

# ALLAHABAD HIGH COURT

Deoki Nandan Agarwala

Vs.

Union of India

Civil Misc. Writ Petn. No. 20328 of 1986

(B.N. Saprú and Anshuman Singh, JJ.)

15.03.1988

## JUDGMENT

### **B.N. Saprú, J.**

1. Sri Deoki Nandan Agarwala who was a Senior Advocate, was appointed a permanent Judge of the Allahabad High Court and assumed office on 17-11-1977. He retired on 4-10-1983 on attaining the age of 62 years.

2. The Deputy Accountant-General (Pension) of the Office of the Accountant-General III (U.P.) Allahabad by his letter No. P. RS/I/214246/83-84/1980 Dt. 2-12-1983 (Annexure-1 to the writ petition) addressed to the Secretary to the Government, Ministry of Law and Justice, Department of Justice, North Block, New Delhi, calculated that he had put in service as a Judge of the Allahabad High Court for a period of 5 years 10 months and 17 days. The letter added that Sri Agarwala had elected to receive his pension under Paragraph 9 of Part I of the First Schedule of the High Court Judges (Conditions of Service) Act, 1954, (hereinafter to be referred to as 'the Act') as amended from time to time. The pension was calculated at Rs. 8,400-00 per annum with effect from 4-10-1983. It was further calculated that the family pension in the event of his death earlier than his wife, would be Rs. 250-00 per month subject to the usual conditions.

3. In this writ petition, Sri Agarwala contends that he should have been granted a pension of Rs. 9,600-00 per annum at the rate of Rs. 1,600-00 for every year of completed service and in calculating the figure of Rs. 9,600-00, he claims that he is entitled to the benefit of S.16 of the Act under which it is provided that the President of India may for special reasons add any period not exceeding three months to the service for pension of a Judge.

4. S.16 of the Act runs as follows :-

"16. POWER OF PRESIDENT TO ADD TO THE SERVICE FOR PENSION :

The President of India may for special reasons direct that any period not exceeding three months shall be added to the service for pension of a Judge :

Provided that the period so added shall be disregarded in calculating any additional pension under Part I or Part II or Part III of the First Schedule."

5. We are not concerned with the proviso to the Section.

6. When the writ petition was taken up for admission, this Court by its order dated 11-12-1986 asked Sri Agarwala to make a representation to the Central Government. A representation was made by Sri Agarwala. A reply has been received to the representation made by Sri Agarwala from Sri J.S. Badhan, Joint Secretary, Government of India, Ministry of Law and Justice (Department of Justice) North Block, New Delhi by his letter No. 24/57/86-JUS Dated 16-4-1987 (Annexure-3 to the supplementary affidavit) filed by Sri Agarwala. It was stated that it had been decided that –

"(i) Addition of any period up to three months is allowed by this Department under S.16 of the High Court Judges (Conditions of Service) Act 1954, on the basis of a proposal duly forwarded by the High Court concerned with the approval of Chief Justice of that High Court. No such proposal had been received from the Allahabad High Court in your case prior to the date of your retirement. Now, after more than three years of retirement, it is not possible for this Department to allow such addition.

(ii) In view of (i), your pension cannot be calculated for complete six years with effect from 04-10-1983 and 01-11-1986 respectively. However, the matter regarding further revision of pension as per the amended Act of 1986 in the case of those who retired prior to 01-11-1986 is under consideration."

This letter also adds that, in view of what as stated in para (ii), the family

pension, also could not be revised.

7. Taking up the latter part of the claim of Sri Agarwala for being given the benefit of S.16 of the Act, first, the reason for denying him the benefit of S.16 of the Act have been stated in the letter filed as Annexure-3 to the Supplement Affidavit. In addition, in the counter-affidavit filed by Sri Babu Lal, under Secretary, Department of Justice, Ministry of Law and Justice, Government of India. it is stated, in paragraph 13, that –

"The answering respondents has reasons to presume that the petitioner would have gone through the relevant provisions of the Act before filing his pension papers. It is stated that the addition of any period up to three months u/s. 16 of the Act cannot be claimed as a matter of right. As stated hereinabove this power u/s. 16 is discretionary power of the President of India. It is stated that even if the petitioner had applied u/s. 16 of the Act even prior to his retirement, the addition of 1 month and 13 days to his service would have been allowed, he could have completed only six years of service. In any case the addition of 3 months u/s. 16 could not in any event make his service of 7 full years for purposes of pension. The Parliament in its wisdom has imposed that condition after necessary debate on the issue under Art.221(2) of the Constitution of India."

