ALLAHABAD HIGH COURT

B. Malik

Vs.

Union of India

Civil Misc. Writ Nos. 3006 of 1967, 1946 of 1968
(S.N. Dwivedi, G.C. Mathur and Gangeshwar Prasad, JJ.)

10.09.1969

JUDGMENT

Dwivedi, J.

1. I have read the judgments of my brothers G. C. Mathur and Gangeshwar Prasad, and I entirely agree with them that these petitions should be dismissed. As the matter is obviously of importance, I have thought it proper to deal with certain aspects in my own way.

2. The Constitutional History before January 26, 1950 is not relevant. It is not necessary to refer to it. By virtue of Article 376 (1) all pre-Constitution Judges became Judges under the Constitution. Their salaries, allowances, and rights in respect of leave of absence and pension are determined not by any pre-Constitution law of its own force but under Article 221 of the Constitution. So in respect of these matters there is no difference between pre-Constitution Judges and post-Constitution Judges. Both of them derive rights from one common source-Article 221.

3. Article 221 (1) settles the salary of the Judges, Article 221(2) deals with their allowances, and rights in respect of leave of absence and pension. Our immediate concern is with Article 221 (2). It reads:

> "(2) 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.
> Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

4. Now I am aware of the ordinary rule of strict construction of a proviso. But I think that this proviso should receive a broad construction. I say this not merely because it is part of the Constitution which generally receives a liberal interpretation. I say this because it is designed to

secure a historic social interest in a democratic society. It is the social interest in the independence of Judges from men and their government. If the Judges are to dispense with fearless and favourless justice between man and man and between man and the Government, they should be kept above 'the throne' by granting them complete economic security. Their rights to economic advantages should be fixed definitely at the time of their call to office and should be insulated from subsequent impairment. (See Holdsworth: Constitutional Position of the Judges, (1932) 48 Law Quarterly Review, P. 25). When the Commissioners of Inland Revenue, purporting to act under the vague words of the National Economy Act, 1931, made a deduction from the salary of the Judges, Holds worth warned:

> "It is clear that if the English legal system is to develop in the future on the same high plane of intellectual excellence as it has developed in the past, the standard of the intellect of the bench must be maintained. And we should remember that, if this standard of intellectual excellence is not maintained, that law-abiding instinct, which is the life-blood of civilization, will be imperiled". (Ibid, pp. 32-33).

5. The Law Commission of India, commenting upon the devaluation of the privileges of the Judges, said:

> "It is necessary for all to realize that the role assigned to the judiciary under the Constitution is an essential one and that the high ideals, the attainment of which is aimed at by our Constitution, social and economic justice, equality, freedom and dignity of the individual, will be impossible of achievement unless the judiciary fearlessly discharges its. duties in every complaint of excess of power by the legislatures or the executive brought to its notice." (Report, Vol. I, P. 81).

6. Recognizing the society-shaping role of the Judges the Constitution-makers gave them greater security by the proviso to Article 221 (2) than the Constitutions of U.S.A. and Australia. So the wide words of the proviso should receive their fullest scope.

7. According to the main part of clause (2) of Article 221 rights in respect of pension are to be determined by Parliament. Until Parliament has so determined, the rights are regulated by the Second Schedule. As soon as Parliament occupies the field, the Second Schedule ceases to operate even though it may continue in the Constitution as an inorganic fact of history.

8. According to the proviso the date of appointment, and not the date of retirement, of a Judge is material for ascertaining his rights in respect of his pension. He acquires a contingent interest in the plexus of rights availing on the date of his appointment. This is put beyond any shadow of doubt by the words 'after his appointment'. Any other view will rob the proviso of its real significance.

9. The expression 'rights in respect of pension' in the main part and in the proviso is important. The proviso immobilizes governmental action against impairment of 'rights in respect of pension' and 'not merely pension.' 'Rights in respect of pension' is a wider expression. It may include the quantum of pension, the medium of payment, the time of payment, the place of payment and the remedies for enforcement of payment, etc. The words 'rights in respect of 'clearly bear out this inclusiveness of the expression.

10. According to the Shorter Oxford Dictionary, the word 'disadvantage' means 'detriment', loss or injury to 'interest'. So Parliament cannot alter or change the rights in respect of pension vesting in him at the date of his appointment to the detriment, or loss or injury to the interest, of the Judge. But every sort of alteration or change will not, I think, be to his disadvantage. Only such alteration or change as will materially and really diminish the value of any right in respect of pension is prescribed by the proviso. Speaking about Articles 19(1) (f) and 31 Sri Justice Vivian Bose said:"These articles deal with substantial and substantive rights and not with illusory phantoms of title." *State of Bombay v. Bhanji Munji*[1]*,* It seems to me that this rationalization should also apply to the proviso to Article 221 (2). So a formal or unsubstantial change may be overlooked, (See *Attar Singh v. State of U.P*[2]*.,* for the application of the de minimis rule).

11. The Constitution of the U.S.A. absolutely forbids any impairment of the obligations of contract. Speaking In that context, Justice Holmes made this generalized remark:"Constitutions are intended to preserve practical and substantial rights, not to maintain theories". *Davis v. Mills*[3]*,* So the Court will examine the facts and circumstances of each case to find out if Parliament has changed the mere form or the substance of the rights. If only formal changes have been made and the substance of the rights is not affected injuriously, the law should not be frowned upon.

12. Lastly, the complainant should bear the burden of showing that Parliamentary alteration or change is to his disadvantage.

13. It is now necessary to find out the rights of the petitioners in respect of pension at the time of their appointment as a Judge in the Republic of India, that is on January 26, 1950. For this purpose we have to refer to the Second Schedule to the Constitution. Clause 10(4) of Part D of the Schedule provided that the law in force immediately before the commencement of the Constitution would apply. So the 1937 Order applied to the petitioners. That was the law then in force.

14. Broadly speaking, the 1937 Order provided in the Third Schedule for the basic pension and the additional pension payable to a Judge on his retirement. The quantum of pension was expressed in sterling only. The pension was expressed to be annual. No place of payment of pension was expressly stated in the Order. Nor did the Order expressly provide for remedies for the enforcement of payment of pension.

15. It is said on behalf of the petitioners that the 1937 Order fixed the place of payment of pension in England. My brothers have rejected this argument, and I agree with them. But let us assume for the sake of argument that England was the place of payment of pension in the case of Sri Justice Malik and Sri Justice Desai.

16. Clause 21 of the 1937 Order provided that pensions expressed in sterling only, if paid

[1](1955) 1 SCR 777 at p. 780: (AIR 1955 SC 41 at pp. 43-44) [3]*(1904) 194 U.S. 45 : 48 Law Ed. 1067*
[2](1959) Supp. (1) SCR 928: (AIR 1959 SC 564)

in India, would be converted into rupees at such rate of exchange as the Governor-General might fix from time to time. It is said that Clause 21 gave them a right to convert the sterling pension into a rupee pension in India at the rate of exchange prescribed by the Governor-General from time to time.

17. These are all the rights claimed under the 1937 Order. How has Parliament affected these rights by the High Court Judges (Conditions of Service) Act 1954? Admittedly the Act applies to the petitioners.

18. The Act converts the sterling pension into a rupee pension. The pension is expressed to be annual. No place for payment of pension is expressly mentioned in the Act. There is indicated no procedure for enforcement of payment of pension.

19. Let us now compare the rights under the 1937 Order with the rights under the Act. In respect of the time of payment and remedies for enforcement of payment there is absolutely no difference. As regards the quantum of pension in terms of rupees, the Act on the date of its commencement, admittedly gave more to Sri Justice Malik than Clause 21 of the 1937 Order. No attempt has been made on behalf of Sri Justice Desai to show that the Act, at the relevant time, gave him less than the 1937 Order. So the Act did not vary the rupee-quantum of pension to their disadvantage at the time of its commencement.

20. Mere change of the medium of payment from sterling to rupee, without any reduction in value, does not matter. It is one of form only. The change became necessary on India becoming a Sovereign Republic. There is no difficulty about the place of payment as well. Most of the Judges will, on their retirement, live in India now. It is to their advantage that they should draw their pension in India. Moreover, the Act does not fix the place of payment. There is no difficulty in paying the rupee pension to a Judge outside India. The debtor is bound to find the creditor.

21. Assuming that Clause 21 does give a right to convert sterling into rupees or a right to receive payment in rupees at a particular rate of exchange, the petitioners cannot fairly complain that the vanishing of this right is to their disadvantage. This right is not absolute and self-sustaining. It is

alternative and dependent. Under the 1937 Order the principal right is the right to a pension in sterling. This principal right has lawfully been transmuted into a right to a pension in rupees by the 1954 Act. The transmutation is not to the disadvantage of the petitioners. When the principal right is lawfully extinguished, the alternative right, which is accessory to the principal right, cannot survive. The accessory right does not lead but follows its principal. Thus when the obligation of the principal is extinguished by release or discharge, the obligation of the surety is also extinguished. The creditor cannot then complain that the extinction of the obligation of the surety impairs the obligation of his contract with the principal debtor. So here, on the lawful extinguishment of the principal right to payment in sterling, the alternative right of conversion of sterling into rupees is automatically extinguished. Accessorium non ducit, sed sequitur suum principal.

