(1989) 02 GUJ CK 0025

In the Gujarat High Court

Kamlaben APPELLANT

Vs

State of Gujarat and Another RESPONDENT

Date of Decision : 13-02-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 1 Rule 8
Constitution of India, 1950 — Article 14

Citation : (1989) 2 GLR 1068

Hon'ble Judges : R.C. Mankad, J

Bench : Single Bench

Judgement

R.C. Mankad, J.—These petitions are filed by and on behalf of widows of retired Government servants claiming family pension under Resolution No. FPS-1077-2485-P dated October 17, 1977 of Government of Gujarat in Finance Department read with Resolution No. FPS-1071-J dated January 1, 1972 of Government of Gujarat in Finance Department.

2. Special Civil Application No. 969 of 1988 is filed by Gujarat Pensioner Samaj, an Association of Gujarat State Government Pensioners and widows or spouses of retired Gujarat State Government servants, who have died. This petition has been filed in representative capacity on behalf of widows or spouses and dependants of retired Gujarat State Government servants and other retired persons who are similarly situated, who have died. Petitioner No. 2 - Indumatiben''s husband retired from Government service on March 4, 1944 and expired on April 1, 1957. He was, before he retired. Head Accountant in Government Treasury at Kheda and after his retirement he received pension from Prantij Treasury till he died. Petitioner No. 2 was granted Rs. 80/- P.M. from July 1, 1982 and this amount was increased to Rs. 375/-P.M. with effect from October 1, 1987 under the Scheme of Financial Relief to the widows of Government Employees/Pensioners who were not covered under the Family Pension Scheme of 1972. This financial aid is received by petitioner No. 2 from Government of Gujarat. Petitioner No. 3-Mahalaxmiben''s husband, who was working as Clerk on-the establishment of District and Sessions Court at Nadiad, retired from service

with effect from August 17, 1970 and he received pension upto May 9, 1971 - the date on which he expired. Petitioner No. 4-Shardaben''s husband retired as Administrative Officer of the District School Board, Nadiad with effect from February 15, 1971 and he expired on December 18, 1971. Petitioner No. 5-Nirmalaben''s husband, who was District Education Inspector retired from service with effect from July 2, 1974 and he expired on July 14, 1982.

Petitioner-Kamlaben of Special Civil Application No. 420 of 1988 is widow of Govindlal Harilal Sheth, who retired from Government service as Clerk of the Court, District Court, Mehsana. Govindlal Harilal Sheth. late husband of the petitioner, retired from Government service on September 12, 1972. He expired on September 7, 1984.

3. Under the revised Pension Rules 1950 a Government servant had to complete service of not less than ten years in order to become eligible for the benefit of family pension. The duration of pension under the said Rules was limited to a maximum period of ten years The above provisions were not found to be adequate and a new Scheme of Family Pension for the State Government servants was framed by Government of Gujarat under Resolution No. FPS-1071-J dated January 1, 1972 issued by Government of Gujarat in Finance Department. This new Scheme of Family Pension came into force with effect from June 1, 1971 and was made applicable to all regular employees on pensionable establishment-temporary or permanent -who were in service on June 1, 1971 or were recruited thereafter. Under paragraph 5 of the Resolution every Government servant eligible to the benefits of the above Scheme was required to surrender a portion of gratuity, where admissible, equal to his two months'' pay subject to the maximum of Rs. 3600/- (revised to Rs. 5000/-) Government of Gujarat in Finance Department by Resolution No. FPS-1077-2485-P dated October 17, 1977 decided to do away with the provision of recovery of two months'' pay from the amount of gratuity for the eligibility of the benefit of the New Family Pension Scheme, 1972. Accordingly, it directed that no deduction should be made from the amount of death-cum-retirement gratuity as a contribution towards Family Pension Scheme under the New Family Pension Scheme, 1972. The Resolution stated that the above order would take effect from October 1, 1977. It was made clear that the order would be applicable to those who retired on October 1, 1977 and thereafter.

4. As pointed out above petitioner-Indumatiben''s husband had retired from Government service on March 4, 1944 and he died on April 1, 1957. Since he had retired from Government service prior to the revised Pension Rules of 1950 and Resolutions dated January 1, 1972 and October 17, 1977 petitioner-Indumatiben was not considered eligible for family pension. Husbands of petitioners-Mahalaxmiben and Shardaben had retired from Government service prior to June 1, 1971, the date on which the New Family Pension Scheme under Resolution dated January 1, 1972 was framed. Since they had already retired from service there was no question of their contributing 2 months'' pay as

