer, confirmation and promotion, (See *State of Haryana v. Inder Prakash Anand*; *State of U.P. v. Batuk Deo Pati Tripathi*) In *State of Gujarat v. Ramesh Chandra Mashrusala* ((1977) 2 SCC 12 :P 1977 SCC (L&S) 217) it was held that 'control' in Article 235 means exclusive and not dual control (See also Chief Justice of A. P. v. L.V.A. Dixitulu; *State of W.B. v. Nripendra Nath bagchi*)"

15. On going through the judgments of this Court right from *Shyamlala v. State of U.P* (AIR 1954 SC 369 : (1955) 1 SCR 26) down to High Courts are vested with the disciplinary control as well as administrative control over the members of the judicial service exclusively, but that does not mean that they can also pass orders of dismissal, removal, reduction in rank or termination from service while exercising administrative and disciplinary control over the members of the judicial service. Undoubtedly, the High Courts alone are entitled to initiate, to hold enquiry and to take a decision in respect of dismissal, removal reduction in rank or termination from service, but the formal order to give effect to such a decision has to be passed only by the State Governor on the recommendation of the High Court. It is well settled again by a catena of decisions of this Court that the recommendation of the High Court is binding on the State Government/Government/Governor (vide para 18 in *Inder Prakash Anand case*⁴)

16. We are clearly of the view that while the High Court retains the power of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them pending enquiries and impose punishment on them but when it comes to the question of dismissal, removal, reduction in rank or termination of the services of the judicial officer, on any count whatsoever, the High Court becomes only the recommending authority and cannot itself pass such an order (vide *Inder Prakash Anand case*⁴ and *Rajiah case*⁸).

17. In the instant case, the decision of the Orissa High Court dated 4-2-1987 (on the administrative side) was required to be forwarded to the Governor for passing an order of compulsory retirement. That was not done. It was wrong of the High Court to have passed the order of compulsory retirement itself. The judicial side of the High Court rightly decided the writ petition in favour of the judicial officers and held the order dated 5-2-1987 to be *bad*. In the words of the Division Bench of the High Court:

"There is a stronger constitutional objection to accept the submission of Shri Nayak for regarding the High Court as the appointing authority of the Chief Judicial Magistrate on the basis of what has been provided in Rule 10 of the Orissa Superior Judicial Service Rules, 1963, inasmuch as it has been laid down in Article 234 of the Constitution that appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with the rules made by him in that behalf. The aforesaid rules are one set of such rules. So, no provision in the rules could have altered the constitutional position that the Governor of the State is the appointing authority of persons other than District Judges also, Conferment of this power on the High Court by virtue of what is stated in Rule would have clashed with the constitutional mandate. We would, therefore, not accept because of what is stated in Rule 10 that the High Court is the appointing authority of a Chief Judicial Magistrate.

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In view of all that is stated above, we would hold that the High Court is not the appointing authority of Chief Judicial magistrates to clothe it Rule 71(a) of the Orissa Service Code. In this connection, may we also point out that it would be really incongruous where though the High Court cannot retire a Munsiff, or for that matter a District Judge, as fairly conceded by Shri Nayak it would be in a position to retire a Chief Judicial Magistrate. We do not think if the concerned provisions permit us to take this view.

Before closing this aspect of the discussion, we may say that we are conscious of the legal position that passing of an order of compulsory retirement by the Governor is a formal matter as stated in *Rajiah case*⁸ because, according to this decision, the Governor in such cases merely acts on the recommendation of the High Court by signing an order in that regard; but the procedure of the Governor formally passing an order of retirement has to be complied with. So long as there is no formal order of The Governor, the compulsory retirement as directed by the High Court cannot take effect, as opined in *Rajiah Case*⁸ itself.

18. The judgment of the Division Bench of the High court is strictly in accord with the catena of judgments referred to above and in particular with appeal.

19. Had the matters rested here, there would have been no problem but the subsequent developments have given a new turn and twist to the case.

20. after the judgment of the Division Bench of the High Court, it appears, the Full Court on the administrative side on 7-11-1991 decided to make a recommendation to the Government for compulsory retirement of the judicial officers concerned. That recommendation was forwarded to the Government on 26-11-1991. In the meanwhile, the high court had also put in issue the judgment

of the Division Bench through the special leave petitions out of which the present appeals have arisen and an interim order dated 19-12-1991 made at the notice stage was as follows:

"Issue notice on the SLP and IA No. 1 of 1991 and tag on to SLP (C) No. 18266 of 1991. In the meantime, the operation of the impugned judgment shall remain stayed.

It is stated by the learned counsel for Respondent 1 that he was permitted to join. In view of our present order he will not now work in the post he has joined.

One month's time is allowed to Respondent 1 for filing his counter-affidavit and two weeks thereafter to the petitioner for rejoinder."

21. After the recommendation of the Full court was received, the Government on 2-12-1991 chose not to proceed further on the plea that that the matter was pending in the Supreme Court. They declined to act further on the recommendation. This, the Government could not have done. The course open to the government was to forward the recommendation of the High Court to the Governor who would have passed an order in accordance with the recommendation made by the High Court as has been held in *Inder Prakash Anand Case*⁴ because the recommendation of the High Court was binding on the Government.

22. By not making an order of compulsory retirement on the recommendation of the High Court, a peculiar situation was created in the sense that the judicial officers were neither in service nor were they technically out of service. They, however, did not perform any work. The question, therefore, nor arises as to what is the manner in which relief can be molded to balance the equities between the parties by this court, so that the litigation itself is given a quietus.

23. The first respondent in civil Appeal No. 4751 of 1992 has died pending appeal. High legal representatives had been brought on record. The first respondent in the other two appeals have since retired.

24. Mr. Jayant Das, learned Advocate General appearing for the State Government, as well as learned counsel appearing for the High Court rightly agreed with the suggestion made on behalf of the judicial officers that on the basis of the recommendation made by the full Court of the High on 7-11-1991, The Governor of State be requested to pass a formal order of compulsory retirement of State be requested to pass a formal order of compulsory retirement of judicial officers with effect from the date when the recommendation was received by the Government i.e. 2-12-1991. The judicial officers (which would include legal representatives in the code of the deceased 1st respondent in CA No. 4751 of 1992) Would, thus be entitled to their salary,, allowances and all other consequential benefits till 2-12-1991. This suggestion appeals to us also as it will balance the equities between the parties and set at naught a controversy which has unnecessarily remained pending for so long. The arrears as per the above terms shall be paid to the judicial officers within three months from the date of receipt of this judgment.

25. The appeals stand disposed of accordingly. There will be no order as to costs.

