

(2003) 06 GAU CK 0007
In the Gauhati High Court
Case No : Writ Petition (C) No. 2729 of 2000

Gitashree Baishya

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 26-06-2003

Acts Referred:

Constitution of India, 1950 — Article 111, 146, 146(2), 226, 229

Citation : (2004) 1 GLT 87

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : G.N. Sahewalla, A.K. Goswami, P. Bora and Md. Aslam, for the Appellant; K.P. Pathak and K.C. Mahanta, for the Respondent

Judgement

I.A. Ansari, J.—In a democratic set up, it is good for a citizen to be conscious of his rights, but at the same time, it is useful to be conscious of the limitations of one's own rights. Similarly, each institution, functioning as an organ of the State, must respect the position and powers of the others in the Constitutional scheme of things and before an institution exercises its powers, it must also be conscious of the limitations imposed on such powers. If an institution exercises its powers without being conscious of the limitations imposed on its powers and without being aware of the constitutional position of the others, an unwarranted collision is bound to take place. Such a collision course of institutions is catastrophic for the State as a whole and should, therefore, be avoided under all circumstances.

2. With the help of the present application made under Article 226 of the Constitution of India, the Petitioner has sought for issuance of appropriate writ/writs commanding the Respondents to upgrade the pay scale of the Petitioner, who is an Assistant Librarian of the Gauhati High Court, with retrospective effect, as proposed by letter, dated 09.01.1996, issued by Respondent No. 3, namely, the Gauhati High Court represented by its Registrar (Administration) and to set aside the impugned letter, dated 09.02.2000 (Annexure-III to the writ petition)

issued by Respondent No. 1, namely, Secretary to the Government of Assam, Judicial Department, conveying State government's inability to agree to the proposal for the up-gradation of pay scale of the Assistant Librarian in the Gauhati High Court establishment.

3. In a nut-shell, the case of the Petitioner runs as follows:

As per the Gauhati High Court Services (Appointment, Conditions of Service and Conduct) Rules 1967, the post of Assistant Librarian is a Class III non-gazetted post in the Ministerial Establishment and there is only one post. The Petitioner, who is an MA in English and LLB having diploma in Library Science, has been serving as Assistant Librarian in the pay scale of Rs. 1475-3825 (Pre-revised) per month at the Principal Seat of the Gauhati High Court. This is a basic scale of pay of the UDA of the High Court and the qualification required for the UDA in the High Court is only graduation, but while the UD As of the High Court have promotional avenues, the Asstt. librarian does not have any such avenues for promotion save and except one i.e. the post of Librarian, but even the post of librarian is not a promotional post as the same can be filled up by direct recruitment too. The Registrar (Administration), Gauhati High Court, wrote to the Secretary to the Govt. of Assam, Judicial Department, stating to the effect that since the Assistant Librarian required additional qualification, the pay scale of Assistant Librarian should be up-graded to Rs. 2215-4075 per month (Pre-revised) i.e. the pay scale equivalent to the pay scale of Superintendent in the High Court. On receipt of this letter, Respondent No. 1 sought for some clarifications from the Respondent No. 3. The clarifications were accordingly provided assigning reasons for the proposal of up-gradation of the pay scale made by the High Court, whereupon the Respondent No. 1, vide its letter, dated 04.11.1996, expressed Government's inability to accede to the High Court's proposal for up-gradation. By letter, dated 26.02.1997, Respondent No. 3, once again, requested Respondent No. 1 requesting him to reconsider the proposal for up-gradation. By letter dated 01.08.1997, request for re-consideration was, again, turned down by Respondent No. 1 on the ground that the basic scale of the post of Assistant Librarian had been revised and upgraded as per Assam Pay Commission's recommendations in 1998 and the High Court was requested to place the matter before the Pay Commission as and when such Commission was constituted. The Petitioner instituted WP(C) No. 1124/99 challenging the refusal of the Government to give effect to the said proposal of the High Court. By judgment and order, dated 21.07.1999, passed in WP(C) No. 1124/99 aforementioned, the High Court disposed of the writ petition setting aside and quashing the letters, dated 04.11.1996 and 01.08.1997, and remanded the matter to the authorities concerned to reconsider the entire matter in the back ground of the observations made by the Court. The Respondent No. 1, vide letter, dated 09.02.2000, again, expressed their inability to accede to the proposal made by the High Court on the ground, inter alia, that (i) the post of the Librarian in the State Govt. carries a lesser scale than the scale of the Assistant Librarian of the High Court, (ii) to be a UDA from LDA, it takes several

years, but the Asstt. Librarian, because of additional qualification, gets higher scale equivalent to a UDA, (iii) to be promoted to the post of Superintendent, it takes about 20 years for LDA, but the Assistant Librarian's post is a directly recruited post and as such, the proposal for upgradation of pay scale is unacceptable, (iv) the nature of duties of the Asstt. librarian is different from that of the Superintendent and (v) there are numerous other posts in the State Government, where promotional avenues are bleak. The writ Petitioner has, now, challenged the validity of the letter, dated 09.02.2000, aforementioned.