envisaged under Resolution dated January 1, 1972. Resolution dated October 17, 1977 modified the New Pension Scheme, but the petitioners-Mahalaxmiben and Shardaben were found not eligible for family pension under the Government Resolutions dated January 1, 1972 and October 17, 1977. Petitioner-Nirmalaben''s husband and petittoner-Kamlaben''s husband retired from Government service after New Pension Scheme under Government Resolution dated January 1, 1972 came into force. This New Pension Scheme came into force with effect from June 1, 1971. Petitioner-Nirmalaben''s husband retired from Government service on July 2, 1974 while petitioner-Kamlaben''s husband retired from Government service on September 12, 1972 It. however. appears that husbands of both these petitioners opted not to contribute two months'' pay as provided in paragraph 5 of the Resolution dated January 1, 1972 and consequentially the New Pension Scheme was not made applicable to them. Both the Government employees died after the modification of the New Pension Scheme by Resolution dated October 17, 1977 under which the Government decided to do away with the provision of recovery of two months'' pay from the amount of gratuity for eligibility for the benefit of the New Family Pension Scheme. However. in spite of the fact that Government had decided to do away with the provision of recovery of two months'' pay from the amount of gratuity, the New Pension Scheme was held not applicable to husbands of petitioners-Nirmalaben and Kamlaben.

5. Under the New Pension Scheme framed under Resolution dated January 1, 1972 read with Resolution dated October 17, 1977 Government servants who retired on or after October 1, 1977 are eligible for family pension under the said Scheme without contributing two months'' pay. In other words. Government servants who retired from service on or after October 1, 1977 are eligible for New Family Pension Scheme although they had not contributed two months'' salary as required under Resolution dated January 1, 1972 Widows of such Government servants are eligible for the family pension under the said Scheme. Widows of Government servants who retired from Government service prior to June 1, 1971 and widows of Government servants who retired from Government service after June 1, 1971 but before October 1, 1977 and who had not contributed two months'' pay as provided in paragraph 5 of the Resolution dated January 1, 1972 are similarly situated as the widows of the Government servants who retired from Government service on or after October 1, 1977 since under the Resolution dated October 17, 1977 Government servants are not required to contribute two months'' pay as provided in paragraph 5 of the Resolution dated January 1, 1972. It is, therefore, that the above widows of Government servants, who retired from Government seivice prior to October 1, 1977 arc claiming that they being similarly situated as widows of Government servants who retired on or after October 1, 1977 are entitled to the family pension in accordance with the New Family Pension Scheme framed under Resolution dated January 1, 1972 read with Resolution dated October 17, 1977. It is submitted that the words "who were in service on 1st June, 1971 or are recruited thereafter" in paragraph

(1) and the words "on or after 1st June, 1971" and the words "who has retired on or after 1st June, 1971 and who has died or who may the on or after that date" in paragraph (2) and Clause (a) of paragraph 12 of the Resolution dated January 1, 1972 and the words "i.e., will be applicable to those who have retired on 1st October, 1977 and thereafter" in paragraph 3 of the Resolution dated October 17, 1977 are arbitrary, being violative of Article 14 of the Constitution and they should, there-fore, be deleted. It is submitted that the aforesaid words appearing in the Resolutions are severable from the other part of the Resolution in support of this contention petitioners placed reliance on the decisions of the Supreme Court in D.S. Nakara and Others Vs. Union of India (UOI), . Union of India Vs. Bidhubhushan Malik and Others, , N.L. Abhyankar and Others Vs. Union of India and Others, , Poonamal v. Union of India and Premilabui I''ishnu Dixit v. State of Maharashtra (Poonamal''s case for short) AIR 19 SC 1196 and in Smt. K. Papayama v. Union of India, Writ Petition No 4004 of 1985 decided on August 28, 1985 and the decisions of this Court in Special Civil Application No. 1556 of 1983 decided on September 4, 1986 (Reported in Indumati A. Patel Vs. State of Gujarat, and in Special Civil Application No. 333 of 1988 decided on March 8, 1988 (Smt. K.M. Bijlani v. State).

6. It is submitted on behalf of respondent-State that under the old Pension Scheme of Government of India, which was in force, prior to January 1, 1964 family pension to the widows of Government servants was admissible for ten years after the death of the Government servant. Such a Scheme was also in force in Gujarat. From January 1, 1964 Government of India introduced the revised Pension Scheme under which life time family pension became admissible to the widows of Government servants, who contributed two months salary out of their retirement gratuity. Government servants opting out of this scheme continued to be governed by the old Pension Scheme under which family pension was admissible for ten years only after the death of the Government servant. It is submitted that Government of Gujarat did not adopt the revised Pension Scheme of the Government of India from January 1, 1964. However, after considering persistent demands from Government servants. Government of Gujarat also adopted contributory Family Pension Scheme from June 1, 1971. According to this Scheme, Government servants who opted to contribute two months salary out of their retirement gratuity could get the benefits of life time pension for their widows. Govemmsnt servants who opted out of the contributory Pension Scheme of 1971 continued to be governed by the old Pension Scheme under which pension was admissible for only ten years after the death of the Government servant. The condition of contribution of two months salary out of gratuity for the purpose of earning life time family pension was deleted by Government of India with effect from September 22, 1977. Government of Gujarat also made the revised Family Pension Scheme non-contributory with effect from October 1, 1977. It is submitted that the effect of ratio of the Supreme Courts judgment in D.S. Nakara''s case is that any cut off date is relevant for the purpose of commencement of payment but it cannot be used for