22. In Faitoute Iron and Steel Co. v, Asbury Park, (1942) 316 US 502 : 86 L Ed 1629 the State law substituted the unsecured debts with a certain rate of interest by the same amount of the principal with a lower rate of interest on the basis of a composition agreement consented to by 85% of the creditors. The appellant did not consent and complained of the impairment of the obligations of his contract. The Supreme Court sustained the law. Holding that it did not violate the Contract Clause of the Constitution, Justice Frankfurter said:"Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights, of what things are worth in dollars and cents, and in what is proposed to realize paper values." Dilating on the obscure distinction between changes of the substance of the contract and changes of the remedy he said:"The dividing line will remain obscure, if we deal with empty abstract rights instead of worldly gains and losses, if we indulge in doctrinaire talk about 'rights' and 'remedies', instead of giving these concepts a content that carries meaning to the understanding of men."

23. The State law was sustained in spite of the absolute command of the Contract Clause. The proviso to Article 221 (2), to some extent pari materia, is not expressed in as absolute and forbidding language. It gives some freedom to Parliament to vary the rights in respect of pension. But it should not be understood that Parliament may make any kind of variance. All that is decided here is that the alterations made by the 1954 Act do not infringe the proviso to Article 221 (2) in their application to the petitioners.

G. C. Mathur, J.

24. These two writ petitions have been filed by the two retired Chief Justices of this Court, Sri B. Malik and Sri M. C. Desai, claiming that they are entitled to have their pensions fixed in sterling and to be paid every month after converting the amount into rupees at the rates of exchange prevailing on the dates of the payments. Sri Desai has further claimed a right to receive his pension in sterling in U.K., if and when he so wishes.

25. Sri Malik was appointed Additional Judge of the Allahabad High Court on March 13, 1944, and was made permanent on May 1, 1944. He was appointed Chief Justice on October 15, 1947, and retired from that post on January 11, 1955. His pension was fixed at Rs. 15,590/-per annum and he has been drawing the same since 1955. After devaluation of the rupee in 1966, he wrote to the Central Government to fix his pension in sterling and to pay it after converting it into rupees at the devalued rate of exchange. He claimed that, instead of Rs. 15,590 per annum, he should be paid Rs. 24,724.56 P. per annum. The Central Government declined to accept this request.

26. Sri Desai was appointed Additional Judge on December 13, 1948, and was made permanent on January 24, 1950. He was appointed Chief Justice on February 17, 1961 and retired from that post on January 25, 1966. His pension was fixed at Rs. 19,340/- per annum. He commuted part of his pension and, thereafter, received Rs. 805. 86 P. every month towards his pension. After devaluation, he also wrote to the Central Government, claiming to have his pension fixed in sterling and then converted into rupees at the prevailing rate of exchange. He also requested the Government to pay his pension for certain months in sterling in U.K. Both these requests were turned down by the Government.

27. Both the petitioners were appointed Judges when the Government of India Act, 1935, was in force. Section 221 of this Act made provision for the salaries etc. of Judges and was in these terms :-

> "221. The Judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may, from time to time, be fixed by His Majesty in Council:
> Provided that neither the salary of a Judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after his appointment." Under this provision, the Government of India (High Court Judges) Order 1937, was made by an Order in Council dated March 18, 1937, which came into force from April 1, 1937. Paragraphs 17 to 24 of this Order dealt with pensions. Paragraph 17 laid down the requirements, upon the fulfilment of which a Judge became entitled to pension. Paragraph 18 (a) provided that the pension payable to a Chief Justice or a Judge who was not a member of the Indian Civil Service, or to a Chief Justice of a High Court other than the Chief Court of Oudh who was a member of the I.C.S. was to be paid in accordance with Part I of the Third Schedule of that Order. Paragraph 18(b) provided that the pension of a Judge, who was a member of the I.C.S. and was not a Chief Justice of a High Court other than the Chief Court of Oudh, was to be paid in accordance with Part II of the Third Schedule.

Part I of the Third Schedule laid down certain rules for determining the basic pension and the additional pension to which a retired Judge was entitled and expressed the pension in sterling.

Part II of the Third Schedule provided that the basic pension was to be the pension to which a Judge was entitled under the ordinary rules of the I.C.S. and his service as Judge was to be treated as service therein. It also laid down certain scales for the computation of the additional pension. Paragraph 19(2) provided that any service Judge, who was entitled to a pension under paragraphs 17 and 18 had a right to elect to receive the pension either under paragraphs 17 and 18 or under paragraph 19(3), sub-section (3) of paragraph 19 prescribed the pension which a service Judge was entitled to. The main part of paragraph 21, upon which some of the arguments turn, was in these words :-

> "21. Pensions expressed in sterling only shall, if paid in India, be converted at such rate of exchange as the Governor-General may from time to time prescribe."

Paragraph 24 provided that the authority competent to grant pension to a Judge under this order was the Governor of the province in which the High Court was situated. These were the terms which governed the pensions of Judges before the Constitution came into force.
When India became a Sovereign Democratic Republic, it was open to it to dispense with the services of the Judges of the Crown or to re-appoint them or to continue them in its service. It was equally open to it, if it chose to continue or re-appoint the existing Judges in spite of the provisions of Section 221 of the Government of India Act, to prescribe new terms and conditions of service. The provision regarding the existing Judges in the provinces is contained in Article 376 of the Constitution which reads:

> "376. (1) Notwithstanding anything in clause (2) of Article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution, shall, unless they have elected otherwise, become, on such commencement, the Judges of the High Court in the corresponding State and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221 in respect of the Judges of such High Court.

Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court or as Chief Justice or other Judge of any other High Court.

> (2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in Clauses (1) and (2) of Article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.
> (3) In this article, the expression 'Judge' does not include an acting Judge or an additional

Judge."

The Constitution thus virtually put an end to the terms of the existing Judges and appointed them to the High Courts in the corresponding States without following the procedure laid down for appointment of Judges in Article 217(1). Artcile 376 provides that, if such Judges do not elect otherwise, they shall become Judges of the High Courts in the corresponding States, even if they are not qualified under Article 217(2) to be appointed Judges under Article 217(1). Thus, after the Constitution, there were two types of Judges in the High Courts, i.e., (i) those who became Judges on 26-1-1950 under Article 376; and (ii) those who were appointed Judges under Article 217(i). Both types of Judges were entitled only to such salaries and allowances and to such rights in respect of leave of absence and pension as were provided for in Article 221. This Article states:

> "221. (1) There shall be paid to the Judges of each High Court such salaries, as are specified in the Second Schedule.
> (2) 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:
> Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

The Second Schedule deals with Judges of the High Courts in paragraph 10. Sub-paragraph (1) of paragraph 10 lays down the salary of the Chief Justices and other Judges. Sub-paragraph (2) provides for the payment of a special pay to the Judges and the Chief Justices, who were Judges and Chief Justices in the provinces before the Constitution, equal to the difference between their salary which they were getting and the salary fixed by sub-paragraph (1). Sub-paragraph (3) deals with travelling allowance. Sub-paragraph (4) makes provisions for leave and pension of Judges until they were determined by an Act of Parliament in these words :-

> "10(4) - The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the High Court of any State shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the High Court in the corresponding Province."

Thus, under sub-paragraph (4), all the post-Constitution Judges were governed in respect of leave and pension by the 1937 Order. Parliament made provision for determining the rights in respect of leave and pension by the High Court Judges (Conditions of Service) Act, 1954, which came into force on May 20, 1954. Chapter III of this Act deals with pensions. Section 14 provides that, subject to the other provisions of the Act, every Judge shall, on his retirement, be paid a pension in accordance with the scale and provisions laid down in Part I of the First Schedule. Section 15 (a) provides that I.C.S. Judges shall, on retirement, be paid a pension in accordance with the

scale and provisions mentioned in Part II of the First Schedule and Section 15(b) provides that other service Judges shall, on retirement, be paid a pension in accordance with the scale and provisions laid down in Part III of the First Schedule. The proviso to this section states:

> "Provided that every such Judge shall elect to receive the pension payable to him either under Part I of the First Schedule or, as the case may be, Part II or Part III of the First Schedule, and the pension payable to him shall be calculated accordingly."

Section 18 provides that

> "Pensions expressed in sterling only shall, if paid in India, be converted into rupees at such rate of exchange as the Central Government may, from time to time, specify in this behalf." Section 21 makes the President of India the authority competent to grant pension to a Judge. Section 25(1) provides:
> "25 (1)-Nothing contained in this Act shall have effect so as to give to a Judge who is serving as such at the commencement of this Act less favorable terms in respect of his allowances or his rights in respect of leave of allowance (including leave allowances) or pension than those to which he would be entitled if this Act had not been passed."

Part I of the First Schedule lays down the rules for computing the basic pension and the additional pension of Judges. Both types of pensions are mentioned in rupees only. Under Part II the basic pension of a Judge was to be the pension to which he was entitled under the ordinary rules* of the Indian Civil Service if he had not been appointed a Judge, his service as a Judge being treated as service therein. The additional pension mentioned in this part was in sterling. Part III of the First Schedule is not relevant for these cases. The additional pension mentioned in Part II of the First Schedule was stated in sterling as, at the time when the Act was passed, the pension paid to the I.C.S. officers was expressed in sterling. In 1956, the rules for payment of pension to I.C.S. officers were amended and their pensions became payable in rupees in India. Thereafter in 1958, the 1954 Act was amended and the additional pensions payable under Part II were also stated in rupees.