4. The Respondent No. 1, namely, Secretary to the Government of Assam, Judicial Department has contested this case by filing affidavit-in-opposition, the case of the contesting Respondent being, briefly stated, thus. No cogent ground existed for upgradation of pay scale of the post of Assistant Librarian in the High Court establishment and that the Government had to decline the proposal of the High Court vide their letter, dated 04.11.1996. The duties and responsibilities of an Assistant Librarian in a Government department are not lesser in nature, than the duties and responsibilities of the Assistant Librarian of the High Court, but the Assistant Librarian in a Government department receives lesser amount of salary than that of the Assistant Librarian of the High Court. There is, therefore, no justification in giving higher pay scale to the Assistant Librarian of the High Court. The post of the Librarians in the State Government departments carries pay scale of Rs. 1375-3375, whereas the post of Assistant Librarian in the High Court, which is a post lower in designation, carries higher pay scale of Rs. 1475-3825. The High Court is entitled to create promotional avenues for Assistant Librarian. The Government re-examined the matter in the light of the directions contained in the judgment and order, dated 21.07.1999, passed in WP(C) No. 1124/99 and, after careful consideration of the same, had to express its inability to agree to the proposal of the High Court.

5. As far as the Respondent No. 2, namely, Secretary to the Government of Assam, Finance Department, is concerned, he has not contested this case.

6. To the affidavit-in-opposition, filed by the Respondent No. 1, the Petitioner has reacted by asserting in her affidavit-in-reply that the job requirements of Assistant Librarian in the High Court are much more demanding. The duties and responsibilities of Assistant Librarian are, in fact, higher than that of the superintendent. The proposal for up-gradation of pay scale was forwarded to the Government on account of the fact that no promotional avenues exist for the post of Assistant librarian. The refusal of the Government to accede to the proposal of the High Court is arbitrary and suffers from discrimination. The refusal of the Government has adversely affected the powers of the Chief Justice under Article 229 of the Constitution of India. The impugned letter, therefore, needs to be set aside and quashed and writ of mandamus needs to be issued to the Respondent No. 1 and 2 for up-gradation of the pay scale of Assistant Librarian with retrospective effect.

7. I have perused the materials on record. I have heard Mr. G.N. Sahewalla,

learned Senior Counsel appearing on behalf of the Petitioner, and Mr. K.C. Mahanta, learned Government Advocate, appearing on behalf of the Respondent Nos. 1 and 2. I have also heard Mr. K.P. Pathak, learned Senior Counsel, appearing on the behalf of Respondent No. 3, namely, the Gauhati High Court, represented by its Registrar (Administration).

8. Presenting the case on behalf of the Petitioner, Mr. Sahewalla has submitted that at present, the pay scale of the UDA of the Gauhati High Court is at par with the pay scale of Assistant Librarian, but while the qualification required for UDA is merely a degree in any discipline and there are avenues for promotion a UDA, the post of the Assistant Librarian requires graduation in any discipline with post graduation degree in Library and Information Science and, thus, though the Assistant Librarian requires higher qualification, there is no avenue for promotion of Assistant Librarian. These differences are, according to Mr. Sahewalla, in themselves enough to up-grade the pay scale of the Assistant Librarian if justice is to be done to the person, who comes to hold the post of Assistant Librarian. It was from this angle, it is pointed out, by Mr. Sahewalla that the proposal was given by the Respondent No. 3, with the approval of the Chief Justice of the High Court, to the Respondent No. 1 for up-grading the scale of pay of the post of Assistant Librarian, but the Respondent No. 1 expressed their inability to agree to the proposal vide their letter, dated 4.11.96. It is also pointed out by Mr. Sahewalla that thereafter, another proposal was submitted by the Respondent No. 3 on 26.2.97, but this proposal was turned down by the Respondent No. 1 and left with no alternative the Petitioner instituted W.P.(C) No. 1124 of 1999 and this Court vide its judgment and order, dated 21.7.99, allowed the Writ petition and directed the Respondents to consider the entire matter in the back ground of the fact-situation of the case and the position of law reflected from the judgment aforementioned. The Respondent No. 1, however, on extraneous considerations, as usual, submits Mr. Sahewalla, regretted their inability to agree to the proposal.