8. In paragraph 14 of the counter-affidavit it is stated that the Power of the President of India is discretionary and cannot be claimed as a matter of right.

9. The relevant provisions of S.16 of the Act have been reproduced in the earlier part of the judgment. In the letter dated 16-4-1987 (Annexure-3 to the supplementary affidavit), the reason for denying the benefit of S.16 of the Act to Sri Agarwala has been set forth. The reason given is that the benefit of three months is allowed by the Department under S.16 of the Act on the basis of a proposal duly forwarded by the High Court concerned with the approval of the Chief Justice of the High Court. It adds that as no such proposal had been received from the High Court prior to the date of retirement of Sri Agarwala, it was not possible for the Department to allow the benefit of S.16 of the Act. It went on to add that the case could not be reviewed and benefit given as three years have elapsed from the date of retirement.

10. S.16 of the Act does not provide that before a proposal for giving the benefit of S.16 of the Act to a Judge is made, it has to be forwarded by the High Court concerned with the approval of the Chief Justice of the High Court. The Department has no authority to reject the claim for giving the benefit of S.16 extraneous to the provisions of S.16 of the Act.

11. We would like to add that the Chief Justice is not a Recommending or Reviewing Authority on the work of a Judge of the High Court and the practice adopted by the Department is totally against the letter of the Act and the spirit of the Constitution of India.

12. We would also like to add that, as far as this Bench is concerned, we were never aware of any such procedure in regard to the grant of the benefit of S.16 of the Act before we perused the letter dated 16-4-1987. From paragraph 2(i) of the letter, it is clear that if a proposal was received from the High Court with the approval of the Chief Justice of the High Court, the benefit would have been granted. As we have already held that the requirement of a proposal from the High Court concerned with the approval of the Chief Justice of the High Court is unwarranted, we take it that there was no reason for the Department other than the one stated in the letter for refusing the benefit of S.16 of the Act to Sri Agarwala.

13. The power of the President of India under S.16 of the Act is discretionary, but not an arbitrary power. As the reason for denial of the benefit has come in, which is extraneous and is unsupported by the provisions of the Act, we are of the opinion that Sri Agarwala is entitled to the addition of one month and 13 days to the length of his service as a Judge of the High Court for calculating the pensionary benefits eligible to him.

14. One of the reasons given in the counter-affidavit of Sri Babu Lal for not considering the grant of benefit under S.16 of the Act to Sri Agarwala, is that there is a delay of more than three years from the date of his retirement in making the claim for the grant of benefit of S.16 of the Act. The delay is no ground for denying the benefit, as there is no provision in S.16 of the Act saying that if there is a delay in making the claim for the grant of benefit of

S.16 of the Act, it will be rejected. The Government of India was not misled and was not prejudiced by the delay in making the application. The whole doctrine of the limitation is based on the theory that the respondent's vested rights are affected by the delay. No rights of the Union of India is adversely affected by the delay on the part of Sri Agarwal in making the application. The Union of India is not expected to deny the legitimate benefits which have accrued to a person who has served it, on a hyper technical ground. We regret that such a technical plea has been taken by the Union of India.

15. We shall presently deal with the submissions on behalf of the Union of India that even the addition of one month and 13 days to the length of service of Sri Agarwal would be of no benefit to Sri Agarwala, as even after the addition of that period his service as a Judge would come only to six years and not seven years up to which only the minimum pension is assured to the Judges.

16. Coming to the claim of Sri. Agarwal for enhanced pension, the position is that under the Government of India Act, 1935. S.221 provided that :

"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."