28. It will be convenient to first deal with the contention of Sri H. N. Seth, learned counsel for the Union of India, that the pensionary rights of those Judges, who retired after the coming into force of the 1954 Act, are governed entirely by that Act and that they cannot claim anything under the 1937 Order. He says that, when Sri Malik became the Chief Justice and Sri Desai became a Judge, under Article 376 of the Constitution they lost all the benefits which had been given to them by the 1937 Order and their pensionary rights thereafter were to be determined by an Act of Parliament on the dates on which they retired. In other words, the right to receive pension accrues on the date of retirement of a Judge and, on January 26, 1950, the petitioners could not claim any benefit under paragraph 10(4) of the Second Schedule to the Constitution. This contention cannot be accepted. The proviso to Article 221 pre-supposes the existence and

accrual of a right in respect of the pension on the date of appointment of a Judge and protects that right. Take the case of a Judge appointed under Article 217(1) of the Constitution in 1951. Will he have no right in respect of pension on the date of appointment? If the answer is 'no', then there can be no right which can be protected by the proviso as the proviso protects only such a right as came into existence on the date of appointment. It is, therefore, clear that Judges appointed under Article 217(1) as well as those who became Judges under Article 376 of the Constitution acquired rights in respect of pension under paragraph 10(4) of the Second Schedule in accordance with the provisions of the 1937 Order.

29. It was urged by Sri Jagdish Swarup appearing for Sri Malik that paragraph 10(4) of the Second Schedule was in force on the date on which Sri Malik retired and, consequently, he was entitled to a pension in accordance with the provisions of the 1937 Order. This argument is based on the fact that paragraph 10(4) was actually deleted from the Second Schedule of the Constitution by the Constitution (Seventh Amendment) Act on October 19, 1956. It is urged that, in view of this fact, paragraph 10(4) remained in force till October 19, 1956, and was in force on January 11, 1955, when Sri Malik retired. This contention is without any force. Article 221(2) clearly provides that the pensionary rights of a Judge were to be governed by the provisions specified in the Second Schedule only till Parliament determined the rights in respect of leave of absence and pension by a law made by it. As soon as Parliament enacted the 1954 Act, the provisions in the Second Schedule relating to leave and pension ceased to be operative. Though paragraph 10(4) was deleted from the Constitution on October 19, 1956, it ceased to have any force from May 20, 1954, when the 1954 Act came into force.

30. Before coming to the main contention raised by the petitioners, the contention of Sri Seth may be considered that Sri Desai could only claim a pension in accordance with the 1954 Act as he was appointed Chief Justice after the Act came into force. His submission is that Sri Desai was entitled to a pension as Chief Justice and ho rights could have been acquired by him to this pension before he became Chief Justice. The argument is not sound. The pensions, which the 1954 Act contemplates are pensions of Judges. Chief Justices of High Courts are also Judges. Their tenure as Chief Justice is only taken into account in determining the additional pension payable to them as Judges. The date, on which a Judge becomes the Chief Justice, is irrelevant and the relevant date is the date on which he becomes a Judge. The right of a Judge to pension accrues on the date when he is appointed a permanent Judge. No separate right of pension accrues when a Judge is appointed Chief Justice. It is, therefore, not correct to say that Sri Desai became entitled to his pension as Chief Justice and from the date on which he was so appointed.

31. Both the petitioners have contended that the 1954 Act is applicable only to those Judges who were appointed after this Act came into force and that it did not apply to Judges who were appointed either before the Constitution came into force or before the Act came into force. In clause (g) of Section 2(1) of the Act, a Judge is defined to mean a Judge of a High Court and to include a Chief Justice, an acting Chief Justice, an additional Judge and an acting Judge of a

High Court. Under Chapter III of the Act, pension is payable to every “Judge" who qualifies for it. Judges, who were either appointed or became Judges before the 1954 Act, are included in the definition of"Judge" and are entitled to get pension under Chapter III. There is no provision in the Act excluding from its operation Judges appointed before the Act came into force. Further, Section 25(1) of the Act, which has been quoted above, would have been wholly unnecessary if the Act did not apply to Judges serving on the date of commencement of the 1954 Act. It is quite clear that the Act was intended to apply to all Judges and Chief Justices who were serving on the date of the commencement of the 1954 Act.

32. The main contention of the petitioners is that the 1954 Act is violative of the proviso to Article 221 of the Constitution inasmuch as it varies the rights of the petitioners in respect of their pensions to their disadvantage. It has first to be seen what were the rights in respect of the pensions enjoyed by the petitioner and then whether such rights have been varied to their disadvantage by the Act. The petitioners claim that, they acquired the following three rights under the 1937 order.

(i) The right to a certain amount of pension expressed in the 1937 Order in sterling;
(ii) the right to receive the pension in sterling; and
(ii) the right to receive the pension in sterling in U.K.

There is no doubt regarding the first right. The second right is sought to be spelt out of the words of paragraph 21 of the 1937 Order:"expressed in sterling only". It is urged that these words refer to the schedules of the 1937 Order and paragraph 21 directs that where the pension is expressed in the Order in sterling only and payment is made in India, then the amount should be converted into rupees at the prescribed rate of exchange at the time of each payment. According to the respondent, these words refer to the Pension Payment Order and that paragraph 21 merely provides that, if in the Pension Payment Order, the pension is expressed in sterling, then, if payment is made in India, the amount shall be converted into rupees at the prescribed rate of exchange. Because of the use of the word 'only', the interpretation suggested by the petitioners is to be preferred. In the payment order, pension can be expressed either in sterling or in rupees but not in both and, therefore, the use of the word 'only' would be inappropriate in reference to the payment order. But, in the Third Schedule to the 1937 Order, pensions are stated in sterling only and, in the Fourth Schedule, in sterling as well as in rupees. It thus appears that paragraph 21 refers to the pensions expressed in sterling in the Third Schedule. In 1937, there were some Indian and some non-Indian Judges in the High Courts of the provinces. Some had to be paid pensions in rupees and some in sterling. It was for the Government to decide whether a Judge was to be paid in rupees or in sterling after taking into consideration his wishes in the matter and the fact whether, after retirement, he had settled in India or elsewhere. There is no express provision in the 1937 Order which confers upon Judges the right to receive their pension in sterling and to compel the Government to pay it in sterling. Paragraph 21 merely provides that where the pension is to be paid in India and the Order expresses the pension in sterling then the

amount shall be entered in the payment order in rupees after conversion at the prescribed rate of exchange. The pension was mentioned in the 1937 Order in sterling only for purposes of calculation and did not imply that the payment order had to be issued in sterling in every case. The pension could equally have been expressed in rupees in the 1937 Order and then there would have been a provision, corresponding to paragraph 21, providing that pensions expressed in rupees only, if paid outside India, shall be converted into sterling at the prescribed rate of exchange. It would not have meant that all payment orders were to be issued for payment in rupees. Therefore, paragraph 21 did not confer any right upon a Judge to insist upon receiving his pension in sterling. Even if it be held that, before the Constitution came into force, a Judge had the right under the 1937 Order to receive his pension in sterling, it is extremely doubtful whether that could be the position under the Constitution. When India became a Sovereign Democratic Republic on January 26, 1950, and its Constitution provided for the pensionary rights of its Judges in accordance with the 1937 Order, it could never have been intended that the pension was to be paid in a foreign currency. The 1937 Order was adopted as a transitional measure only for laying down the scales for the determination of pensions. It thus appears that, on the date on which the 1954 Act came into force, the petitioners had no right to receive their pensions in sterling.

33. Sri Desai claims the right to receive the pension in U.K. by virtue of paragraph 933-A of the Civil Service Regulations. The main part of this paragraph provided:

> "When a pension is stated in sterling, it is payable at the Home treasury, or, at the option of the pensioner, if he be residing in India, at any treasury in India, converted into rupees at such rate of exchange as the Secretary of State in Council may by order prescribe."

This contention assumes that, under the 1937 Order, Sri Desai was entitled to his pension in sterling. Even if that were so, paragraph 933-A was not applicable and did not confer any right to receive the pension in U.K. Chapter XLVIII of the Civil Services Regulations, which contains paragraph 933-A, deals with payment of pensions. This paragraph was not applicable to Judges of the High Court as the rules relating to their pensions were contained in Chapter XXIII. It was also contended on behalf of Sri Desai that paragraph 933-A was made applicable to Judges of the High Courts by paragraph 26 of the 1937 Order. Paragraph 26 laid down subsidiary conditions of service of Judges. It provided that the conditions of service of a Judge shall be determined by the rules for the time being applicable to a member of the I.C.S. holding the rank of Secretary to the Government of a province in which the principal seat of the High Court was situated. Paragraph 26 did not deal with any pensionary rights but with subsidiary rights, such as medical facilities etc. Then paragraph 933-A of the Civil Service Regulations could only be made applicable to Judges by paragraph 26 of the 1937 Order if it was applicable to members of the I.C.S. holding the rank of a Secretary. Paragraph 933-A was not applicable to members of the I.C.S. either, as the pensions of members of the I.C.S. were dealt with in Chapter XLIX of the Regulations. Clearly, paragraph 933-A of the Regulations was not applicable to High Court Judges and was

not made applicable by paragraph 26 of the 1937 Order. On its own words, this paragraph was applicable when a pension was stated in sterling in the payment order; but the pension of Sri. Desai was not expressed in sterling in the pension payment order. This paragraph was deleted from the Regulations in the year 1956. Sri. Desai has failed to establish that he had any right to receive his pension in U.K.