9. Drawing attention of this Court to the Respondent No. 1's letter, dated 09.02.2000, (Annexure 3 to the writ petition) Mr. Sahewalla has submitted that the Respondent No. 1 has drawn a comparison between the pay scale of the Librarian of the State Government with that of the Assistant Librarian of the High Court, though the duties and functions of the Assistant Librarian are, according to Mr. Sahewalla, much more onerous. This apart, submits Mr. Sahewalla, it has been pointed out by Respondent No. 1 while conveying their regrets and inability to the Respondent No. 3, that a graduate, who enters as LDA becomes a UDA after about 20 or 25 years of service on promotion, whereas an Assistant Librarian is directly recruited to the post. On such a unreasonable comparisons and unjust reasons, the Respondent Nos. 1 and 2 have, contends Mr. Sahewalla, arbitrarily declined to agree to the proposal of the High Court. It is, therefore, a fit case, according to Mr. Sahewalla, where an appropriate Writ deserves to be issued commanding the Respondent Nos. 1 and 2 to accede to the proposal of the High Court for up-gradation of the pay scale of the post of Assistant Librarian.

10. Appearing on behalf of the Respondent No. 3, Mr. K.P. Pathak has submitted that the reasons assigned by Respondent No. 1 in conveying their regrets to agree to the proposal of the High Court are, undoubtedly, most unreasonable. It has been pointed out by Mr. K.P. Pathak that Article 146(2) of the Constitution of India relates to the framing of service conditions for employees of the Supreme Court and Article 229(2) relates to the framing of service conditions of High Courts and that the language of both the Articles being same, decision on Article 146(2) can be safely relied upon for the purpose of interpreting the scope and ambit of Article 229(2).

11. Referring to the decisions in *State of Andhra Pradesh and Another Vs. T. Gopalakrishnan Murthi and Others, Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another, and C.G. Govindan v. State of Gujrat*, reported in (1998) 7 SCC 265, Mr. K.P. Pathak has candidly submitted that there was an error apparent on the face of record on the part of the High Court administration too in sending the proposal to the Government.

12. In the case at hand, points out Mr. Pathak, the Registry of the High Court put up the proposal for up-gradation of the pay scale, in question, before the Chief Justice for approval and on receiving the approval, as had been sought for, the letter, dated 09.01.96 was sent to the Government with a request to up-grade the pay scale as had been proposed. The correct procedure of the Registry should have been, further points out by Mr. Pathak, that a proposal for amendment of the High Court Rules relating to the pay scale of Assistant Librarian ought to have been drafted by the Registry and with the approval of the draft by the Chief Justice, the proposal should have been sent to the Governor of Assam and in accordance with the advice tendered by the Government, the Governor's reaction to the proposal ought to have been conveyed to the High Court by the Governor's Secretariat. This apart, submits Mr. Pathak, in the light of the decisions of the Apex Court in *C.G. Govindan (Supra)* and *Supreme Court Welfare Employees Asson. (Supra)*, the Government has to show full respect to the views of the Chief Justice and cannot deal with the High Court in the manner it may choose to deal with other governmental departments.

13. In the present case, contends Mr. Pathak, the Government appears to have proceeded in the matter, in a routine manner as if it was considering proposal for upgradation of the pay scale made by any of its other departments without realizing that it was considering a proposal made by the Chief Justice under Article 229 and that the Government was duty bound to show full respect to the views of the Chief Justice and not to shirk its responsibility on the pretext that the matter would be looked into, when the new pay Commission is constituted. In the case of a proposal for up gradation of pay scale made by the Chief Justice, in terms of Article 229(2), in respect of any category of the employees of the High Court, submits Mr. Pathak, Pay Commission, which is ordinarily constituted by the Government for its employees including the employees engaged in subordinate judiciary, cannot be resorted to Mr. Pathak, therefore, submits that

appropriate directions may be issued to the Registry as well as to the Government to look into the grievances of the Petitioner and do the needful.

14. As far as Mr. K.C. Mahanta is concerned, he has candidly submitted that though the economic condition of the State Government does not permit it to agree to the proposal for up-gradation of pay scale made in the present case, yet it was, indeed, wrong on the part of the State Government to have dealt with the proposal of the High Court in a routine manner and in regretting its inability to agree to the proposal without taking into consideration the importance and significance of the powers of the Chief Justice under Article 229(2) referred to above.

15. Before coming to the merit of the submissions made before me on behalf of the parties, what is of utmost importance to note is that the Constitution of India makes a definite distinction between officers and servants of a High Court, on the one hand and officers and staff of the Courts and their establishments subordinate to the High Court, on the other. It is Article 229 of the Constitution, which governs the conditions of service of the officers and servants of High Courts. It is, therefore, apposite to refer to and quote hereinbelow Article 229, which reads as under:

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

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

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

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that fund.