17. In pursuance of the aforesaid provisions, his Majesty in Council issued the Government of India (High Court Judge) Order, 1937, on 18-3-1937. This order was amended by an order dated 29-7-1937 Cl.17 of the Order provides that a pension shall be payable to a Judge on hrs retirement, but only if, either –

- (a) he has completed not less than 12 years' service for pension; or
- (b) he has completed not less than 7 years' service for pension and has attained the age of sixty; or
- (c) he has completed not less than 7 years' service for pension and his

retirement is medically certified to be necessitated by ill-health.

18. The position under the Government of India Act, 1935, was that a Judge who had completed less than 7 years' service for pension was not, in any circumstance, allowed any pension. There was, however, no bar on a retiring Judge from practicing in the High Court.

19. With the coming into force of the Constitution of India, Art.220 provides that no person who, after the commencement of this Constitution has held office as a permanent Judge of a High Court, shall plead or act in any Court or before any authority in India except the Supreme Court and the other High Courts. Thus, a bar was created on practice which was not to be found in the Government of India Act, 1935.

20. Consequently when the High Court Judges (Conditions of Service) Act, 1954, was enacted by the Parliament, the statement of Objects and Reasons appended to the Bill recited that –

"Hitherto no pension has been admissible to a non-Service Judge of High Court, unless, on attaining the age of sixty years, he completed not less than seven years' qualifying service for pension. Provision has been made in paragraph 9 of Part I of the First Schedule to this Bill for a minimum pension of Rs. 6,000 per annum even if the service put in by a Judge is less than seven years. This is considered necessary, mainly because of Art.220 of the Constitution barring practice after retirement, a provision which adversely affects the recruitment of desirable candidates who would not be able to put in the minimum seven years on attaining the age of sixty to qualify for pension."

(Gazette of India 1952 Part II, S.2 at page 654).

21. We, therefore, find that the minimum service of seven years for getting any pension whatsoever is rooted in history.

22. In this, case, we are concerned with the case of a Judge who gets a minimum pension of Rs. 6,000-00 per annum on the ground that he has put in less than seven years' service, as Sri Agarwala retired on 4-10-1983.

23. The First Schedule to the Act was amended by the Act No. 35 of 1976. The Statement of Objects and Reasons appended to the Bill, which became the Act on being adopted by the Parliament, runs as follows :

"Since the passing of the High Court Judges (Conditions of Service) Act, 1954, there has been no material modification of the conditions of service of the High Court Judges. There is a widespread feeling that in the present day context, the conditions of service are not attractive enough, especially with reference to the Members of the Bar. There has also been a persistent demand for improvement of the salary and other conditions of the service of Judges. Having considered all aspects of the matter, it is proposed to allow the Judges of the High Courts certain ancillary benefits with effect from 1st October, 1974."

2. At present there is no provision for grant of family pension and death-cum-retirement gratuity in the case of Judges who are governed by Part I of the First Schedule to the Act. It is proposed to extend the facility of family pension on the same lines as is applicable to Class I officers of the Central Government. It is also proposed to give them the facility of death-cum-retirement gratuity admissible to Class I Officers of the Central Government, subject to the modifications that the minimum qualifying service for the purpose of entitlement shall be two years and six months and that the gratuity will be calculated at the rate of twenty days' salary for each completed year of service as a Judge.

3. ....

4. While the maximum pension of Government servants on retirement has been increased on the recommendation of the Third Pay Commission, there has been no increase in the pension of Judges since the commencement of the Constitution. It is proposed to increase the pension of the Judges by about 40 per cent and fix the maximum as Rs. 28,000 per annum in the case of the Chief Justice and Rs. 22,400 per annum in case of other Judges. The maximum will be reached on completion of 14 years of service. The minimum pension is also proposed to be increased by 40 per cent, from Rs. 6,000 per annum to Rs. 8,400 per annum."

