

(2008) 01 KL CK 0033

In the High Court Of Kerala

Case No : Writ Petition (C) No. 31662 of 2007

Valsakumari and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 04-01-2008

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 146, 146(2), 16
General Clauses Act, 1897 — Section 16
High Court Service Rules, 1970 — Rule 35
Kerala High Court Service Rules, 2007 — Rule 37(1)

Citation : (2008) 01 KL CK 0033

Hon'ble Judges : V. Giri, J

Bench : Single Bench

Advocate : Kurian George Kannanthanam and P. Sreekumar, K.S. Manu, P.S. Sidhan, Tony George Kannanthanam, Thomas George, Jiji Thomas and Pinku Thaliyath, for the Appellant; C.P. Sudhakara Prasad, General, K.R.B. Kaimal P. Nandakumar, Sr. G.P. and B. Unnikrishna Panicker, for the Respondent

Judgement

V. Giri, J.—Seminal questions, inter alia, involving interpretation of Article 229(2) of the Constitution of India, arise for consideration in these writ petitions. Since the issues are common, they have been heard together and are being disposed of by this common Judgment. For the sake of convenience, reference is made to W.P.(C) No. 31662/07.

2. The Petitioners were/are officers and members of the staff of the High Court of Kerala and are governed by the Kerala High Court Service Rules, 2007 (for short "the Rules, 2007"). The said Rules have been brought into force by the Hon'ble Chief Justice exercising powers under Article 229(2) of the Constitution of India.

The Rules which were earlier in force in Kerala from 1970 were revised and published in the Gazette dated 13-2-2007 and were brought into force with effect from 1-1-2007. The Rules, in operation prior to the 2007 Rules, were the High Court Service Rules, 1970, which were enforced with the approval of the Governor. Rule 35 of the 1970 Rules provided that the various service rules in

the State of Kerala, applicable to the Officers and servants and subject to the Rule making control of the Governor or the Government of Kerala, as the case may be, shall, subject to the High Court service Rules, govern the members of the service in the matter of their pay, allowances, leave, leave salary, pension and other conditions of service. Thus, the provisions of the Kerala Service Rules were also made applicable to the members of the High Court staff. Consequently, by virtue of Rule 60(a) of Part I of the Kerala Service Rules, the age of retirement of the High Court staff was also 55 years. When the Rules were framed in 2007, an express provision was made as regards the age of retirement, vide Rule 37(1) of the Rules which reads as follows:

Except as otherwise provided in these Rules, the compulsory retirement on superannuation of a member of the Service shall take effect from the afternoon of the last day of the month in which he attains the age of 58 years.

3. Consequently, insofar as the High Court staff are concerned, the age of retirement stood enhanced from 55 to 58. The Petitioners, therefore, contended that they are eligible to continue till the age of 58 years. Apparently, the State Government took up the stand that the enhancement of the retirement age 55 to 58 for the High Court staff as per Rule 37(1) of the Rules cannot be accepted. The Government declined to disburse the salaries due to the persons who continued in service after the age of 55 by virtue of Rule 37(1) of the Rules, 2007. This was challenged in a batch of writ petitions before this Court, and ultimately led to the judgment dated 13-8-2007. This Court found that Rule 37(1) of the Rules, which provided for enhancement of the retirement age of the High Court Staff from 55 to 58 is a prescription made by the Hon'ble Chief Justice in exercise of his powers under Article 229(2) of the Constitution of India. The stand taken by the Government, that the said Rules, insofar as it relates to the prescription of the retirement age, will be comprehended by the proviso to Article 229(2) of the Constitution and therefore, it requires the approval of the Governor of the State, considered by this Court and negated. Regarding the prescription of the age of retirement, this Court found that it does not relate to the salary, leave, leave salary (sic) pension and therefore, the Rule prescribing the retirement age does not require approval of the Governor of the State. It was so declared and a writ of mandamus issued commanding the Government to draw and disburse the salary due to the (sic) petitioners in the said cases.