classifying Government servants into two separate groups of Government servants recruited prior to the cut off date and the Government servants recruited on or after the cut off date. It is, however, submitted that this ratio does not extend to the case of widows in the matter of family pension. Government servants who retired or died before June 1, 1971 could not obviously be brought under the contributory Family Pension Scheme of 1971 because in case of such Government senanis. the option of contribution of two months salary from the amount of gratuity could never be exercised. Therefore, the families of Governmeni servants who died or retired before June 1, 1971 continued to be governed by the old Pension Scheme. It is submitted that the question of any discrimination between Government servants recruited prior to June 1, 1971 and those recruited on or after June 1, 1971 does not arise in this case, because the Government servants who died or retired before June 1, 1971 were no longer Government servants on June 1, 1971. It is further submitted that widows of Government servants who retired on or after October 1, 1977 became eligible for life time family pension. However. Government servants who died or retired before October 1, 1977 were not existing as Government servants on October 1, 1977 and, therefore, the question of discrimination between Government servants recruited prior to October 1, 1977 and the Government servants recruited on or after October 1, 1977 does not arise. It is submitted that the benefit of non-contributory Family Pension Scheme effective from October 1, 1977 is available to all Government servants whether recruited prior to October 1, 1977, or on or after October 1, 1977, provided the death occurred on or after October 1, 1977. It is submitted that the employer-employee relationship must end after the death of the employee. If the employer extends benefits in the form of family pension to the widow or minor children of the employee, it is a welfare measure extended by the employer beyond the scope of employer-employee contract. As a welfare State the Government has been adopting such welfare measures and extending them to the employees from time to time. But extending such welfare benefits has to be within the limits of employer''s resources. Such welfare benefits should not be converted into the justiciable rights. It is further submitted that the Government of Gujarat as a welfare measure extended the benefit of relief to widows beyond the period of ten years in case of widows of Government servants, who retired or died before June 1, 1971 and who were eligible only for ten years pension. It is further submitted that the Government of Gujarat is currently passing through a critical financial position. From April 1987 till date, the Government of Gujarat had to spend about Rs. One thousand crores on drought relief measures as the State was very badly affected by successive third drought of a very severe nature. During the year 1988-89, the State Government''s budget has a deficit of Rs. 343 crores. It is submitted that to pay family pension from October 1, 1977 to the families of Government servants, who died or retired before October 1, 1977, the Government will have to pay a sum of Rs. 50 crores for the period from October 1, 1977 till date. It is not possible for the Government to pay this amount.

7. It is submitted that the State Government had filed Letters Patent Appeal against the judgment of this Court in Special Civil Application No. 1556 of 1983 (Indumati A. Paiel v. The State of Gujarat), but this Appeal was dismissed on the ground That it was barred by limitation, the application for condonation of delay having been rejected. The Government of Gujarat made a petition for Special Leave to Appeal No. 12943 of 1987 in the Supreme Court. There was however, delay of three days in submission of this petition for Special Leave to Appeal. The Supreme Court condoned the delay of three days It, however, dismissed the appeal holding that the High Court was right in rejecting Letters Patent Appeal on the ground of delay. The Supreme Court, however, did not express any opinion on the contentions raised in the petition. It is, therefore, submitted that the contentions raised before the Supreme Court were still open for adjudication by this Court.

8. It is further submitted that as a measure of sympathetic approach to the families of Government servants, who died or retired before October 1, 1977, the Government by way of settlement with the petitioners will be willing to apply non-contributory Family Pension Scheme prospectively and would also be willing to consider payment of a token amount of a modest lumpsum amount to the widows of Government servants, who retired or died before October 1, 1977 instead of actual family pension from October, 1, 1977 till date. It may be mentioned here that the parties to these petitions had made sincere efforts to bring about a settlement, but their efforts failed and no settlement was arrived at.