5. """"

(Gazette of India, dated 6-2-1976, Part II, Sec. 2, Ext., at page 591)

24. By the Amendment Act No. 35 of 1976, the minimum pension of a Judge serving less than seven years as a Judge was enhanced from Rs. 6,000-00 to Rs. 8,400-00. By the Amendment Act No. 35 of 1976, the First Schedule to the Act was also amended and in place of paragraph 2, a new paragraph 2 was substituted as under :-

2. Subject to the other provisions of this Part, the pension payable to a Judge to whom this Part applies and who has completed not less than seven years of service for pension shall be

(a) for service as Chief Justice in any High Court, Rs. 2400 per annum:  
and

(b) for service as any other Judge in my High Court, Rs. 1600 per annum  
:

Provided that the pension shall in no case exceed Rs. 28,000 per annum in the case of a Chief Justice and Rs. 22,400 per annum in the case of any other Judge."

25. The argument of Sri Agarwala is that Parliament has assessed that the pension should be paid to a Judge who has served not less than seven years as a Judge at the rate of Rs. 1,600.00 per annum. He submits that the pension at the rate of Rs. 1,600.00 per annum to a Judge who has put in upto five years of service, comes to Rs. 8,000/- and he gains by the fixation of a minimum pension of Rs. 8,400.00. However, he submits that a Judge who has put in six years or more service, is being denied the benefit which would have enured to him, if his pension had been calculated at the rate of Rs. 1,600.00 per annum.

26. In the counter affidavit, there is no justification given for fixing seven years as the limit For earning the minimum pension. The only reason for fixing seven years, as has been observed earlier in the judgment, is the historical reason that the Government of India Act, 1935, had no pension for the Judges who had not put in seven years' service as a Judge, which reason ceased to have any validity after Art.2.20 of the Constitution of India came into force.

27. The argument of Sri Agrwala is that the Judges who have put in six years to seven years of service as Judges, have been arbitrarily treated in fixing the minimum pension at Rs. 8,400.00 per annum under paragraph 9 of Part-I of the First Schedule to the Act, as it stood after the 1976 amendment.

28. We find that the fixation of a minimum pension for the Judges has a rational basis inasmuch as a person who becomes a Judge, is prevented from practising except in the Supreme Court and a High Court other than the High Court in which he was the Judge. However, such fixation should not lead to discrimination amongst the Judges who would earn more than the minimum pension if pension for them is calculated according to the rates prescribed for the other Judges who have put in more than seven years of service. We would, therefore, be driven to strike down this discriminatory piece of legislation.

29. However, the legislation can be served by reading down paragraph 2 of Part I of the First Schedule to the Act and reading more than 'five years' in place of not less than 'seven years'. If this is done, there would be no discrimination. The Judges who served up five years would be benefited by the provisions of a minimum pension while the Judges who have put in more than five years would gain as a result of the reading down of the provisions.

30. The principle that a statute can be read down is well established. In the case of all *Saints High School, Hyderabad v. Govt. of Andhra Pradesh reported in* <sup>1</sup> the Supreme Court has said that –

"This Court has in several cases adopted the principle of leading down the provisions of the statute. The reading down of a provision of a statute puts into operation the principle that so far as is reasonably possible to do so, the legislation should be construed as being within its power. It has the principal effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power."

31. Similarly, in an earlier case, *Kedar Nath Singh v. State of Bihar*, <sup>2</sup> at p. 969. The Supreme Court observed that –

"It is well settled that if certain provisions, of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional the Court would lean in favor of the former construction".

32. In re Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act. 1938. (1941) FCR 12 : (AIR 1941 FC 72); (1941) 4 LJ 1 (FC), Chief Justice Gwyer, speaking for the Court, observed as follows :-

"No doubt if the Act does affect Agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word 'property' in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word 'property', as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decision of the Judicial Committee, were cited in the course of the argument, does not arise. The Court does not seek to divide the Act into two parts, viz., the part which the Legislature was competent, and the part which it was incompetent to enact. It holds that, on the true construction of the Act and especially of the word 'property' as used in it, no part of the Act was beyond the Legislature's powers".