34. It is now to be seen whether the 1954 Act varies the rights of the petitioners in respect of their pensions, which they had acquired before the Act came into force, to their disadvantage. The first right i.e. the right to a certain amount of pension expressed in sterling was certainly varied by the Act and was converted into a right to receive a certain amount of pension expressed in rupees. Mere change from a foreign currency into the Indian currency cannot be deemed to be an alteration which is to the disadvantage of an Indian citizen. It is not the case of the petitioners that the amounts mentioned in rupees in the 1954 Act are lower than the amounts which were mentioned in sterling in the 1937 Order if those amounts were converted into rupees at the rates of exchange prevailing in 1954. In fact, it is conceded by Sri Malik that the pension determined in rupees and expressed in his payment order is a little higher than what it would have been if it had been calculated in sterling under the 1937 Order and then converted into rupees in accordance with the rate of exchange prevailing on the date of the 1954 Act. The first right, which the petitioners had in respect of their pensions, though it has been varied by the 1954 Act, has not been varied to the disadvantage of the petitioners. Assuming that the petitioners also had the second right to receive their pension in sterling, it was quite competent for Parliament to convert this right into one of receiving their pension in rupees. As already observed, the conversion of a right to receive pension in sterling into a right to receive pension in rupees cannot be said to be to the disadvantage of an Indian citizen. Even if there is a variation of the right of the petitioners to receive their pension in sterling that right has not been varied by the 1954 Act to the disadvantage of the petitioners. Once the right to receive the pension in sterling is legally converted into a right to receive pension in rupees, the further right, even if it existed, to receive the pension in U.K. would automatically disappear. The petitioners have not succeeded in establishing that the 1954 Act varies their rights in respect of pension to their disadvantage. The Act, therefore, cannot be said to be violative of the proviso to Article 221 of the Constitution and is a perfectly valid piece of legislation. It has now completely superseded paragraph 10(4) of the second schedule. After the Act came into force, the rights of the petitioners in respect of their pensions have to be determined in accordance with the provisions of this Act.

35. One more contention of Sri K. L. Misra on behalf of Sri Desai may be noticed. The contention is that neither Part I nor Part II of Schedule I of the 1954 Act applies to Sri Desai and as such the Act is inapplicable to him and his pensionary rights are still governed by the 1937 Order. It is said that Sri Desai was entitled to pension under the 1937 Order under paragraph 18 (a) as a Chief Justice of a High Court, other than the Chief Court of Oudh, who was a member of the I.C.S. in accordance with the scale and rules in Part I of the Third Schedule of that Order and that, under the 1954 Act, he is entitled to his pension under Section 15(a) as a member of the

I.C.S. in accordance with the scale and provisions in Part II of the First Schedule of the Act. It is contended that the provisions of Part II of Schedule I of the 1954 Act are less advantageous to Sri Desai than the provisions of Part I of Schedule III of the 1937 Order and, therefore, by virtue of the provisions of Section 25 of the Act, Part II of Schedule I of the Act is inapplicable to him.
It is further contended that Part I, on its own terms, does not apply to I.C.S. Judges and does not apply to Sri Desai, thus neither Part I nor Part II of the First Schedule of the Act applies to him. There is no foundation for this argument. There is no allegation in the writ petition of Sri Desai, alleging that the provisions of Part II of the First Schedule of the 1954 Act are less advantageous to Sri Desai than the provisions of Part I of the Third Schedule of the 1937 Order; nor is there any material on the record to substantiate this. Under the 1937 Order, Sri Desai was entitled to a pension under paragraph 18 (a) in accordance with Part I of the Third Schedule of the Order and he was given an election by paragraph 19(2) to receive his pension under paragraph 18 (a) or paragraph 19(3). Under paragraph 19(3), the basic pension is the pension admissible to I.C.S. officers. Under the 1954 Act, Sri Desai is entitled under Section 15 to a pension in accordance with Part II of the First Schedule under which his basic pension would be the pension as an I.C.S. officer. The pension under Part II of Schedule I of the Act is comparable to the pensions under paragraph 19 (3) of the Order. Under the Act, he has been given a right to elect to receive the pension payable to him either under Part I of the First Schedule or under Part II. There was thus a similar election available to Sri Desai both under the 1937 Order and the 1954 Act. In his application for pension to the President of India made under the 1954 Act, Sri Desai elected to receive his pension under Part I of the First Schedule of the Act. There is nothing on the record to show that the pension, to which Sri Desai was entitled under the 1937 Order, was, in any way, more advantageous to him than the pension available to him under the Act.

36. There is no force in any of the points raised by the petitioners. Their pensions have been correctly determined in rupees under the 1954 Act. The writ petitions are accordingly dismissed. There will be no order as to costs.

Gangeshwar Prasad, J.

37. I have had the benefit of reading the judgment of my learned brother G. C. Mathur and I agree that both these writ petitions be dismissed. I would, however, like to state my reasons for the proposed order in a separate judgment.

38. The circumstances in which the petitioner, Sri B. Malik and Sri M. C. Desai, filed their respective writ petitions and the reliefs claimed by them have been set out in the judgment of my learned brother and it is unnecessary for me to repeat them. I may only note that Sri B. Malik was appointed Additional Judge of the Allahabad High Court on March, 13, 1944, was made a permanent Judge on May, 1, 1944 and retired as Chief Justice of this Court on January 11, 1955, and Sri M. C. Desai was appointed Additional Judge of the Allahabad High Court on December 13, 1948, was made a permanent Judge on January 24, 1950 and retired as Chief Justice of this

Court on January 25, 1966. The position thus is that both the petitioners were appointed Judges of High Court, before and retired after the commencement of the Constitution of India and that by the time of their retirement the High Court Judges (Conditions of Service) Act, 1954 (hereinafter referred to as the 1954 Act) had come into force.

39. The first contention raised on behalf of the petitioners was that despite the enactment of the 1954 Act their rights in respect of pension are governed by the provisions of the Government of India (High Court Judges) Order, 1937 (hereinafter referred to as the 1937 Order) because rights of a High Court Judge in respect of pension were governed by the said Order at the time of their appointment. For judging the soundness of this contention it is necessary to examine first the legal position in regard to the appointment and conditions of service of a High Court Judge at the time of the appointment of the petitioners and then the effect of subsequent changes in the constitutional structure of the country on that legal position. Sri B. Malik was appointed by His Majesty the King of Britain under Section 220 of the Government of India Act, 1935. Upon his appointment, he became entitled to such salaries and allowances and to such rights in respect of leave and pension as were fixed in the 1937 Order which was made by His Majesty in Council in exercise of the power mentioned in Section 221 of the said Act and of all other powers enabling him in that behalf. He had also a guarantee provided by Section 221 of the aforesaid Act that neither his salary nor his rights in respect of leave of absence or pension would be varied to his disadvantage after his appointment. With the coming into force of the Indian Independence Act, 1947, however, the position was radically altered. The changes brought about by the Indian Independence Act have been explained at length by their Lordships of the Supreme Court in *State of Madras v. K. M. Rajagopalan*[4], and I need only mention briefly such of them as were fundamental and pertained to High Court Judges. The basic change effected by the Indian Independence Act, in the words of their Lordships, was that"a completely independent Dominion of India was set up with a wholly independent legislature and with a completely independent Government free from any kind of fetters as regards their functioning either from the British Parliament or from the British Government although the Government of the Dominion "was still to be carried on in the name of His Majesty, the King of Great Britain by the Governor-General of India to be appointed by His Majesty." The Government of India Act and the Orders in Council made there under certainly remained operative, but that was not by their own force but because of sub-section (2) of Section 8 of the Indian Independence Act which was a part of the temporary provision made for the Government of the Dominion, and their operation also became subject to the conditions mentioned in that sub-section. In respect of the High Court Judges who had been appointed before the enforcement of the Act provision was made in Section 10 (2) of the Indian Independence Act which was as follows:

4 AIR 1955 SC 817

> "10(2) Every person who-
> (a) Having been appointed by the Secretary of State or Secretary of State in Council, to a

> civil service of the crown in India continues on and after the appointed day to serve under the Government of either of the new Dominitions or any province or part there of; or
> (b) Having been appointed by His Majesty before the appointed day to be a judge of the Federal Court or of any Court or of any Court which is a High Court within the meaning of the Government of India Act, 1935 continues on and after the appointed day to serve as a Judge in either of the new Dominions shall be entitled to receive from the Governments of the Dominions and Provinces or parts which he is from time to time serving or, as the case may be, which are served by the Court in which he is from time to time a Judge, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or, as the case may be, as respects the tenure of his office, or rights as similar thereto as changed circumstances may permit, as that person was entitled to immediately before the appointed day."

Neither in Clause (a) which dealt with persons who had been appointed to a civil service of the Crown in India by the Secretary of State or Secretary of State in Council nor in Clause (b) which dealt with Judges of the Federal Court and High Courts appointed by His Majesty was there any indication as to who would continue to serve after the enforcement of the Act, and that was left to be provided by Orders of the Governor-General under Section 9 (1) (a) of the Act. The above feature of Clause (a) of Section 10 (2) was pointed out in AIR 1955 Supreme Court 817 (Supra) and what is true of Clause (a) is equally true of Clause (b). Provision as to who would be entitled to the benefit of Section 10 (2) was made in Article 7 (1) of the India (Provisional Constitution) Order, 1947 (hereinafter referred to as the 1947 Order) which was in the following terms.

> "7(1) Subject to any general or special order or arrangements affecting his case, any person who immediately before the appointed day is holding any civil post under the Crown in connection with the affairs of the Governor-General or Governor-General in Council or of a Province other than Bengal or the Punjab, shall as from that day be deemed to have been duly appointed to the corresponding post under the Crown in connection with the affairs of the Dominion of India or, as the case may be, of the province."