9. In the historic decision of Supreme Court in D.S. Nakara''s case (supra) the question which arose for consideration before the Supreme Court was whether the Government servants who retired before the specified date were eligible for the revised Pension Scheme. On May 25, 1979 Government of India, Ministry of Finance, issued Office Memorandum No. F-19(3)-EV-79 whereby the formula for computation of pension was liberalised but made it applicable to Government servants, who were in service on March 31, 1979 and retired from service on or after that date (specified date for short). The formula introduced a slab system for computation of pension. This liberalised pension formula was applicable to employees governed by the 1972 Rules retiring on or after the specified date. The pension for the service personnel which will include Army, Navy and Air Force staff is governed by the relevant regulations. By the Memorandum of the Ministry of Defence bearing No. B/40725/AG/PS-C/ 1816/ AD (Pension)/Services dated September 28, 1979 the liberalised pension formula introduced for the Government servants governed by the 1972 Rules was extended to the Armed Forces personnel subject to limitation set out in the memorandum with a condition that the New Rules of Pension would be effective from April 1, 1979, and may be applicable to all service officers who become/became non-effective on or after that date (for short specified date). Liberalised pension formula became applicable prospectively to those who retired on or after March 31, 1979 in case of Government servants covered by 1972 Roles and in respect of defence personnel those who became/become non-effeciive on or after April 1, 1979.

Consequently those who retired prior to the specified date were not entitled to the benefits of the liberalised pension formula. The Supreme Court held to the effect that with the expanding horizons of socioeconomic justice, the Socialist Republic and Welfare State which the country endeavours to set up and the fact that the old men who retired when emoluments were comparatively low are exposed to vagaries of continuously rising prices, the falling value of rupee consequent upon inflationary inputs, by introducing an arbitrary eligibility criteria, ''being in service and retiring subsequent to the specified date'' for being eligible for the liberalised Pension Scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and being wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, the eligibility for liberalised Pension Scheme of ''being in service on the specified date and retiring subsquent to that date'' in the memoranda, violates Article 14 and is unconstitutional and is liable to be struck down. As the arbitrary and discriminatory portion of memoranda could be easily severed, the Supreme Court directed that both the memoranda shall be enforced and implemented after severence of unconstitutional part. The Supreme Court, however, directed that the arrears of pension prior to the specified date are not required to be paid to those who have retired before the specified date because to that extent the scheme is prospective. Accordingly the Supreme Court held that all the pensioners governed by the 1972 Rules and Army Pension Regulations would be entitled to pension under the liberalised Pension Scheme from the specified date, irrespective of their date of retirement.

10. In Union of India v. Bidhubhushan Malik, (supra) the Supreme Court confirmed the decision of the Allahabad High Court which held as follows:

... The High Court Judges (Conditions of Service) Act, 1954, (as amended) shall be read down as under: In para 10 of the First Schedule, the words "and who has retired on or after the 1st day of October, 1974" are unconstitutional and are struck down. Omitting the unconstitutional part it is declared that the Judges (including the Chief Justices) of the High Courts 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 I, 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.

Similar view was taken by the Supreme Court in N.L. Abhyankar v. Union of India (supra).

11. In Poonamal v. Union of India (supra) question similar to the one which arises for consideration in these petitions arose for consideration before the Supreme Court while dealing with group of petitions filed by widows of erstwhile Government servants who were not in receipt of family pension and also appeal

against the decision of the Division Bench of the Bombay High Court, which had rejected the writ petition filed by widows who were similarly situated The Supreme Court considered the Family Pension Scheme of 1950. liberalised Pension Scheme which was introduced in 1964 and further liberalisation of the Pension Scheme of 1964 by an order dated September 22, 1977 framed by Government of India. Under the liberalised Family Pension Scheme of 1964 Government servants who contributed 2 months salary out of death-cum-retirement gratuity were eligible for liberalised Pension Scheme. However, those Government servants who specifically opted out of the liberalised Scheme by not contributing 2 months salary out of death-cum-retirement gratuity were not eligible for the liberalised Pension Scheme. However, by order passed on September 22, 1977 the Government of India had done away with the pre-condition of contribution of 2 months salary out of death-cum-retirement gratuity. Accordingly, since September 22, 1977 the contributory scheme ceased to exist. A very anomalous situation arose. The widows of the Government servants who had not agreed to make the contribution in accordance with the 1964 Scheme were denied the benefit of Pension Scheme and this disability continued even after the changes introduced in 1977, when the Scheme ceased to be contributory. Such widows moved the Supreme Court by way of writ petitions. Widows similarly situated had also filed Writ Petition No. 3749 of 1984 in the High Court of Bombay. The Division Bench of the High Court of Bombay rejected this petition. The widows were granted leave to appeal against the decision of the Bombay High Court and this appeal came up for hearing before the Supreme Court alongwith the writ petitions filed by the widows as aforesaid. While dealing with these petitions the Supreme Court observed that the payment of pension does not depend upon the discretion of the Government but is governed by the relevant rules and anyone entitled to the pension under the Rules can claim it as a matter of right. It is further observed that where the Government servant rendered service to compensate which a Family Pension Scheme is devised, the widow and the dependent minors would equally be entitled to family pension as a matter of right. The Supreme Court went on to observe "In fact we look upon pension not merely as statutory right but as the fulfilment of a constitutional promise inasmuch as it partakes the character of public assistance in cases of unemployment, old-age disablement or similar other cases of undeserved want. Relevant rules merely make effective the constitutional mandate. That is how pension has been looked upon in D.S. Nakara''s judgment". The Supreme Court further went on to observe as follows:

At the hearing of this group of matters we pointed out that since the family pension scheme has become non-contributory effective from September 22, 1977 any attempt at denying its benefit to widows and dependants of Government servants who had not taken advantage of the 1964 liberalisation scheme by making or agreeing to make necessary contribution would be denial of equality to person similarly situated and hence violative of Article 14. If widows and dependents of deceased Government servants since after September

22, 1977 would be entitled to benefits of family pension scheme without the obligation of making contribution, those widows who were denied the benefits on the ground that the Government servants having not agreed to make the contribution could not be differently treated because that would be introducing an invidious classifications among those who would be entitled to similar treatment.

The statement, which is reproduced in the judgment, was made on behalf of Union of India before the Supreme Court. After the statement was made some clarifications were sought from the Union of India and these clarifications were also made. The Supreme Court disposed of the writ petition in terms of the statement and the clarifications made on behalf of the Union of India. The appeal against the decision of the Division Bench of the Bombay High Court was allowed on the same terms.

12. The aforesaid decision of the Supreme Court was followed by this Court in Special Civil Application No. 1556 of 1983 (Indumati A. Patel v. State of Gujarat) and it was declared that cut off date, namely, June 1, 1971 prescribed in the Government Resolution dated January 1, 1972 referred to above is illegal and void as the same is violative of the provisions of Article 14 of the Constitution. It was further directed that the petitioner of that Special Civil Application would be entitled to claim the benefits flowing from the Resolution as if the words "who were in service on or after 1st June, 1971" were never there in the Resolution. It is stated on behalf of the respondent-State that the State had preferred a Letters Patent Appeal against the said decision but as the appeal was time barred it had made an application for condonation of delay. This application for condonation of delay was rejected and the appeal was dismissed as time barred. The State filed petition for Special Leave before the Supreme Court, but this petition was also time barred by 3 days. The Supreme Court condoned the delay in filing the petition but confirmed the decision of Division Bench of this Court refusing to condone the delay and entertaining Letters Patent Appeal. It is stated on behalf of the respondent-State that the Supreme Court clarified that all the contentions raised on behalf of the State Government before the Supreme Court were left open. It is, therefore, submitted that inspite of the said decision of. this Court in Indumati A. Patel Vs. State of Gujarat, all the contentions raised on behalf of the State Government are still open for adjudication,

13. Question similar to one which arises for consideration in these petitions had arisen for my consideration in Special Civil Application No. 333 of 1988, adverted to above. The question which arose for my consideration in that Special Civil Application was whether by reason of failure on the part of the deceased Government employee to contribute two months pay, family pension could be denied to his widow, who was the petitioner. It was held that this question was directly covered by the decision of the Supreme Court in Poonamal v. Union of India. Following the said decision of the Supreme Court the said Special Civil Application was allowed and the respondent-state was directed to grant family

pension to the petitioner with effect from Ma\\ 5, 1980, the date on which, her husband who was a retired Government employee, died. It is stated before me that Letters Patent Appeal preferred against the said decision was dismissed.

14. The controversy involved in these petitions would appear to be directly and completely covered by the decisions of the Supreme Court in D.S. Nakara''s case and Poonamal''s case (supra). In D S. Nukara''s case, the question which was considered by the Supreme Court was whether there was justification for dividing homogeneous class of Government servants, who had retired from service, for application of liberalised pension formula. The liberalised pension formula became applicable or effective from a specified date prospectively. In other words, it was made applicable to those who retired on or after the specified date. The Supreme Court held that eligibility criteria of being in service and retiring subsequent to the specified date was arbitrary dividing a homogeneous class, the classification being not based on any discernible rational principle and being wholly unrelated to the objects sought to be achieved by grant of liberalised pension had offended Article 14 of the Constitution. The New Family Pension Scheme framed by the State Government under Resolutions dated January 1, 1972 and October 17, 1977 divides the homogeneous class of widows and dependants of retired Government servants by introducing eligibility criteria of Government servant being in service and retiring subsequent to the specified date, which is equally arbitrary as the liberalised pension formula in the case of the retired Government servants which came up for consideration before the Supreme Court in D.S. Nakara''s case. Widows and dependants of Government servants who retired on or after October 1, 1977 are eligible to claim family pension under the New Family Pension Scheme, although such Government servants, whose widows and dependants they are, had not made the contribution. How are these widows and dependants differently situated than the widows and dependants of Government servants, who retired prior to June 1, 1971 or the widows and dependants of Government servants who retired between June 1, 1971 and October 1, 1977 and who had not made the contribution? The obvious answer to this question is that they are not differently but similarly situated. The division of the homogeneous class of widows and dependants of the Government servants, which is sought to be made by applying the above criteria results in classification which is not based on any discernible rational principle and which is wholly unrelated to the object sought to be achieved by the New Family Pension Scheme. As held in the case of D.S. Nakara, it must be held here also that the eligibility criteria which is devised is thoroughly arbitrary and it violates Article 14 of the Coustirution.