33. Sri Deoki Nand Agarwala has also claimed pension at the rate of Rs. 3,430.00 per annum with effect from 1-11-1986 which is the pension prescribed

at present for the Judges who retired after coming into force of the High Court and Supreme Court Judges (Conditions of Service) Amendment Act, 1986. In Part-I of the First Schedule to the Act, Paragraph 11 was added as under :

11. In the case of Judge to whom this Part applies and who has retired on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) Amendment Act, 1986, the foregoing provisions of this Part shall have effect subject to the modifications that –

(i) for paragraph 2, the following paragraph shall be substituted, namely -

"2. Subject to the other provisions of this part, the pension payable to a Judge to whom this Part applies and who has completed not less than seven years of service for pension shall be -

(a) for service as Chief-Justice in any High Court, Rs. 4,500 per annum for each completed year of service;

(b) for service as any other Judge in any High Court, rupees 3,430 per annum for each completed year of service;

Provided that the pension shall in no case exceed Rs. 54,000/- per annum in the case of a Chief Justice and Rs. 48,000/- per annum in the case of any other Judge;"

(ii) to (iv) .....

(v) In paragraph 9, for the figures "6,000", the figures "15,750" shall be substituted ;

(iv) ....."

34. We find that there is no rational justification for treating retired Judges for the purposes of pension who retired before 1-11-1986, differently from these who retired after that date.

35. We are, therefore, of the opinion that the phrase "and who has retired on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) Amendment Act, 1986" should be omitted. They have to be omitted as the words are discriminatory. Once those words are omitted, all the Judges would have the benefit of paragraph 11 and paragraph 11 would be perfectly constitutional and enforceable.

36. In view of the 1986 amendment, it is clear that the legislature has assessed that a Judge is entitled to a pension of Rs. 3,430.00 per annum for each completed year of service. If a Judge serves for four years, he earns a pension of Rs. 13,720.00 calculated at the rate of Rs. 3,430.00 per annum. He, therefore, gains by the provision for minimum pension of Rs. 15,750.00. However, a Judge who serves 5 years or more but less than 7 years will get a pension of Rs. 15,750. We have, therefore, necessarily to read down not less than "seven years" as "more than four years" in paragraph 2 in order to uphold the validity of the provisions. We accordingly so read it down.

37. At this state, it is necessary to mention that payment of pension was governed by S.14 read with Part-I of the First. Schedule to the Act. Paragraphs 2, 3, 4, 5 and 9 of Part-I of the First Schedule to the Act, as originally stood, ran as follows :

"Subject to other provisions of this Part, the pension payable to a Judge to whom this Part applies and who has completed not less than seven years of service for pension shall be the basic pension specified in Paragraph 3, increased by the additional pension, if any to which he is entitled under paragraph No. 5.

3. The basic pension to which a Judge shall be entitled shall be -

(a) for the first seven completed years of service for pension, Rs. 5,000/-, per annum; and

(b) for each subsequent completed year of service a further sum of Rs. 1,000/- per annum;

Provided that basic pension shall in no case exceed Rs. 10,000/- per annum.

4. For the purpose of calculating additional pension, service as a Judge shall be classified as follows :-

Grade-I Service as Chief Justice in any High Court.

Grade-II Service as any other Judge in any High Court.

5 For each completed year of service for pension in either of the grades mentioned in paragraph 4, the Judge who is eligible for basic pension under this Part shall be entitled to additional pension specified in relation to that grade in the second column of the table annexed hereto;

Provided that the aggregate amount of his basic and additional pension shall not exceed the amount specified in the third column of the said Table in relation to the higher grade in which he has rendered service for not less than one completed year.

Se rvi ce	Additional pension per annum	Maximum aggregate pension per annum
Gr ad e - I	Rs. 740/-	Rs. 20,000 /-
Gr ad e - II	Rs. 470 /-	Rs. 16,000 /-

9. Where a Judge to whom this Part applies retires or has retired at any time after the 26th January, 1950, without being eligible for a pension under any other provision of this Part, then, notwithstanding anything contained in the foregoing provisions, a pension of Rs. 6000 per annum shall be payable to such a Judge :

Provided that nothing in this Paragraph shall apply -

- (a) to an additional Judge or acting Judge; or
- (b) to a Judge who at the time of his appointment is in receipt a pension other than a disability or wound pension in respect of any previous service under the Union or a State."