A High Court Judge appointed under the Government of the India Act certainly held a civil post under the Crown and, if this was not so, it was not at all necessary to provide in Section 253 of the Act that the provisions of Chapter 11 of Part X would not apply to High Court Judges. The result, therefore, was that subject to any general or special order or arrangements affecting his case a person appointed as a High Court Judge before the enforcement of the Indian Independence Act was deemed to have been appointed a High Court Judge upon the enforcement of the Act. Sri B. Malik thus held the office of a High Court Judge in the Dominion of India not under the appointment made in 1944 but under an appointment deemed to have been made upon the creation of the Dominion; and the conditions of his service became determinable in accordance with the Govt. of India Act and the 1937 Order as they stood after the enforcement of

the Indian Independence Act and subject to the conditions laid down in Section 8 (2) of the said Act, and not in accordance with the Govt. of India Act and the 1937 Order as they stood in 1944.

40. So far as Sri M. C. Desai is concerned, he was appointed a High Court Judge in the interval between the enforcement of the Indian Independence Act and the commencement of the Constitution of India. At the time of his appointment as a High Court Judge, Section 220 of the Government of India Act as modified by the 1947 Order vested the power of appointing High Court Judges in the Governor-General and the appointment of Sri M. C. Desai as a High Court Judge was made by the Governor-General. The conditions of his service as High Court Judge, like those of Sri B. Malik after his appointment deemed to have been made upon the creation of the Dominion, had to be determined on the basis of the Government of India Act and the 1937 Order as they operated after the enforcement of the Indian Independence Act.

41. When the Constitution of India came into force and India became a Sovereign Democratic Republic and the break with the constitutional past which had been substantially effected by the Indian Independence Act became complete. The Government of India Act and the Indian Independence Act ceased to have effect and Article 395 of the Constitution specifically repealed them. Under Article 376 Judges of a High Court in any Province holding office immediately before the commencement of the Constitution "became" Judges of the High Court in the corresponding State on the commencement of the Constitution and "thereupon" became entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221. The appointment of such Judges under the Government of India Act was thus replaced by an appointment under the Constitution, and their rights in respect of salaries, allowances, leave of absence and pension as provided in Section 221 of the aforesaid Act were replaced by those provided in Article 221 of the Constitution. In Article 221 as well there is a guarantee that neither the allowances of a Judge nor his rights in respect of leave of absence of pension shall be varied to his disadvantage after his appointment, but the appointment spoken of in the Article is obviously an appointment under the Constitution and it cannot be construed as meaning, in relation to persons who became High Court Judges under Article 376, their appointment under the provisions of the Government of India Act. Upon the commencement of the Constitution, therefore, the petitioners were appointed Judges of the High Court under the Constitution and on the terms mentioned in Article 221. Article 221 lays down that Judges of each High Court shall be paid such salaries as are specified in the Second Schedule and each 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. Paragraph 4 of the Part 'D' of the Second Schedule as it originally stood provided that the rights in respect of leave of absence and pension of the Judges of High Court shall be governed by the provisions which immediately before the commencement of the Constitution, were applicable to the Judges of the High Court in the corresponding Province. It, therefore, followed that until the rights of High Court Judges in respect of pension were determined by or

under law made by Parliament they were governed by the 1937 Order, but subject to the conditions mentioned in Section 8 (2) of the Indian Independence Act because immediately before the commencement of the Constitution, the operation of the Government of India Act and of the Orders in Council made there under was subject to those conditions. With the enactment of 1954 Act such a law came into existence and the rights of pension of High Court Judges became determinable thereafter in accordance with the provisions of the said Act. The operation of the 1954 Act is, however, subject to the guarantee provided by Article 221 that the rights of the High Court Judge shall not be varied to his disadvantage after his appointment (which, as I have said above, means appointment under the Constitution) and its operation is also controlled by Section 25 of the Act itself which says that nothing contained in it shall have effect so as to give to a Judge who is serving as such at the commencement of the Act less favorable terms in respect of his rights in respect of pension than those to which he would be entitled if the Act had not been passed. The result, therefore, is, that the rights of the petitioners in respect of pension are governed not by the 1937 Order but by the 1954 Act, unless it is shown that the said Act violates Article 221 of the Constitution or that its application to their case is precluded by Section 25 of the Act.

42. It was urged on behalf of the petitioners that immediately before the commencement of the Constitution the petitioners had the right to receive pension in sterling and if this right of theirs was taken away by the 1954 Act there was a variation of their rights to their disadvantage. On behalf of Sri M. C. Desai it was also urged that he had the right to receive such pension in the United Kingdom as well and if the 1954 Act had the effect of depriving him of that right there was again a variation to his disadvantage. To me it appears that the right to receive pension in sterling and the right to receive it in the United Kingdom went together and they could not be dissociated from each other. Indeed, the former right depended on the latter and could be claimed only as long as the latter existed. Let us first find out the exact nature of the rights that High Court Judges had in the above respects before Independence.

43. For well known reasons, pensions of High Court Judges used to be fixed in sterling during the British rule. In the High Court Judges (India) Rules, 1922 pensions were fixed only in sterling and Rule 25 (b) provided that pensions paid in India shall be issued in rupees and converted at such rate of exchange as the Secretary of State in Council may by order prescribe. In the 1937 Order injury gratuities and pensions mentioned in the Fourth Schedule were expressed both in sterling and in rupees but the pensions mentioned; in the Third Schedule, which is the relevant Schedule, were expressed in sterling only; and paragraph 21 of the Order provided that pensions expressed in sterling only shall, if paid in India be converted at such rate of exchange as the Governor-General may from time to time prescribe. At the time when the 1937 Order was made India was a Dependency of the British Crown and a High Court Judge in India held his office under an appointment made by His Majesty the King of Britain. A High Court Judge had therefore, the right to receive his pension in the United Kingdom as well unless the right was expressly denied to him by the law governing his pension. That right was implicit

in the very nature of his appointment and the right to receive payment in sterling when the payment was claimed in the United Kingdom was its necessary incident. These rights were postulated and not conferred by the 1937 Order, unless Paragraph 933-A of the Civil Service Regulations, which will be dealt with later, is deemed to have been made a part of it by virtue of paragraph 26 of the Order. In any view of the matter, however, the Third Schedule to the Order only provided the measure of the pensions in terms of sterling and not the currency in which they were payable. In *Adelaide Electric Supply Co. v. Prudential Assurance Co*[5]*.,* Lord Russell of Killowen emphasized the distinction between a unit of account and a legal tender which corresponds to the unit. The question in that case was whether the debt involved therein had to be paid in English or in Australian currency. Lord Russell said:

> "The question then is, how can the Company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account."

In *Ottoman Bank of Nicosia v. Ohanes Chakarian*[6]*,* the Privy Council observed that the principles laid down by the House of Lords in Adelaide's case were of general application and, after quoting the above statement of Lord Russell, proceeded to say:

> "The same view was expressed by this Board in a similar case, (1937) AC 587 at p. 605 : (AIR 1937 PC 54 at p. 59) where it is stated:
> 'Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connecting the appropriate currency.'
> "The unit of account must accordingly be applied to the appropriate currency which may vary from time to time. In the Adelaide's case Lord Wright in his speech, p. 160, quoted as a correct statement of the law what was said by Maugham, J. in (1933) 1 Ch 373 at p. 391."
> 'A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is prima facie a contract to pay money according to the currency of the country where payment has to be made.'

These words are equally true of a case like the present where the question does not turn on a conflict between the currency of one country and another, the unit of account being identical in both, but where there has been a change in the currency of the country concerned. That type of case was dealt with in (1923) 2 Ch 466, where a mortgage debt in German reichsmarks contracted while Germany was on gold was held by Russell, J. and by the Court of Appeal to be dischargeable in depreciated German reichsmarks without reference to what country was the place of payment. Lord Sterndale said at p. 478, 'if their (i.e. the mortgagees') rights are to be defined by German law, it must be that law as it exists from time to time'." It is true that

Adelaide's case and the other cases referred to in the above passage dealt with contracts and not with statutory provisions, but there seems no reason why the principle laid down in the above cases should not also apply to statutory provisions, and it will be seen that in Ottoman Bank case the Privy Council applied the principle to the interpretation of pension regulations of the Imperial Ottoman Bank established by a Turkish Imperial Firman. In the light of these decisions it seems clear that the Third Schedule to the 1937 Order fixed the unit of account in terms of the

[5]1934 AC 122
[6] AIR 1938 PC 26

Sterling but it did not have the effect of making the pensions payable only in sterling. The pensions were payable in the currency of the United Kingdom if paid in the United Kingdom and in the country of India if paid in India. Sterling was certainly a currency of His Majesty the King of Great Britain but it was not an Indian currency. Even in absence of paragraph 21 of the 1937 Order, therefore, the pensions would not have been payable in sterling in India, and the object behind the paragraph essentially was to lay down how the rate of exchange was to be determined at the time of the payment, if made in India. Reference in this connection may be made to *Dekhri T. Co. Ltd. v. Assam Bengal Rly. Co., Ltd*[7]*.,* which suggests that even before independence Courts in India could give judgment in terms of only one currency i.e. rupees. However, the paragraph made it clear that the pensions, if paid in India, would be payable only in rupees and at the rate of exchange indicated therein. The position, therefore, was that the right to receive in sterling the pensions mentioned in the Third Schedule to the 1937 Order was entirely dependent upon the right to receive them in the United Kingdom and the latter right flowed from the facts that India was a Dependency of the British Crown, a High Court Judge was appointed by His Majesty and King of Great Britain and the pensions were fixed by an Order of His Majesty in Council. Of course, if paragraph 933-A of the Civil Service Regulations is deemed to have been a part of the 1937 Order there was a specific provision conferring the right to receive the pensions in sterling at the Home treasury.