15. A identical view has been taken by the Supreme Court in Poonamal''s case. There the Supreme Court was dealing with a case of widows and dependants of Government servants, who had retired from service before the family Pension Scheme became non-contributory claiming benefit of the Family Pension Scheme. It appears that the State Government has followed the Central Government in framing the New Family Pension Scheme in 1971 and modifying it in 1977. The

New Family Pension Scheme and its modification are broadly on the same pattern as the Family Pension Scheme framed by the Central Government and the modification of it made by it. The Supreme Court held to the effect that after the Family Pension Scheme became non-contributory, if the widows and dependants of the Government servant who had retired from service before the Family Pension Scheme was made non-contributory and who had not made the contribution, are denied the benefit of the Family Pension Scheme would amount to denial of equality to them. It was held that such widows and dependants were similarly situated as the widows and dependants of Government servants who retired from service after Family Pension Scheme become non-contributory. The Supreme Court, therefore, held that any attempt at denying the benefit of the Family Pension Scheme to the widows and dependants of Government servants who had not taken the advantage of 1964 liberalised Scheme by making or agreeing to make the necessary contribution would be denial of equality to the persons similarly situated and hence violative of Article 14. The position of the widows and dependants of the State Government servants, who retired prior to June 1, 1971 and who retired between June 1, 1971 and October 1, 1977 but who had not made the contribution is identical. Such widows and dependants cannot be treated differently from the widows and dependants of the Government servants, who retired from service on or after October 1, 1977. If such widows and dependants are denied the benefit of New Family Pension Scheme either on the ground that the Government servant had retired before the New Family Pension Scheme came into force, or on the ground that the Government servant had failed to make the contribution when the Scheme was contributory, would be denial of equality to the persons similarly situated and hence violative of Article 14. In my opinion, therefore, the ratio of the decisions of the Suprefne Court in D.S. Nakafa''s case and Poonamal''s case applies with equal force to the case of the petitioners and other similarly situated persons. For the same reasons which are recorded in the decisions of the Supreme Court, it must be held that the words "who were in service on 1st June, 1971 or are recruited thereafter" occurring in paragraph (1), the words "on or after 1st June, 1971" and "and who has retired on or after 1st June, 1971 and who has died or who may the on or after that date" in paragraph (2) and Clause (a) of paragraph 12 of the Resolution dated January 1, 1972 and the words "i.e. will be applicable to those who have retired on 1st October, 1977 and thereafter" in paragraph 3 of the Resolution dated October 17, 1977 introduce an arbitray eligibility criteria for being eligible for the New Family Pension Scheme and are violative of Article 14 of the Constitution

16. Inspite of the clear pronouncements of the Supreme Court, a very curious stand has been taken up on behalf of the State Government. It is urged that the ratio of the decision of the Supreme Court in D.S. Sakara s case does not extend to the case of widows in the matter of family pension. It is urged that the effect of the ratio of the Supreme Court''s judgment in the said case is that any cut off date is relevant for the purpose of commencement of payment, but it cannot be

used for classifying Government servants recruited prior to the cut off date and the Government servants recruited on or after the cut off date. It is submitted That the Government servants who retired or died before June 1, 1971 were governed by the old Pension Scheme and they could not be brought under contributory Family Pension Scheme of 1971. Government servants who died or retired before June 1, 1971 were no longer Government servants on June 1, 1971 and, therefore, according to the State Government, the question of any discrimination between Government servants recruited prior to June 1, 1971 and those recruited thereafter, does not arise. Similarly, Government servants who retired or died before October 1, 1977 were not existing,as Government servants on October 1, 1977 and, therefore, the question of discrimination between Government servants recruited prior to October 1, 1977 and those recruited thereafter, does not arise. It is submitted that the employer-employee relationship ends after the retirement of the employee. It is urged that if the employer extends benefit in the form of family pension to the widow or minor children of the employee, it is a welfare measure extended by the employer beyond the scope of employer-employee contract. Such welfare benefits could not be extended to those who had ceased to be Government servants. In any case, such welfare benefits do not confer any justiceable rights.