38. It will be seen that the minimum pension was governed by Paragraph 9. Paragraph 2 provided that a Judge on completion of seven years of service would earn a basic pension mentioned in Paragraph 3. Thereafter Paragraph 5 provided for an additional pension for each completed year of service.

39. The position changed materially with the coming into force of Act No. 35 of 1976.

which came into force on 1-10-1974. Paragraphs 3, 4 and were omitted and in Paragraph 9, the figure "8,400" was substituted in place of "6,000" and

Paragraph 2 was substituted and ran as follows :

"2. Subject to the other provisions of this Part, the pension payable to a Judge to whom this Part applies and who has completed not less than seven years of service for pension, shall be -

(a) for service as Chief Justice in any High Court, Rs. 2400 per annum;

(b) for service as any other Judge in any High Court, Rs. 1600 per annum;

Provided that the pension shall in no case exceed Rs. 28,000 per annum in the case of a Chief Justice and Rs. 22,400 per annum in the case of any other Judge."

40. When the 1986 Amendment Act came into force, Paragraph 11 was added to Part I of the First Schedule to the Act, which runs as follows :-

"11. In the case of Judge to whom this Part applies and who has retired on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) Amendment Act, 1986, the foregoing provisions of this Part shall have effect subject to the modifications that

(i) for Paragraph 2, the following paragraph shall be substituted, namely -

"2. Subject to the other provisions of this part, the pension payable to Judge to whom this Part applies and who has completed not less than seven years of service for pension shall be -

(a) for service as Chief Justice in any High Court, Rs. 4,500/- per annum for each completed year of service;

(b) for service as any other Judge in any High Court, Rs. 3,430 per annum for each completed year of service;

Provided that the pension shall in no case exceed Rs. 54,000 per annum in the case of a Chief Justice and Rs. 48,000 per annum in the case of any other Judge."

.....

(v) in Paragraph 9, for the figures "6,000" the figures "15,750" shall be substituted;"

41. Sri D.N. Agarwala retired in 1983, when he was governed by the provisions of paragraph 2 of Part 1 of the First Schedule to the Act, as it was in 1983, in which it was provided that a Chief Justice would get a pension of Rs. 2400-00

per annum and for service as any other Judge in any High Court, Rs. 1600-00 per annum. There was no provision, that a part of a year which was not a complete year of service, would not qualify for calculation of pension prescribed to a Judge. We, therefore, find that the services rendered by Sri Deoki Nandan Agarwala beyond five years had to be taken into account while calculating his pension.

42. We are re-inforced by the fact that the phrase "for each completed year of service" which were to be found in Paragraph 3 in the original Act and paragraph 2 as it now stands after the 1986 Amendment Act, whereas the same was missing in Paragraph 2 after the 1976 Amendment Act.

43. A meaning must be given to the change in the language and the absence of the phrase 'for each completed year of service' indicates clearly that for the last year of service of a Judge for the purposes of pension, it is not necessary that it should be a complete year of service. After the 1976 Amendment Act. the pension will be payable for a whole year even if the whole year has not been completed.

44. The prayer made by Sri Deoki Nandan Agarwala for being given the benefit of S.16 of the Act by the President making an order by adding to his length of service for the purposes of pension one month 13 days, in the view we have taken, is redundant. But we would, nevertheless, as a matter of precaution, grant the prayer.

45. Immediately it strikes us that the words 'for each completed year of service' have been added in both these clauses, which were not to be found earlier. This is an addition, which, to our mind, prima facie, is in violation of the provisions of the proviso to Art.221(2) of the Constitution of India, which provides 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 qua Judges who are entitled to a pension under paragraph 2 of Part I of the First Schedule to the Act. This question, however, does not directly arise in the case of Sri Agarwala, who retired on 4-10-1983.