44. Ignoring for the time being Paragraph 933-A of the Civil Service Regulations, let us see whether the right to receive pension in sterling survived the enforcement of the Indian Independence Act and the creation of the Dominion of India. In AIR 1955 Supreme Court 817 (supra) it was observed by their Lordships of the Supreme Court that the question as to whether the Indian Independence Act brought about a full Sovereign State for each and every purpose is one of considerable importance and is not free from difficulty and their Lordships did not think it necessary to decide the question in that case; but whatever the answer to that question might be, it cannot be disputed that the Dominion of India was “completely independent" with wholly independent legislature and with a completely independent Government free from any kind of fetters as regards their functioning either from the British Parliament or from British Government." Appointment of High Court Judges made by His Majesty and the King of Great Britain therefore, ceased to be effective and the Judges appointed by His Majesty, if they

continued in services derived their office not from the appointment made by His Majesty but from the appointment deemed to have been made under Article 7 (1) of the 1947 Order. Their rights in respect of pension could, under Section 221 of the Government of India Act as modified by the 1947 Order, be fixed by the order of the Governor General and, under Article 5 of the 1947 Order, the 1937 Order was to be deemed as having been made by the Governor General. As to High Court Judges appointed after the enforcement of the Indian Independence Act and the creation of the Dominion of India, they were appointed by the Governor-General and their rights in respect of pension, like those of High Court Judges deemed to have been appointed as aforesaid, were governed by the 1937 Order deemed to have been made by the Governor-General. Thus the basis on which the right to receive

[7] AIR 1921 Cal 239

pensions in the United Kingdom rested or could rest completely disappeared. Payment of the pensions could therefore, no longer be claimed in the United Kingdom and naturally it could not then be claimed in sterling. It is true that the government of the Dominion continued still to be carried on in the name of His Majesty the King of Great Britain by the Governor-General of India appointed by His Majesty but this, as their Lordships of the Supreme Court said in Rajagopalan's case, “was no more than a symbol of the continued allegiance to the Crown."

45. Section 7 (a) of the Indian Independence Act said that after the setting up of the Dominion of India His Majesty's Government in the United Kingdom had no responsibility as respects the Government of the territories of the Dominion, and proviso (b) to sub-section (2) of Section 8 of the Act said that nothing in the sub-section would be construed as continuing in force after the setting up of the Dominion any form of control by His Majesty's Government in the United Kingdom over the affairs of the said territories. It is, therefore, manifest that after Independence the right to receive pension under the 1937 Order from His Majesty's Government terminated and, with the termination of that right, the right to receive pension in the United Kingdom and in sterling, also terminated, because the latter right was founded only on the former. It is true that Sch. III of the 1937 Order which expressed pensions in sterling only still remained a part of the Order without any modification; but, as I have said above, the Schedule only fixed the unit of account in terms of sterling, and since quite a number of retired High Court Judges were paid their pensions in the United Kingdom because they lived there after retirement that unit of account was left unchanged.

46. We may then consider whether the right to receive the pensions in sterling was enforceable through court before Independence and, if so, whether it remained so enforceable after Independence. In India not only were the pensions, not payable in sterling by reason of paragraph 21 of the 1937 Order but no kind of suit relating to the pensions could be entertained by Civil Court on account of the bar imposed by Section 4 of the Pensions Act, 1871. Even if any matter connected with the pensions went before Civil Court on a certificate as provided by Section 6 of that Act no decree directing payment of the pensions in sterling could be passed. Indeed, it appears that under Section 6 only a declaration of right could be obtained but not an order for

payment of the pensions either in sterling or in rupees vide *Secy, of State v. Parashram Madhavrao*[8], The remedies provided by the Constitution of India were not then available, and the position thus was that the right to receive the pensions in sterling was not enforceable through Indian Courts. The only means of enforcement of the right to receive the pensions in sterling before Independence could, therefore, be a legal proceeding in the United Kingdom. The Crown Proceedings, Act, 1947, came into force on January, 1, 1948 i.e after the enforcement of the Indian Independence Act, but from what has been observed in the *State of Bihar v. Abdul Majid*[9], *Punjab Province v. Tara Chand*[10]. it may be concluded that an action was maintainable in the United Kingdom for the recovery of the pensions. The right to receive the pensions was a statutory right conferred by Section 221 of the Government of India Act read with the 1937 Order as such, it may be said, on the

[8] AIR 1934 PC 108

[9] AIR 1954 SC 245

[10] AIR 1947 FC 23 and Reilly v. The King, 1934 AC 176

authority of the above mentioned cases, that it was enforceable through a Court of law in the United Kingdom. The considerations on which, the unpaid salary of an Indian Civil Servant was not held to be a debt"owing or occurring" from the Crown in *Lucus v. Lucus and High Commr. for India*[11], a case which was not regarded in the AIR 1954 Supreme Court 245 (Supra) and AIR 1947 FC 23 (Supra) as having been correctly decided could have no application to such a right. In any case the remedy of a Petition of Right was available in the United Kingdom. After Independence, however, the situation completely changed. 46-A. In India the right to receive the pensions in sterling was, as has been seen unenforceable even before Independence. After Independence unenforceability of the right became still clearer. Whatever might have been the position in regard to the power of an Indian Court to pass a decree in terms of sterling prior to Independence, it seems undeniable that no such decree could be passed after Independence. Dicey's Conflict of Laws (Seventh Edition) contains the following statement at page 909:

> "Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), the currency in which the debt or liability can and must be discharged (money of payment) is determined by the law of the country in which such debt or liability is payable, but (semble) the rate of exchange at which money of account must be converted into a money of payment is determined by the proper law of the contract or other law governing the liability".

Again we find the following statement at page 914:

> "English Court cannot give judgment for the payment of an amount in foreign currency. A debt which is expressed and damages which are calculated in a Foreign currency must, therefore, be converted into sterling for the purposes of litigation in England irrespective of the place at which they are payable and irrespective of the law governing the substance of the obligation."

In Cheshire's Private International Law (Sixth Edition) the position has been stated in the

following words at page 708:

> "Again, the view taken in England, though not shared by several foreign countries, is that an English Court cannot order payment except in English currency."

47. Performance of an obligation to pay the pensions in sterling in the United Kingdom, became all the more incapable of being enforced through an Indian court after Independence. Apart from the fact that such an obligation no longer existed, the Dominion of India could not be compelled by an Indian court to perform an act which became one of extra-territorial nature after Independence. At any rate no decree enjoining performance of such an act could be passed by a Civil Court in India by reason of the provisions of the Pensions Act, 1871. A to enforceability of the right in the United Kingdom, under Section 7 (a) of the Indian Independence Act, His Majesty's Government ceased to have any responsibility as respects the government of the territories of the Dominion of India and nothing could thereafter form the basis for the institution of a legal proceeding in respect of the pensions in the United Kingdom. Further, under Section 176

[11](1943) 2 All England Reporter 110

of the Government of India Act as modified by the 1947 Order the authority to be sued in respect of any claim against the Government of India was the Dominion of India or the Province, according as the suit related to the sphere of the one or the other, and no suit was maintainable against the Secretary of State in Council. Even against the Dominion of India or any Province no suit or other legal proceeding was entertain able in a Court in the United Kingdom. In Dicey's Conflict of Laws (Seventh Edition) it has been stated at page 129 as a general rule of jurisdiction that the English Court "has no jurisdiction to entertain an action or other legal proceeding against any foreign State, or the head, or government or any department of the government of any foreign State", and the comments on the above rule at pages 133 and 134 show that the Dominion of India was a foreign State for the purpose of jurisdictional immunity. Reference in this connection has to be made to *Kahan v. Federation of Pakistan*[12], where the question whether the Federation of Pakistan was a foreign State for the purpose of a suit in English Courts arose for consideration. Slade, J. against whose judgment appeal was taken to the Court of Appeal had, in accordance with the practice long recognized in cases in which the status of a defendant claiming to be a Sovereign State was in question, sought the advice of the Secretary of State for Commonwealth Relations. The advice that had been received was that under the provisions of the Indian Independence Act, 1947 and by reason of the Constitutional Conventions,"Pakistan is a self-governing country within the British Commonwealth of Nations, Sovereign both in internal and in external affairs, linked with the United Kingdom through a common allegiance to the Crown, but in other respects independent of it", and the advice had been finally summed up by saying:"In the view of the Secretary of State, therefore, Pakistan Is an independent Sovereign State. Slade J., again following the recognized practice had accepted the advice or certificate as conclusive evidence for the purpose of that case and had dismissed the appeal preferred before him against an order of the Master. Before the court of Appeal the counsel for the appellant

accepted the conclusiveness of the certificate issued by the Secretary of State and the appeal was decided on the footing that the status of the Federation of Pakistan was equivalent to that of a foreign State. Dealing with this aspect of the case Jenkins L. J. observed:

> "No convincing reasons were adduced before us why such a certificate should not be just as conclusive in the present case as it would be in the case of a foreign sovereign State; but the matter was not fully argued and it is not necessary for the purpose of the present appeal to express any concluded opinion upon it, for ultimately both parties agreed that for the purposes of this appeal the Federation of Pakistan could be taken to be in the position of a foreign sovereign State so far as the question of immunity is concerned."

Thus there seem to be no doubt about the fact that payment of the pension in sterling could not be enforced after Independence, either through an Indian Court or through a Court in the United Kingdom.