4. The State preferred appeals against the said judgment of this Court before the Division Bench as W.A. No. 2254/07 and connected cases. The appeals are pending before the Division Bench, though there is no order of stay as such.

5. It is thereafter that an Ordinance was issued as the Kerala High Court" Service (Determination of Retirement Age) Ordinance, 2007, (Ordinance 61/07) (hereinafter referred to as "the Ordinance"). The Ordinance is stated to have come into force on 1st of January, 2007 and it declares to be "an Ordinance to determine the retirement age of the officers and servants of the High Court of Kerala". Sections 2 and 3 of the Ordinance are relevant in the context and are

extracted hereunder:

2. It shall be deemed to have come into force on the 1 st day of January, 2007.

3. Determination of Retirement Age in High Court Services.- Notwithstanding anything contained in any other law for the time being in force, or in any rule, or in any judgment, decree or order of any Court, the compulsory retirement on superannuation of an officer or servant of the High Court of Kerala shall take effect from the afternoon of the last day of the month in which he attains the age of 55 years.

6. The Ordinance was promulgated on 22-10-2007. Consequent thereupon, by Ext. P-7 order dated 24-10-2007, the Petitioners were intimated that they are deemed to have retired on superannuation, on the last day of the month in which they have attained the age of 55 and that their service in the High Court stands terminated on 22-10-2007, as mandated in the Ordinance. It is thereupon, the Petitioners have approached this Court, inter alia, seeking the following reliefs:

(a) To declare that the Ordinance as not valid as the same was promulgated in violation of Article 213 of the Constitution of India.

(b) To declare that Rule 37(1) of the Rules made under Article 229(2) of the Constitution is not subject to the Ordinance promulgated under Article 213 of the Constitution.

(c) To declare that the Petitioners are entitled to continue in service till the age of 58 years in terms of Rule 37(1) of the Rules. Petitioners have also sought for a writ of certiorari, both in relation to the Ordinance as also in relation to the order of termination issued by the Registrar General.

7. Counter-affidavit has been filed by the Government, inter alia, supporting the validity of the Ordinance. The Government has also taken up a contention that, as a matter of fact, Rule 37(1) of the Rules, is comprehended by the proviso to Article 229(2) of the Constitution and consequently the same requires the approval of the Governor. According to the Government, the stand taken up by the Government in this regard should have been accepted by this Court in the earlier round of litigation and at any rate, according to it, the issue is pending before the Division Bench. Apart from the same, it is also contended that the power of the Chief Justice under Article 229(2) of the Constitution of India is subject to the provisions of the law made by the State Legislature, in terms of Article 229(2) of the Constitution regulating the conditions of service of officers and servants of the High Court. The power of the Governor to promulgate an Ordinance is plenary and an Ordinance, therefore, is law, within the meaning of Article 13 of the Constitution. Once, therefore, there is a plenary law prescribing the retirement age of the staff of the High Court, the Rule made by the Chief Justice under Article 229(2) of the Constitution will have to be read as subject to this. It is contended that the age of retirement of the Government staff is still restricted to 55 years. It is open to the Legislature of the State and

consequently, it is open to the Governor, exercising powers under Article 213 of the Constitution of India, to declare that the age, of retirement of High Court staff will be restricted to 55 years. Once, therefore, the law declares the age of retirement as 55 years, the Petitioners are bound to be superannuated on attaining the age of 55. The period of service rendered by the Petitioners, after attaining the age of 55 years till 24-10-2007 when their services were terminated, is saved for the purpose of salary and allowances, which they have been drawing in terms of Section 3 of the Ordinance. It is contended that the Ordinance is a valid piece of legislation and consequently, the Petitioners are not entitled to any of the reliefs prayed for in the writ petitions.

8. The High Court has not filed any counter-affidavit in the writ petitions. But Mr. K.R.B. Kaimal, learned Senior Counsel, made submissions on behalf of the High Court. I will refer to the said submissions at the appropriate stage.