(Emphasis is supplied)

16. Clause (1) of Article 229 makes it clear that in matters of appointments of officers and servants of a High Court, the power is vested in the Chief Justice of

the High Court or in such other Judge or officer of the Court as the Chief Justice may direct. Clause (2) of Article 229 makes it clear that if there is a law made by the Legislature of the State, then, subject to such law and, otherwise, without it, the Chief Justice or some other Judge or officer of the Court authorized by the Chief Justice is empowered to make rules laying down the conditions of service of the High Court staff. If, however, the Rules made under Clause (2) relate to salaries, allowances, leave or pension, then, the same would require approval of the Governor of the State, i.e. of the State Government. This embargo has been placed on the powers of the Chief Justice on account of the fact that salaries, allowances, leave and pension involve the questions of finance. What is, however, of paramount importance to note is that ordinarily and generally, approval to the Rules made by the Chief Justice relating to even salaries, allowances, leave and pension should be accorded. This position of law becomes amply clear from what has been held and observed by the Apex Court in the case of State of Andhra Pradesh and Another Vs. T. Gopalakrishnan Murthi and Others, The relevant observations read as follows:

If there is a law made by the Legislature of the State then subject to that law, otherwise without it, the Chief Justice or some other Judge or officer of the Court authorized by the Chief Justice is empowered to make rules laying down the conditions of service of the High Court Staff. But if the Rules made under Clause (2) relate to salaries, allowances, or pensions then since in them is involved the question of finance the framing of the rules under Clause (2) requires the approval of the Governor-that means the State Government. One should expect in the fitness of the things and in view of the spirit of Article 229 that ordinarily and generally, the approval should be accorded.

(Emphasis added)

17. What is also of immense importance to note is that the scope and ambit of the powers of the Chief Justice of a High Court under Article 229 in respect of High Court staff is similar to the that of the powers of the Chief Justice of India under Article 146 of the Constitution in respect of the officers and staff of the Supreme Court. For the sake of brevity, Article 146 of the Constitution is also quoted hereinbelow:

146.- Officers and servants and the expenses of the Supreme Court- (1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or Officer of the Court as he may direct;

Provided that the President may by rule required that in such case as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission.

(2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be

prescribed by rules made by the Chief Justice of India or by some other Judge or Officers of the Court authorized by the Chief Justice of India to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President.

(3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund.

18. That the nature of powers of the Chief Justice of a High Court under Article 229 stand on the same footings as the powers of the Chief Justice of India under Article 146 is clear from the following observations made by the Apex Court in the case of C.G. Govindan Vs. State of Gujarat and Others,

Just as the Chief Justice of India is the Supreme Authority in the matter of Supreme Court Establishment including its office staff and officers, so also the Chief Justice of the High Court is the sole authority in these matters and no other judge or officer can legally usurp those administrative functions or power.

(Emphasis is added)

19. While dealing with the Chief Justice's powers with regard to making of Rules relating to salaries, allowances, leave and pension, the Supreme Court in Supreme Court Employees' Welfare Association (Supra) observed thus:

Under Article 146(2), the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by the rules made by the Chief Justice of India or by some other Judge or officer of the Court authorized by the Chief Justice of India to make rules for the purpose. This is, however, subject to the provisions of any law that may be made by Parliament. It is apparent from Article 146(2) that it is primarily the responsibility of the Parliament to lay down the conditions of service of the officers and servants of the Supreme Court, but so long as parliament does not lay down such conditions of service, the Chief Justice of India or some other Judge or officer of the Court authorized by the Chief Justice of India is empowered to make rules for the purpose. The legislative function of Parliament has been delegated to the Chief Justice of India by Article 146(2). It is not disputed that the function of the Chief Justice of India or the Judge or the officer of the Court authorized by him in framing rules laying down the conditions of service, is legislative in nature. The conditions of service that may be prescribed by the rules framed by the Chief Justice of India under Article 146(2) will also necessarily include salary, allowance, leave and pensions of the officers and servants of the Supreme Court. The proviso to Article 146(2) a restriction on the power of the Chief Justice of India by providing that the rules made under Article 146(2) shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the

President of India. Prima facie, therefore, the conditions of service of the employees of the Supreme Court that are laid down by the Chief Justice of India by framing the rules will be final and conclusive, except that with regard to salaries, allowance leave or pensions the approval of the President of India is required. In other words, if the President of India does not approve of the salaries, allowances, leave or pensions, it will not have any effect. The reason for requiring the approval of the President of India regarding salaries allowances, leave or pensions is the involvement of the financial liability of the government.