48. We now proceed to examine whether as contended by Sri Kanhaya Lal Misra, learned counsel for Sri M. C. Desai paragraph 933-A of the Civil Service Regulations should be deemed to have been incorporated in the 1937 Order by virtue of paragraph 26 of the Order. The relevant portion of Paragraph 933-A of the Regulations was in the following

[13](1951) 2 K.B. 1003

terms:

> "When a pension is stated in sterling, it is payable at the Home treasury, or at the option of the pensioner, if he be residing in India at any treasury in India, converted into rupees at such rate of exchange as the Secretary of State in Council may by order prescribe".

Paragraph 26 of the 1937 Order which, according to the learned counsel, made the aforesaid paragraph of the Civil Service Regulations a part of the 1937 Order ran as follows:

> "26. Subject to the provisions of this order and of any other order in council made under the Act, the conditions of service of a Judge shall be determined by the rules for the time being applicable to a member of the Indian Civil Service holding the rank of Secretary to the Government of the Province in which the principal seat of the High Court is situated:
> Provided that nothing in this paragraph shall have effect so as to give to a Judge who is a member of a civil service of the Crown in India less favorable terms in respect of any of his conditions of service than those to which he would be entitled as a member of his civil service if he had not been appointed a Judge his service as Judge being treated as service for the purpose of determining those terms."

The above paragraph of the Order was placed under the heading 'Subsidiary Conditions of Service' and not under the heading 'Pension' which contained paragraphs 17 to 24, It will be

noticed that Section 221 of the Government of India Act did not speak of conditions of service although it cannot be denied that provisions relating to salaries, allowances, leave and pension would certainly constitute conditions of service. What meaning then the words subsidiary conditions of service bear? While answering that question it will be useful to refer to the relevant provisions of the Indian Constitution and the 1954 Act first. Article 221 of the Constitution too does not use the words “condition of service" and the things which according to the Article were left to be determined by law made by Parliament were allowance and rights in respect of leave of absence and pension. The 1954 Act which has been called the High Court Judges (Conditions of Service) Act deals. not only with allowance and right in respect of leave of absence and pension but also with other conditions of service i.e., provident fund (Section 20) and facilities for medical treatment (Section 22). Further, it empowers the Central Government to make rules not only in regard to other conditions for medical treatment but also in regard to other conditions of service and any other matter which may be prescribed (Section 24). In enacting the 1954 Act Parliament did not, therefore, confine itself to matters mentioned: in Article 221 of the Constitution and provided for other conditions of service as well. For ascertaining the condition of the things prevailing at the time of the enactment, reference may be made to Objects and Reasons attached to the Bill, relating to the Act. In clause (c) of paragraph 3 of the Statement it was said:

> "Special provision has been made to govern certain other subsidiary conditions of service, such as medical attendance facilities which are enjoyed by all Government servants and which, upto the commencement of the Constitution were admissible also to High Court Judges under paragraph 26 of the Government of India (High Court Judges) Order, 1937."

This clause indicates that conditions of service in regard to matters other than allowances, leave of absence, and pensions were treated as 'other subsidiary conditions of service' and provisions in regard to such subsidiary conditions of service were intended to be a substitute for the provision in Paragraph 26 of the 1937 Order. Going back to the 1937 Order, it would be seen that the Order was made by His Majesty not merely in exercise of the power mentioned in Section 221 of the Government of India Act but also in exercise of “all other powers enabling him in that behalf". It cannot, therefore, be said that the provisions made in the Order must be construed as provisions relating only to salaries, allowances, leave and pensions. The question then is whether Paragraph 26 was intended to provide only for matters other than salaries, allowances, leave and pensions or embraced the above matters as well. The answer to the question is not free from difficulty. The words “subject to the provisions of this order" in paragraph 26 and the proviso to the paragraph may be construed as lending support to the argument that unless the Order and rules applicable to members of the Indian Civil Service were to operate to some extent in the same sphere the words quoted above and the proviso were unnecessary. The words might, however, also have been used only to mark out the separate spheres in which Order in Council and rules referred to in paragraph 26 were to respectively operate, and the proviso might have been intended to ensure to the members of the service mentioned therein the conditions of that service. It will be noticed

that wherever the 1937 Order intended to provide that the provisions in regard to any matter specifically dealt with by it should be supplemented by rules in that behalf governing another service the order explicitly said so. In regard to pensions too this was done in paragraphs 20 and 23. It is significant in this connection that the High Court Judges (India) Rules, 1922, contained no provision corresponding to paragraph 26 of the 1937 Order. It, therefore, appears that paragraph 26 was really intended for matters other than salaries, allowances, leave and pensions. In any case, in view of the specific provision, made in paragraph 21 of the Order, paragraph 933-A of the Civil Service Regulations could not, in my opinion, be read as a part of the 1937 Order by aid of paragraph 26 of the Order.

49. But even if paragraph 933-A of the Civil Service Regulations were to be regarded as having been incorporated in the 1937 Order the effect only was that the right to receive in sterling at the Home treasury pensions mentioned in sterling was explicitly conferred by the 1937 Order, and the question would still be whether that right remained available after the Indian Independence Act. Section 8 (2) of the Act would, I think, furnish a clear answer to that question. The relevant portion of the Section 8(2) ran as follows:

> "8(2). Except in so far as other provision is made by or in accordance with a law made by the Constitution Assembly of the Dominion under sub-section (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935, and the provisions of that Act and of the Orders in Council, rules and other instruments made there under, shall so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in Orders of the Governor-General under the next succeeding section, have effect accordingly."

In the above provision, the words “as nearly as may be" and “as far as applicable" carried much more than their usual significance because the Indian Independence Act completely changed the political status of the country and its constitutional structure. The aforesaid words had the effect of bringing laws made in a different setting into harmony with the new situation, and rendered such provisions thereof as were inconsistent with or unworkable or inappropriate in the changed political and constitutional frame, automatically inapplicable or applicable with modifications, without having been formally deleted modified. If the 1937 Order did not confer the right to receive, pensions in sterling and only presupposed the existence of such a right the basis of that presupposition was destroyed in consequence of the changes brought about by the Indian Independence Act. And if the Order is to be interpreted as having been supplemented by paragraph 933-A of the Civil Service Regulations the aforesaid paragraph became inconsistent with the provisions of the Indian Independence Act and inapplicable to the new situation. Obviously the pensions could not be payable “at the home treasury" after Independence. But what is more important and goes to the root of the matter is that upon the enforcement of the Indian Independence Act the Indian Civil Service automatically came to an end. In *Taraknath*

Ghose v. State of Bihar[14], their Lordships of the Supreme Court held:

> "When Independence was achieved by India, the Secretary of State and the Crown ceased to have any authority in India, so that no service of the Secretary of State or the Crown could continue thereafter. Under the agreement that was entered into by the new Indian Government with the British Government, provision was made that members of the previous Secretary of State Service could continue to serve the Government of India or a Provincial Government and certain rights were preserved to them if they continued to do so. There was, however, no provision that the old Secretary of State Service would continue so that with the passing of States, Services like the Indian Civil Service and the Indian Police Service ceased to exist."

Their Lordships also referred to the following observations made in AIR 1955 Supreme Court 817 :-

> "Thus the essential structure of the Secretary of State Services was altered and the basic foundation of the contractual-cum-statutory tenure of the service disappeared. It follows that the contracts as well as statutory protection attached thereto came to an automatic and legal termination."

The Indian Administrative Service, as observed in the majority judgment delivered by Wanchoo, J. (as his Lordship then was) in *R. P. Kapur v. Union of India*[15], was legally and formally constituted in 1951. The unsettled condition of things relating to All India Service obtaining even after the commencement of the

[14] AIR 1968 SC 1372

[15] AIR 1964 SC 787

Constitution may be gathered from Statement of Objects and Reasons appended to the Bill which resulted in All-India Services Act, 1951. It was to remove those conditions which were described as “neither satisfactory nor quite justifiable" and"to fill a constitutional lacuna without proceeding to incorporate any detailed provisions" that the Bill was introduced. The Indian Administrative Service (Recruitment) Rules were, however, made in 1954 and till then the members of former Indian Civil Service were not, to use the words of their Lordships of the Supreme Court in AIR 1968 Supreme Court 1372 (supra), members of “any Regularly constituted Service". The result, therefore, was that after the enforcement of the 1947 Act paragraph 933-A of the Civil Service Regulations could not constitute a part of the 1937 Order and Sri M. C. Desai (who was a member of the Indian Civil Service before Independence) was not a member of any regularly constituted service at the time of his appointment as High Court Judge.

50. The effect of Section 10(2) of the Indian Independence Act, which has been referred to earlier, has to be considered in this connection as well. Under that provision Sri Desai, as a member of the former Indian Civil Service was, upon his appointment which will be deemed to have been made by the Government of India after Independence, vide AIR 1964 Supreme Court

787 (supra), entitled to receive from the Dominion of India the same conditions of service as respects remuneration, leave and pension as he was entitled to on August 14, 1947. But so long as he was not a member of any regularly constituted service those provisions of the Civil Service Regulations which related to the Indian Civil Service did not apply to him. It is another matter altogether that for the purpose of ascertaining what rights in respect of pension were secured to Sri Desai by Section 10(2) of the Indian Independence Act the Civil Service Regulations had to be seen, but they had ceased to be actually operative in his case. When Sri Desai was appointed a High Court Judge his rights in respect of pension changed; and since at that time the rights were not governed by the Civil Service Regulations (so far as they were applicable to the Indian Civil Service), and paragraph 933-A thereof could not on any reading of paragraph 26 of the 1937 Order, then supplement the Order, the right mentioned in paragraph 933-A was never available to him as a High Court Judge. In the case of Sri Malik it may be said that if paragraph 933-A of the Civil Service Regulations had to be read with the 1937 Order and regarded as supplementing it he was entitled to the benefit of that provision on August 14, 1947. But the question is whether he “received" a different condition of service as respects his pension. The 1937 Order still governed his rights in that matter, and his right to receive pension in sterling ceased to exist not because the right was taken away or not granted by the Government of India but because such a right could not in the very nature of things, continue after the transfer of power by the British Government and it also became unenforceable.