46. Another aspect of the matter which strikes us though it does not directly

arise in the case in hand, is that the pension of the Judges of High Courts who have put in 14 years of service under the 1976 Amendment Act, was fixed at 60 per cent of the basic salary and pension for less than 14 years of service was fixed on a proportionate basis. Under the 1986 amendment the pension had been fixed at 50 per cent of the basic salary for the Judges who put in 14 years of service and the pension of Judges who have put in less than 14 years of service, has also been fixed on the basis that maximum is 50 per cent of the basic salary and their pension has been proportionately reduced by the number of years by which the service has been less than 14 years. This again may violate the provisions of the proviso to Art.221(2) of the Constitution of India as the amendment Act of 1986 while raising the amount of pension, has reduced the pension as a proportion of the salary drawn.

47. This of course, would apply to Judges who were in service when the 1976 Amendment came into force.

48. The claim of Sri Agarwala to a pension under the 1986 amendment cannot be denied on the ground that he retired in the year 1983, i.e. before 1-11-1986, when the 1986 Amendment Act came into force.

49. In this connection see the decision of this Court in the case of *Bidhubhusan Malik, v. Union of India reported in* <sup>3</sup> What had happened was that the Judges including the Chief Justice who retired prior to 1-10-1974 were not entitled to the enhanced pension provided by the Act No. 35 of 1976. Aggrieved some retired Judges filed a writ petition. This Court following the decision of the Supreme Court in the case of *D.S. Nakara v. Union of India reported in* <sup>4</sup> held that they were entitled to the benefit of the enhanced pension under the 1976 amendment. This Court read down the provisions of paragraph 10 of Part I of the First Schedule to the Act and held that the words "and who has retired on or after the 1st day of October, 1974" are unconstitutional and struck them down. Thereafter it was observed –

"Omitting the unconstitutional part it is declared that the Judges (including the Chief Justice) of the High Court are entitled to pension as computed under the High Court Judges (Conditions of Service) Act, 1954 (as amended) irrespective of the date of retirement. The date October 1,

1974, continues to be relevant as being one from which the liberalised pension became operative under the High Court Judges (Conditions of Service) (Amendment) Act, 1976, irrespective of the date of retirement and hence there is no question of payment of arrears of pension for the period preceding October 1, 1974."

50. The Union of India went in appeal before the Supreme Court. The decision was proved in the case of the *Union of India v. Bidhubhushan Malik*,<sup>5</sup> The special leave petition was dismissed for the reasons mentioned by the Judges of the Allahabad High Court.

51. We now come to the family pension which is governed by S.17-A of the Act. S.17-A(1) runs as follows :

" 17-A. Family Pension and Gratuities; (1) Where a Judge who, being in service on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) amendment Act, 1986, dies, whether before or after retirement in circumstances to which S.17 does not apply, family pension calculated at the rate of fifty per cent of the pension admissible to him on the date of his death shall be payable to the person or persons entitled thereto and the amount so payable shall be paid from the day following the date of death of the Judge for a period of seven years or for a period up to the date on which the Judge would have attained the age of sixty-five years, had he survived, whichever is earlier, and thereafter at the rate of half of the family pension so admissible.

Explanation : For the purposes of determining the person or persons entitled to family pension under this Sub-Section :

(i) In relation to a Judge who elects or is eligible to receive pension under Part I of the First Schedule, the rules, notifications and orders for the time being in force with regard to the person or persons entitled to family pension in relation to an officer of the Central Civil Services, Group 'A', shall apply;

(ii) in relation to a Judge who elects to receive pension under Part II or Part III of the First Schedule, the ordinary rules of his service if he had not been appointed a Judge with respect to the person or persons entitled to family pension shall apply and his services as a Judge being treated as

service therein."

52. The opening part of the Section which confines the benefit of S.17-A to the Judges who die on or after the commencement of the High Court and Supreme Court Judges (Conditions of Service) (Amendment) Act, 1986, is clearly unconstitutional. For the given earlier, the words "being in service on to after the commencement of the High Court and Supreme Court Judges (Conditions of Service) (Amendment) Act, 1986" have to read down and omitted and family pension to be paid on the basis that those words did not exist in the statute.