17. It is difficult to comprehend as to how such a stand can be taken up by the State Government after the judgment of the Supreme Court in Poonamal''s case. In Poonamal''s case, it has been clearly laid down that payment of pension does not depend upon the discretion of the Government, but it is governed by the relevant Rules and anyone entitled to pension under the Rules can claim it as a matter of right. Where Government servants rendered service, to compensate which Family Pension Scheme is devised, the widow and dependant minors would equally be entitled to family pension as a matter of right. It is, therefore, not open to the State Government to contend that Family Pension Scheme does not confer any right and that it is only a welfare measure conferring benefits and not any right. Again, here, there is no question of discrimination between the Government servants who were recruited or who retired or died prior to certain specified date and those who were recruited subsequent to that date. What we are considering is whether discriminatory treatment is given to the widows and dependants of the Government servants who retired or died prior to June 1, 1971 or October 1, 1977. These widows are similarly situated as the widows of Government servants who retired on or after October 1, 1977. Government servants who retired on or after October 1, 1977 are not required to make any contribution for becoming eligible for the New Family Pension Scheme. This is the position which emerges after modification of the New Family Pension Scheme by Resolution dated October 17, 1977. Government servants who retired prior to June 1, 1971, were governed by the old Pension Scheme of 1950 and those Government servants had no occasion to opt for the New Pension Scheme by making the contribution. Government servants who retired on or after June 1, 1971 but before October 1, 1977, were eligible for the New Family Pension

Scheme only if they made the contribution: and if they did not make the contribution, their position was the same as of those who retired prior to June 1, 1971. However, after the New Family Pension Scheme was liberalised and made non-contributory in October 1977, no Government servant was required to make contribution to become eligible for the New Family Pension Scheme. In other words, on or after October 1, 1977, Government servant was eligible for New Family Pension Scheme without making the contribution and his widow would be entitled to the benefits of the family pension under the said Scheme. If the stand taken up by the Government were accepted, as held above, there would be invidious classification dividing homogeneous class of widows and dependants of Government servants. Widows and dependants of Government servants, who retired or died prior to June 1, 1971 or the widows and dependants of Government servants who retired between June 1, 1971 and October 1, 1977 and who had not made the contribution, are similarly situated as the widows and dependants of Government servants who retired on or after October 1, 1977, since none of those Government servants whose widows and dependants they are, had made the contribution. The position of the widows and dependants of the Government servants, who retired on or after October 1, 1977 is, in no way different from the widows and dependants of Government servants who retired or died prior to June 1, 1971 or the widows and dependants of Government servant who retired between June 1, 1971 and October 1, 1977 and who had not made the contribution. It is these widows and dependants who are not givert equal" treatment. There is no question of giving unequal treatment to Government servants who had retired prior to the specified date and those who had retired thereafter. The whole approach and stand of the State Government are misconceived.

18. It was urged on behalf of the State Government that the decision of the Supreme Court in Poonamal''s case was on the basis of the concession made on behalf of the Union of India and, therefore, this decision had no binding effect. This argument proceeds on misreading of the decision of the Supreme Court. It also overlooks the fact that the Supreme Court was not dealing merely with the case of widows of Central Government servants, but it was also dealing with the case of widows of Maharashtra State Government servants The Supreme Court has clearly held that 10 treat widows of Central Government servants, who retired prior to September 22, 1977 differently from the widows of Central Government servants who have retired on or after That date would amount to discrimination violating Article 14 of the Constitution. This view of the Supreme Court was not based on any concession made by the Union of India. In any case, no concession was made on behalf of the State of Maharashtra. The Supreme Court had also heard the appeal filed by the widows of Maharashtra State Government servants against the decision of the Bombay High Court rejecting their writ petition. And the Supreme Court, for the reasons recorded in the judgment allowed their appeal.

19. In the context of the stand taken up by the State Government, it is

interesting to refer to the following observations made by the Supreme Court in Poonamal''s case AIR 1935 SC 1196:

Family pension came to be conceptualised in the year 1950. When a Government servant dies in harness or soon after retirement, in the traditional Indian family on the death of the only earning member, the widow or the minor children were not only rendered orphans but faced more often destitution and starvation. Traditionally speaking the widow was hardly in a position to obtain gainful employment. She suffered the most inasmuch as she was deprived of the companionship of the husband and also became economically orphaned. As a measure of socio-economic justice family pension scheme was devised to help the widows tide over the crisis and till the minor children attain majority to extend them some succour. This appeared to be the underlying motivation in devising the family pension scheme. It was liberalised from time to time. The liberalisation was, however, subject to the condition that the Government servant had in his lifetime agreed that he shall make a contribution of an amount equal to two months'' emoluments or Rs. 5000/- whichever is less out of the death-cum retirement gratuity. Those Government servants who did not accept this condition, were denied the benefit of family pension scheme.