51. The result of the foregoing discussion is that neither Sri Malik nor Sri Desai had the right to receive pension in the United Kingdom or in sterling at the time of their respective appointments, and the provision which, immediately before commencement of the Constitution, governed their rights in respect of pension did not entitle them to such a right. It is true that even after Independence payment of pensions in sterling? continued to be made to retired High Court Judges residing in the United Kingdom and desiring payment to be made there but this became only a matter of international comity and a concession to suit the convenience of persons who had served as High Court Judges and as it ceased to be a matter of any legal obligation.

52. By virtue of paragraph 10 (a) of Part D of the Second Schedule to the Constitution the position in respect of the right of pension of High Court Judges as existing immediately before the commencement of the Constitution continued till the enforcement of the 1954 Act. The pensions payable under Part I of the First Schedule of the Act were expressed in rupees, and the pensions payable under Part II of the Schedule still remained expressed only in sterling because of the reference therein to rules of the Indian Civil Service. Section 18 of the Act corresponding to paragraph 21 of the 1937 Order was enacted to provide that pensions expressed in sterling only shall if paid in India, be converted into rupees at such rate of exchange as the Central Government may from time to time specify in that behalf. The section did not have the effect of creating a right to receive such pensions outside India or in any other currency nor did it postulate the existence of such a right. The unit of account in respect of pensions payable to a certain class of High Court Judges having continued to be expressed in sterling it was necessary

to provide the mode of determining the rate of exchange and that was done by section 18. The pensions that remained expressed in sterling were, however, neither payable in the United Kingdom nor in sterling. It is true that paragraph 933-A of the Civil Service Regulations was not formally deleted from the Regulation till 1956, but for the reasons that I have already given lost its force and become inapplicable upon the enforcement of the Indian Independence Act. I may here mention that even though a law determining the allowance of a High Court Judge and his rights in respect of leave of absence and pension was enacted by Parliament in 1954, it was not until 1956 that sub-paragraph (4) of paragraph 10 in Part D of the Second Schedule to the Constitution was deleted by the Constitution (Seventh Amendment) Act. Even after the commencement of the Constitution and the 1954 Act pensions to High Court Judges residing in the United Kingdom are being paid there in sterling. This is, however, being done not by reason of any legal obligation or in recognition of any legal right, but only by way of concession. It may be pertinent to mention here that Government of India's decisions noted at pages 563 and 564 of Chaudri's Compilation of the Civil Service Regulations (Fourth Edition) indicated that even in respect of persons governed by the Regulations payment has been made in the United Kingdom in sterling only by way of concession to suit the convenience of persons residing there. I have referred to these decisions of the Government of India only as explaining the conduct of the Government. I may, however, point out that at page 564 of the above Compilation there is a reference to some decision of the President also which show that payment of pensions in the United Kingdom in sterling has been only in the nature of a concession.

53. Now paragraph I of Part II of the First Schedule to the 1954 Act provides that provisions of that part apply to a Judge who is a member of the Indian Civil Service and who has not elected to receive the pension payable under Part I, and provision for making an election has been made in Section 15 of the Act. Sri Desai availed of the election provided for in Section 15 and was receiving pension in accordance with Part I in rupees. Sri Malik to whom Part I alone applies was also receiving his pension in rupees as provided in that Part.

54. The argument on behalf of the petitioners was that by converting pensions in sterling into pensions in rupees the 1954 Act had varied the rights of the petitioners to their disadvantage and had infringed Article 221 of the Constitution. I have already dealt with the question whether the petitioners had a right to receive pension in sterling before the commencement of the Constitution and I have found that the answer should be in the negative. What Part I of the First Schedule to the Act did was that it changed the unit of account which was expressed in a foreign currency into a unit of account expressed in the Indian currency and gave fixity to the pensions mentioned therein. If on the date of the 1954 Act the pension fixed in Part I of the First Schedule to the Act were not below the amount into which the pensions expressed in sterling in the 1937 Order were convertible on that date there was no variation in the rights of High Court Judges in respect of pension to their disadvantage. It has not been shown by the petitioners that the pensions payable under Part I were less than the amount which would have been payable in rupees on the date of the enforcement of the 1954 Act, and so far as Sri Malik is concerned it was

also admitted that his pension fixed in rupees under Part I was a little higher than the amount into which the pension expressed in sterling in the 1937 Order was convertible on the said date. The contention on behalf of the petitioner was that if on any occasion of payment of pension the amount to which a High Court Judge is found entitled under Part I of the First Schedule to the 1954 Act is less than what, under the 1937 Order, he would have been entitled to receive in rupees at the prescribed or prevalent rate of exchange, the Act should be regarded as having made a variation in the rights of pension to his disadvantage and since this has actually happened in the case of the petitioners as a result of the devaluation of the rupee such a variation has taken place. The contention appears to me to be wholly misconceived.

55. Article 221 of the Constitution prohibits variation in “the rights in respect of pension" and the prohibition is, therefore, in respect of a law determining the rights and not in respect of payments which may from time to time be made in accordance with that law. Variation of the rights in respect of pension takes place when a change in the rights is brought about by a law relating thereto and payments made from time to time according to the law that has made the variation would not be variation of “rights in respect of pension" because such rights have already been varied by the law. If the variation made by the law was a permissible variation when made, it cannot become an impermissible variation at any later point of time by reason of the fact that if it were made at such later point of time it would be impermissible. It is obvious that whether or not a law regulating the rights infringes Article 221 has to be judged with reference to the state of things at the time of its making and its constitutionality would not be for ever hanging in the balance or be perpetually subject to being judged in the light of rates of exchange that prevail from time to time. If on the date of the enforcement of the 1954 Act the pensions fixed in Part I of the First Schedule did not effect a variation in the rights of a High Court Judge to his disadvantage the Act cannot be said to have become violative of Article 221 because of the subsequent devaluation of the rupee. What Article 221 of the Constitution guaranteed was that primary right which was determined by fixing the measure of the pensions a right which became vested in the person entitled to it on the date of his appointment - and not what may be called those secondary rights of receiving payment which would accrue as and when the pensions recurrently become due. Some variation in the primary right may certainly be said to have been made by the 1954 Act but it has not been shown that it was to the disadvantage of the persons entitled to that right. Under the 1937 Order too the pensions were not actually payable in sterling, and their payment in sterling could not be enforced. The variation in the manner of expressing the pensions brought about a definiteness in the amounts of pension which would otherwise have been subject to the fluctuations in the rate of exchange. The variation may, therefore, be said as having possessed some advantageous features. At any rate, the 1954 Act cannot be said to have varied the rights of High Court Judges in respect of pension to their disadvantage. The right that Article 221 guarantees is not the right to such advantages of chance as might occasionally become available, and the Article does not give its protection against a disadvantage which amounts to no more than the possibility of not being able to gain at some future time some advantage from a change in the exchange rate.

56. As to the other disadvantage pointed out in the course of argument on behalf of Sri Desai, namely, the disadvantage of not being able to receive pension in the United Kingdom it should be sufficient to say that the question of any disadvantage on that score does not arise because the right to receive pension in the United Kingdom was never available to High Court Judges after the enforcement of the Indian Independence Act. I may, however, add that “disadvantage" can have no fixed positive or negative content, and the answer to the question whether the absence of a particular benefit constitutes a disadvantage would vary with circumstances. Loss of the right to receive pension in the United Kingdom was a necessary consequence of India ceasing to be a part of the British Empire or, in any case, of India becoming a Sovereign Democratic Republic, and that loss could not be a disadvantage if the achievement of Independence and the attainment of the status of a Sovereign Democratic Republic were advantaged.

57. The change introduced by Part I of the First Schedule to the 1954 Act was, therefore, valid and rights of pension of Sri Malik are governed by it. Sri Desai elected, under Section 5 of the Act, to receive pension in accordance with Part I and his rights too are, therefore, governed by that Part. Sri Kanhaiya Lal Misra urged that Sri Desai cannot be regarded as having exercised any election if Part I infringed Article 221 and was therefore invalid. As Part I did not, in my opinion, infringe Article 221, I find no force in this argument.

58. The effect of Section 25 of the 1954 Act on Part I of the First Schedule to the Act remains to be seen. The relevant portion of the section is as follows:

> "25(1). Nothing contained in this Act shall have effect so as to give to a Judge who is serving as such at the commencement of this Act less favorable terms in respect of his allowances or his rights in respect of leave of absence (including leave allowances) or pension than those to which he would be entitled if this Act had not been passed."

This provision, therefore, subjected the operation of the Act to the condition to which it was already subject under Article 221 of the Constitution. It prevents such provisions of the Act from operating as given"less favourable terms" in respect of pension and, therefore, it virtually provides that those provisions which vary the rights of High Court Judges in respect of pension to their disadvantage will not operate. For the reasons given by me for holding that Part I of the First Schedule to the 1954 Act does not infringe Article 221 of the Constitution I also hold that its operation is not precluded by Section 25 of the Act.

59. In the result I find that both the writ petitions are devoid of force and the petitioners are not entitled to any of the reliefs claimed by them. Both the petitions are accordingly dismissed. I do not, however, make any order as to costs.
(BY THE COURT)
The petitions are dismissed. But there shall be no order as to costs.

Petitions dismissed.