53. In the matter relating to a claim by. Mr. R.P. Khosla, a former Judge of the Punjab and Haryana High Court, for leave encashment, which was denied to him on the ground that he had retired in March, 1967. The plea of the Union of India was that the facility of leave encashment was extended to the Judges with effect from 30-9-1977 and the Judges who had retired prior to 30-9-1977 were not entitled to leave encashment. A learned single Judge of the Punjab and Haryana High Court in the case of *R.P. Khosla v. Union of India*,<sup>6</sup> following the decision of the Supreme Court in the case of *D.S. Nakara v. Union of India*,<sup>7</sup> held that Mr. R.P. Khosla was entitled to the benefits. The reason given by the Judge was that for facility of retiring benefit like pension, retired Judges form one homogeneous class. They cannot be classified in two categories on the basis of a fortuitous circumstance like the date of retirement. The learned Judge went on to observe –

"The benefit provided under R.208 of the Leave Rules cannot rationally and legitimately be confined only to those Judges who retired after 20th Sept., 1977. This benefit cannot be withheld from those Judges who happened to retire prior to this date. Such a treatment will attract the frown of Art.14 of the Constitution of India which does not permit any invidious discrimination amongst persons similarly situated and belonging to the same class."

54. The learned Judge relied upon the following passage in the case of D. S.Nakara (supra) :

"That is the end of the journey. With the expanding horizons of socio-

economic justice, the Socialist Republic and Welfare State which we Endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criteria; being in service retiring subsequent to the specified date' for being eligible for the liberalized pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved, by grant of liberalized pension and the eligibility criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalized pension scheme of 'being in service on the specified date and retiring subsequent to that date' in impugned memoranda, exhibits P1, and P2, violates Art.14 and is unconstitutional and is struck down."

55. If benefits like leave encashment are available to the Judges who had retired earlier to coming into force of Rule 20-B of the Leave Rules, there is no reason why the heirs of a Judge can be denied family pension on the ground that they had died prior to coming into force of the Amendment Act, 1986.

56. We are, therefore, clear that the wife of Sri Deoki Nandan Agarwal, a will be entitled to receive the family pension, in case of death of Sri Agarwala, under the provisions of S.17A of the Act on the basis of the pension to be determined under the orders of this Court of date.

57. In the result, the writ petition succeeds and is allowed. The respondent is directed by a writ of mandamus to –

- (i) add one month and 13 days to the total length of service rendered by Sri Deoki Nandan Agarwala as a Judge of Allahabad High Court for the purposes of computing the pension under S.16 of the High Court Judge (Conditions of Service) Act, 1954;
- (ii) grant pension to Sri Deoki Nandan Agarwala at the rate of Rs. 9,600-00 per annum from 4-10-1983 to 31-10-1986 and at the rate of Rs. 20,58000 per annum from 1-11-1986 onwards, plus the usual dearness

allowance admissible to him from time to time treating him that he had put in six years of service as Judge :

(iii) determine the family pension payable under S.17A of the High Court Judges (Conditions of Service) Act, 1954, admissible to the wife of Sri Deoki Nandan Agarwala in the event of his death treating the pension of Sri Deoki nandan Agarwala at Rs. 20,580-00 as of date;

(iv) pay Sri Deoki Nandan Agarwala the difference between the pension which he had been paid and the enhanced pension to which he is entitled under the terms of this order within two months of the presentation of a certified copy of this order before the Secretary the Government of India, Ministry of Law and Justice, Department of Justice, North Block, New Delhi; and

(v) re-determine the death-cum-retirement gratuity payable to Sri Deoki Nandan Agarwal treating, his pension as being Rs. 9,600 per annum on the date of his retirement and, if necessary to re-calculate the pension equivalent to death cum-retirement gratuity.

58. The petitioner is entitled to his costs.

59. A copy of this judgment be supplied to the parties on payment of usual charges within 48 hours.

Petition allowed.

Cases Referred.

1. AIR 1980 SC 1042 at p. 1084
2. AIR 1962 SC 955
3. AIR 1983 all 209
4. AIR 1983 SC 130
5. AIR 1984 SC 1177
6. (1988) 19 Reports (P and H) 223
7. AIR 1983 SC 130