The Union of India in its onward march for ushering in socio-economic justice in the form of social security further took a bold and imaginative step on September 22, 1977 by which the pre-condition of contribution on two months'' emolument out of death-cum-retirement gratuity was done away with....

20. Here what we find is the State Government has taken retrogratory and unimaginative step. The object of the Family Pension Scheme is to usher in socio-economic justice. However, the State Government, by taking up the stand, which it has, denied socio-economic justice to the widows and dependants of Government servants, who retired or died prior to June 1, 1971 and the widows and dependants of Government servants who retired between June 1, 1971 and October 1, 1977 and who had not made the contribution. It may be that as a result of liberalisation of Family Pension Scheme, the benefit of which, as held above, cannot be denied to the said widows and dependants financial burden may fall upon the State Government; but the financial resources of the State Government are not so inadequate as not to bear this burden. Hundreds of crores of rupees have been expended in making payment of arrears of pay and allowances to the Government sen ants as a result of revision of pay-scales and allowances of Government servants with effect from January 1, 1986; and as compared to the large amount which has been expended, the amount which will become payable to the petitioners and widows and dependants of retired Government servants, whom they represent, would be very small. In any case, additional burden can hardly justify unequal or discriminatory treatment violative of Article 14 of the Constitution to such widows and dependants. The State Government cannot take up a stand, which would violate salutory constitutional provision.

21. The decision of the Supreme Court in Poonamal''s case is binding on this Court. As already pointed out above, this Court, following the said decision has allowed writ petitions filed by widows of retired Government servants. 1 am bound by these decisions also.

22. As held by the Supreme Court, the aforesaid unconstitutional and discriminatory portion in the Resolutions dated January 1, 1972 and October 17, 1977 can be easily severed and both these "Resolutions can be enforced and implemented after severance of the unconstitutional part. These petitions must, therefore, succeed.

23. The learned Counsel for the petitioners stated that the petitioners were not claiming arrears of pension prior to October 1, 1977. In other words, it was clarified that petitioners were not pressing their claim for arrears of pension prior to October 1, 1977. It is, therefore, not necessary for me to deal with the question of arrears of pension prior to October 1, 1977. Petitioners have also not pressed their claim for interest on the amount payable to them for the present.

24. In the result, these petitions are allowed. It is declared that the words "who were in service on 1st June, 1971 or are recruited thereafter" occurring in paragraph (1), the words "on or after 1st June 1971" and "and who has retired on or after 1st June, 1971 and who has died or who may the on or after that date" in paragraph (2) and Clause (a) of paragraph 12 of the Resolution dated January 1, 1972, referred to above; and the words "i.e. will be applicable to those who have retired on 1st October, 1977 and thereafter" in paragraph 3 of the Resolution dated October 17, 1977, referred to above, are arbitrary and violative of Article 14 of the Constitution of India, and they shall stand severed and deleted from the said two Resolutions. It is directed that the said two Resolutions shall be enforced and implemented after severance and deletion of the said unconstitutional part.

25. It is further declared that the peittioners and widows and dependants of the Government servants and other persons to whom the New Pension Scheme is applicable, who are similarly situated, meaning thereby, the widows and dependants of Government servants and such other persons who retired or died prior to June 1, 1971, and the Government servants and such other persons, who retired between June 1, 1971 and October 1, 1977 who had not made the contribution, shall be entitled to claim benefit of New Family Pension Scheme flowing from the said two Resolutions as if the aforesaid portions or words which arc held to be unconstitutional and severed and deleted were never there in the said Resolutions.

26. It is, however, clarified that the arrears of pension prior to October 1, 1977 are not required to be paid to the widows of the Government servants and other persons referred to above, who have retired before that date, because to that extent, the aforesaid New Pension Scheme is prospective and the claim in respect thereof is not pressed. In other words, the petitioners and widows and

the dependants of the retired Government servants and other persons referred to above, who are similarly situated as the petitioners, shall be entitled to family pension under the New Family Pension Scheme with effect from October 1, 1977.

27. Respondent-State Government is directed to compute the amount of pension and arrears of pension payable to the petitioners and such widows and dependants on the above basis and make payment of the arrears of pension on or before May 31, 1989. The State Government is further directed to pay to each of the petitioners and such widows and dependants of the retired Government servants and other persons referred to above, who are similarly situated, family pension from month to month regularly on or before 10th of every month with effect from April 1, 1989.

Rule made absolute in each of these petitions with costs. The cost shall include the expenses which the petitioners have incurred for following the procedure laid down in Order 1 Rule 8 of the Code of Civil Procedure.

Orders accordingly.