(Emphasis is supplied)

20. With regard to the above, I may also refer to C.G. Gobindan (supra), wherein the Apex Court has observed thus:

Since, under the Constitution, the Chief Justice has also power to make rules regulating the conditions of service of the officers and servants of the High Court, it is obvious that he can also prescribe the scale of salary payable to the particular post. This would also include the power to revise the scale of pay. Since, such a rule would involve finances, it has been provided in the Constitution that it will require the approval of the governor, which in other words, means the State Government. This Court in State of A.P.V. T. Gopalakrishnan Murthy had expressed the hope that "one should accept in the fitness of themes and in view of the spirit of Article 229 that the approval, ordinarily and generally, would be accorded". This was reiterated by this Court in Supreme Court's Employees Welfare Assn. v. Union of India. We again reiterate the hope and feel that once the Chief Justice, in the interest of High Court administration, has taken a progressive step specially to ameliorate the service conditions of the officers and staff working under him, the State Government would hardly raise any objection to the sanction of creation of post or fixation of salary payable for the post or the recommendation for revision of scale of pay if the scale of pay of the equivalent post in the Government has been revised.

(Emphasis is added)

21. From a combined reading of the observations of the Apex Court in T Gopalakrishnan (Supra), Supreme Court Employees Welfare Association (Supra) and C.G. Gobindan (Supra), it becomes crystal clear that ordinarily and generally, the Rules framed by the Chief Justice of a High Court under Article 229(2) should receive Governor's approval and the powers to prescribe pay scale under Article 229(2) include the powers to prescribe the revised pay scale.

22. From a close reading of Article 229, it is also clear that the conditions of service of the employees of a High Court, as laid down by the Chief Justice of the High Court by framing Rules, will be final and conclusive except with regard to salaries, allowances, leave and pensions inasmuch as Rules, relating to these aspects of the matter require approval of the governor. This power is legislative in nature.

23. It is apparent that the Chief Justice of India and the Chief Justice of the High Court have been placed at a higher level with regard to the framing of rules containing the conditions of service.

24. It is also apparent that even when such Rules framed by the Chief Justice to salaries, allowances, leave or pensions, it should be looked upon with respect by the State Government and unless there is very good and substantive reasons for not granting approval, the approval shall, generally, be always granted. In fact, if the Governor of a State, acting on the advice of the Council of Ministers, of the State, is of the view that approval to the Rules, so framed, which involve financial implications, cannot be granted, he cannot straightway refuse to grant such approval. Far from doing so, there must be exchange of views and thoughts between the Governor and the Chief Justice of the High Court. This position of law is clear from the following observations of the Apex Court in the case of Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another,

So far as the Supreme Court and the High Courts are concerned, the Chief Justice of India and the Chief Justice of the concerned High Court, are empowered to frame rules subject" to this that when the rules are framed by the Chief Justice of India or by the Chief Justice of the High Court relating to salaries, allowances, leave or pensions, the approval of the President of India or the Governor, as the case may be, is required. It is apparent that the Chief Justice of India and the Chief Justice of the High Court have been placed at a higher level in regard to the framing of rules containing the conditions of service. It is true that the President of India cannot be compelled to grant approval to the rules framed by the Chief Justice of India relating to salaries allowances, leave or pensions, but it is equally true that when such rules have been framed by a very high dignitary of the State, it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted. If the President of India is of the view that the approval cannot be granted, he cannot straightway refuse to grant such approve, but before doing so, there must be exchange of thoughts between the President of India and the Chief Justice of India.

(Emphasis is supplied)

25. It is also imperative to note that because of the nature of powers vested in the Chief Justice of the High Court under Article 229, the recommendations of the Finance Commission stand, so far as the same relate to staff of the High Court, on a footing different from the recommendations of such finance Commission in respect of other employees of the State Government including the officers and servants of the Courts and their establishments subordinate to the High Court. Though the State Government has the power to agree and, for cogent reasons, not to agree with the recommendations of the Finance Commission, the State Government must obtain the views of the Chief Justice of the High Court on the recommendations of the Finance Commission, which relate

to the financial aspects of the High Court staff. In other words, unlike the State Government's powers to act upon the recommendations of the Finance Commission in respect of its employees including the employees of the Courts subordinate to the High Court, the fact remains that so far as such recommendations relate to High Court staff, it is in fitness of things that the State Government shall obtain the views of the Chief Justice on such recommendations and the views expressed by the Chief Justice in such matters should be treated with utmost respect and shall not be dealt with in a routine manner.

26. In the present case, the letter, dated 01.08.97, sent by the Govt. reveals that the Govt. was of the view that the pay scale of the post of Asstt. Librarian has been revised and upgraded as per the Assam Pay Commission's recommendations in 1988 and the High Court should place the matter before the Pay Commission if, in future, such a Pay Commission is constituted. In this regard, as already indicated above, it needs to be emphasized that there is nothing in the record to show that the views of the Chief Justice were ever obtained by the Govt. in 1988 before accepting the recommendations of the Pay Commission, on the question of various pay scales relating to the High Court employees. Ideally, the recommendations of the Pay Commission, which relate to pay scales of the High Court employees shall be submitted to the Chief Justice of the High Court for consideration and it is only after obtaining the views of the Chief Justice in such a matter that final decision should be taken by the Government on the aspect of the pay scale of the High Court employees. In the case at hand, since the State Govt. revised the pay scales of Asstt. Librarian in 1988 without obtaining the views of the Chief Justice, the mere fact that the Govt. has upgraded the pay scale as per the recommendations of the pay Commission in 1988 cannot be, in the light of the scheme of the Constitution a ground for not agreeing with the views of the Chief Justice. This aspect of the matter becomes clear, when the following observations of the Apex Court in the case of Supreme Court Employees' Welfare Association (supra) are taken note of:

The regulation of the conditions of service of the Supreme Court employees is thus the constitutional responsibility and power of the Chief Justice of India, subject of course, to the two conditions postulated in Clause (2) of Article 146. The Pay Commission was in the past not concerned with this category of employees because of the special position of the latter under the Constitution. These employees, however, came to be included within the purview of the Pay Commission on account of the recommendations of the Committee of Judges. The Judges had intended the Pay Commission to study all aspects of the matter in depth and make their recommendations to the Chief Justice of India to aid him in the discharge of his constitutional function under Clause (2) of Article 146. In this respect the Chief Justice must necessarily act on the basis of data made available to him by persons he might in that regard appoint, or, as has been done in the present case, by the Pay Commission themselves to whom a reference was made by the government pursuant to the recommendations of the Judges"

Committee. The cardinal function of the Pay Commission, while duly acting in connection with the employees of the Supreme Court, is to render effective assistance to the Chief Justice of India to discharge his responsibility of formulating rules under Article 146(2). This is the first step towards the final adoption of the rules governing the conditions of service in relation to salaries, allowances, etc. It is only by formulating specific rules in that respect can the President (that means the Government of India) exercise his mind over the question and approve or disapprove the rules. The approval of the President follows the making of the rules, and unless and until rules are made by the Chief Justice of India specifically in regard to salaries, allowances, etc., the President, acting as a constitutional authority, does not and cannot exercise the power of granting or refusing approval. Similar provisions are contained in the Constitution in relation to the High Court (see *malitiy but are prescription required to be strictly complied with to insulate the judiciary from undue executive interference with a view to according it, subject to any law made by the competent legislature, a special position of comparative independence in accordance with the fundamental constitutional scheme of maintaining a harmonious balance between the three organs of State. (See M. Gurumoorthy v. Accountant General Assam and Nagaland 26).*

(Emphasis is added)

27. I may also pause here to mention that a careful reading of Article 229(2) shows that though it is, primarily, responsibility of the State Legislature to lay down the conditions of service of the officers and servants of the High Court, yet so long as the State Government does not lay down such conditions of service, the Chief Justice has the power to make Rules for the purpose. The legislative function of the State has, thus, been delegated to the Chief Justice. This power of the Chief Justice is legislative in nature. Though the Rules, so framed, by the Chief Justice is a piece of subordinate legislation and requires the approval of the Governor, the fact remains that such approval is not akin to the powers of the Governor to give assent to the Bill passed by the State Legislature.

It is common for Parliament to confer by Act on ministers and other executive bodies the power to make general rules with the force of law - to legislate, Parliament is said to delegate to such bodies the power to legislate. Thus the phrase delegated legislation covers every exercise of a power to legislate conferred by Act of Parliament. The phrase is not a term of art, it is not a technical term, it has no statutory definition. To decide whether the exercise of a power constitutes "delegated legislation" we have to ask whether it is a delegated power that is being exercised and whether its exercise constitutes legislation. Clearly an Act, Public or private, is not delegated; it is primary legislation. When a minister or other authority is given power by Act of Parliament to make rules, regulations etc. the power has been delegated to him, and insofar as the rules made by that authority are legislative in their nature, they comprise delegated legislation. If the contents of the document (made

under delegated powers) are not legislative the document will obviously not be a piece of (delegated) legislation. Ministers and others are in fact given power to make orders, give directions, issue approval and notices etc. which one would not, because of their lack of generality, classify as legislative but rather as administrative.

28. In *Supreme Court Employees' Welfare Association (supra)*, it was contended by the learned Attorney General of India that the power of the President to grant or refuse to grant approval to the Rules framed by the Chief Justice of India regarding salaries, allowances, leave or pensions of the staff of the Supreme Court establishment is the same as the power of the President under Article 111 to give assent to, or withhold the assent from, a Bill passed by the Houses of Parliament and consequently, his actions in that regard are beyond judicial review. This contention was not acceded to by the Supreme Court and it was held therein that while under Article 111, the President exercises the power as a part of the Legislature and not as a delegatee, but he acts as a delegatee, when he acts under the proviso to Article 146(2). Since the power of the Chief Justice of a High Court is co-extensive with the power of the Chief Justice of India under Article 146(2), it follows, as a corollary, that the power of the Governor to give approval to such Rules is same as that of the power of the President of India and exercise of such powers is subject to judicial review. In other words, if the Governor decides not to grant approval to the pay scale indicated by the Rules framed by the Chief Justice of the High Court, such decision can be looked into by the High Court under Article 226 of the Constitution of India. This aspect of the matter becomes abundantly clear from the following observations made by the Apex Court in *Supreme Court Employees' Welfare Association (Supra)*:

The Attorney-General strenuously contended that the power of the President under the proviso to Clause (2) to Article 146 to grant or refuse approval tantamount to a legislative function comparable in its nature, ambit and quality to the President's power under Article 111 to assent to, or withhold assent from, a bill passed by the Houses of Parliament, and consequently his actions in that regard are beyond judicial review. No Court can, he says, sit in judgment over the validity or correctness or reasonableness of the President's act of approval or under Article 146 with his power under Article 111 is, with great respect to the Attorney-General, misplaced.

The Power of the President under Article 111 is primary and plenary and not delegated and subordinate. He exercises legislative power under Article 111 in his capacity as a part of the legislature (see Article 79) and not as a delegate. On the other hand, he acts as a delegate when he acts under the proviso to Article 146(2). This power is no doubt legislative in character, but subordinate in quality and efficacy. The Constitution envisages that the President is not only a part of the legislature, but he is also the ultimate repository of the executive power of the Union [see Article 56(1)]. It is in the latter capacity that the President acts as a delegate. In the exercise of this function, he does not assume the mantle of

the legislature, but functions as the head of the executive to whom the Constitution has delegated specific legislative power to make subordinate legislation. This power is limited by the terms, and subordinate to the objects, of delegation. On the advice of his council of Ministers the President grants or refuses approval of the rules made by the Chief Justice of India. It is indeed this power of Article 146 delegated to the President that can vitalize and activate the rules, so far as they relate to salaries, allowances, etc., as subordinate legislation. In the making of such instruments, both the Chief Justice and the President act as delegates by virtue of the constitutional conferment of power. They must in this regard necessarily act in good faith, reasonable, *intra vires* the power granted, and on relevant consideration of material facts.

The fact that the power exercised by the Chief Justice of India or the President under Article 146(2) is derived directly from the Constitution, and not from a statute, makes no difference to the power of judicial review by a competent Court. Any action taken (or refusal to act) on the strength of power derived directly by constitutional delegation is as much justiciable or reviewable upon the same grounds and to the same extent as in the case of any statutory instrument. The fundamental question in determining whether the exercise of power by an authority is subject to judicial review is not whether the source of his power is the Constitution or a statute, but whether the subject matter under challenge is susceptible to judicial review. Pure questions of facts or questions which cannot be decided without recourse to elaborate evidence or matters which are generally regarded as not justiciable—such as for example, those relating to the conduct of the external affairs or the defence of the nation—are not amenable to judicial review²⁷.

(Emphasis is supplied)

29. Thus, refusal to grant approval to the Rules framed by the Chief Justice of a High Court is a matter, which is justiciable and reviewable by the High Court under Article 226 of the Constitution of India.

30. What is, however, of vital importance to note is that even revision of pay scale of High Court employees can be done only by appropriate amendments in the relevant Rules inasmuch as salaries, allowances, leave or pensions of a High Court employee are governed by the Rules framed either by the State Legislature or, in the absence thereof, by the Rules framed by the Chief Justice and approved by the Governor. In other words, the revision of pay scale or upgradation of pay scale is not possible without the Rules having been framed. There is a great deal of difference between the Rules formed by the Chief Justice under Article 229(2) and the administrative proposals made by the Registry of the High Court. Hence, in the absence of any Rule upgrading the pay scale, question of upgradation does not arise at all. If the Rules for upgradation have not been framed by the Chief Justice, the stage for consideration by the Governor as to the question of granting approval, as required under the proviso to Article 146(2), does not reach. This position is clear from a careful reading of the observations made by

the Apex Court in Supreme Court Employees Welfare Association (supra)

Be that as it may, after the report or recommendation of the Fourth Pay Commission, was forwarded by the Ministry of Finance to the Chief Justice of India, the Registrar General of the Supreme Court, presumably under the authority of the Chief Justice of India, by his letter dated July 22, 1987, addressed to the Secretary, Government of India, Ministry of Finance, Department of Expenditure, did not agree with some of the recommendations of the Fourth Pay Commission relating to the revision of pay scales including the revision or pay scales of Junior Clerks and class IV employees of the Supreme Court. It does not appear that there was any exchange of thoughts or views between the government department and the Registry of the Supreme Court. The government has not produced before us any material showing that there was exchange of thoughts and views. But whether that was done or not, is not the question at the present moment. The most significant fact is that no rules were framed by the Chief Justice of India in accordance, with the provision of Article 146(2) of the Constitution. Instead, what was done was that the Registrar General made certain proposals to the government and those proposals were turned down as not acceptable to the government. There is a good deal of difference between rules framed by the Chief Justice of India under Article 146(2) and certain proposals made by the Registrar General of the Supreme Court, may be under the instructions of the Chief Justice of India. The provision of Article 146(2) requires that rules have to be framed by the Chief Justice of India and if such rules relate to salaries, allowances, leave or pensions, the same shall require the approval of the President of India. This procedure was not followed. So, the stage for the consideration by the President of India as to the question of granting approval, as required under the proviso to Article 146(2), had not then reached. Indeed, it is still in the preliminary stage, namely, that the rules have to be framed by the Chief Justice of India.

(Emphasis is added)

31. In the case at hand, the Respondent No. 3, namely, Registrar (Administration) of the Gauhati High Court has written letters to the State Government for upgradation of the pay scale of the Petitioner. This was presumably done on the instructions of the Chief Justice. But the fact remains that on the basis of such letters, no upgradation of the pay of a High Court employee can take place. It was, therefore, imperative on the part of the Registry to frame Draft Rules incorporating upgradation of pay scale of the Assistant Librarian and the same ought to have been laid before the Chief Justice. If the Chief Justice approved the Draft Rules so prepared, then, the same could have been forwarded to the Governor's Secretariat and on receipt of the same, the Governor could have obtained the views of the State Government and accord or refuse to accord approval to the Rules so framed. But while considering the question of giving approval, the State Government as well as the Governor must give full respect to the views of the Chief Justice and if, for any reason,

they find that the Rules, so framed, regarding upgradation of pay scale, cannot be agreed to, they must, before turning down the Rules forwarded to the Governor, exchange their views with the Chief Justice. No such formalities in the present case were observed either.

32. Situated thus, it is clear that while the action on the part of the Registry of the High Court to sent the letters, to the Government for upgradation of pay scale was not in conformity with the scheme of the Constitution, the fact remains that the State Government too has dealt with the matter wholly contrary to the role assigned to it in such matters by the Constitution of India and the law laid down in this regard by the Apex Court, which, even if obiter dictum, is binding on all including the State Government.

33. What, thus, crystallizes from the above discussions is that the Registry of the High Court is, as emerge from the materials on record, satisfied that the pay scale of the Assistant Librarian in the High Court establishment needs upgradation as proposed by it. The proposal presumably has, as indicated hereinabove, the consent of the Chief Justice. Hence, the Registry shall take its proposal to the logical conclusion and this can be done by making a draft for the Rules governing upgradation of the pay scale in question and lay the same before the Chief Justice for approval and if the same is approved, the Rules shall be forwarded, in consonance with the provisions of Article 229, to the Governor of the State for approval and on receipt thereof, the Governor shall obtain the views of the State Government and, then, take a decision as to whether to approve the Rules, so forwarded, to him or not to give approval thereto. However, while taking this decision, the governor and while advising the Governor, in this regard, the State Government shall bear in mind the Constitutional scheme, as indicated hereinabove, and normally, approval to such Rules shall follow.

34. Since the rules framed by the Chief Justice on such matters require approval of the Governor, the Registry shall also put up only such proposal before the Chief Justice involving financial implications, which the Governor does not find impossible to agree to. The tone in which the averments in the affidavit-in-opposition have been made by the State Govt., it transpires that the Govt. has dealt with the proposal, in question, just like proposals from any of its other departments, whereas the mandates of Article 229, as indicated above, is that the Government cannot summarily regret its inability to agree to the proposals of the Chief Justice for upgrading of pay scale of any or all of employees of the High Court.

35. In the result and for the reasons discussed above, this writ petition stands disposed of with direction to the Registry of the Gauhati High Court to obtain, on the administrative side the views of Chief Justice on the question of upgradation of pay scale of the Asstt. Librarian and if the Chief Justice accedes to the proposal of the Registry, draft Rules shall accordingly be prepared and laid before the Chief Justice for consideration and if, upon consideration, the Chief Justice approves such draft Rules, the same shall be forwarded to the Governor of the

State of Assam for approval. If the draft Rules, as indicated hereinabove, is forwarded to the Governor, the Governor, i.e., the State Government, shall consider the same in the light of the scheme of the Constitution and the Constitutional mandates, as indicated hereinabove, and the Governor shall, thereafter, convey to the Chief Justice of the High Court his approval or his refusal to approve the draft Rules. This Court hope and trust that while considering the draft Rules, if so forwarded to the Governor, the Governor, i.e., the State Government, would show full respect to the views of the Chief Justice and would not refuse to grant approval without having further exchange of views, if necessary, with the Chief Justice in the matter.

36. Considering, however, the entire facts and circumstances of the case, I make no order as to costs.