9. Taking into account the width and sweep of the questions involved in the writ petitions, elaborate submissions were made by Mr. Kurian George Kannamthanam, Senior Counsel, Mr. R. Sreekumar and Ms. Pinku H. Thaliath, on behalf of the Petitioners; Advocate General Mr. C.P. Sudhakara Prasad, assisted by Mr. P. Nandakumar on behalf of the State and Mr. K.R.B. Kaimal assisted by Mr. Unnikrishna Kaimal on behalf of the High Court.

10. Learned Counsel for the Petitioners have also submitted argument notes also on conclusion of arguments.

11. There is no dispute to the facts, which I have already narrated above, in the opening portion, while referring to the contentions of the Petitioners. The question that could be formulated in simple terms would be "whether the Ordinance is valid and constitutional and are there any grounds to declare the Ordinance as unconstitutional, invalid and inoperative"?

12. If the Ordinance is valid and constitutional, then obviously, the age of retirement of the Petitioners will be governed by Section 2 thereof.

13. Since the contentions of the parties are centered around Article 229 of the Constitution of India, it is only appropriate to extract the same in its entirety.

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 authorised 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.

14. For the sake of convenience, I find it advantageous to formulate the contentions raised by the learned Counsel for the Petitioners in the following terms:

(i) The Hon^{ble} Chief Justice of the High Court has exclusive power to prescribe the conditions of service of the officers and servants of the High Court. Once Rule 37(1) has been prescribed by the Chief Justice, it cannot be set at naught by any subsequent legislation brought into force by the State Legislature and it obviously cannot be done by any Ordinance promulgated by the Governor in that behalf.

(ii) The words "Subject to the provisions of any law made by the Legislature of the State", as occurring in the opening portion of Article 229(2) of the Constitution postulates the existence of a law prescribing the conditions of service of officers and servants of a High Court prevailing and in force at that point of time when the Chief Justice exercises powers under Article 229(2). In the present case, admittedly, there was no plenary statute as on 1-1-2007 when the Hon^{ble} Chief Justice brought into force the Rules, 2007. The effect of Rule 37(1) of the Rules cannot be nullified by a subsequent legislation.

(iii) Though the power of the Governor to promulgate an Ordinance will extend to areas where the Legislature of the State is also competent to enact laws, taking into account the fact that Article 229 contemplates conferment of power on high constitutional functionaries to frame Rules, "provisions of any law" as contemplated under Article 229(2) means provisions of any plenary law made by the State Legislature and not the provisions as contained in an Ordinance promulgated by the Governor.

(iv) Independence of judiciary, which has been identified and highlighted by the Supreme Court in more than one case as part of the basic structure of the Constitution behooves that Rules made by the Hon^{ble} Chief Justice under Article 229(2) of the Constitution should not be attempted to be diluted in its operation or brought into conflict with the provisions of an Ordinance promulgated by the Governor. The power ought not to have been exercised by the Governor in circumstances where the operation of the Ordinance comes into conflict with the Rule made by the Chief Justice under Article 229(2) of the Constitution.

15. I will consider each one of the contentions separately.

16. The ambit of the powers of the Chief Justice of a High Court under Article 229 of the Constitution in the context of a recalcitrant attitude shown by the State to pass a pay slip of an officer appointed by the Chief Justice was considered by the Supreme Court in *M. Gurumoorthy Vs. Accountant-General, Assam and Nagaland and Others*, . Paragraph 8 of the said judgment, insofar as it is relevant in the context, is extracted hereunder:

The unequivocal purpose and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of appointments of officers and servants of a High Court, it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that it is provided in the Article. This is essentially to secure and maintain the independence of the High Courts. The anxiety of the Constitution-makers to achieve that object is fully shown by putting the administrative expenses of a High Court including all salaries, allowances and pension payable to or in respect of officers and servants of the Court at the same level as the salaries and allowances of the Judges of the High Court nor can the amount of any expenditure so charged be varied even by the legislature. Clause (1) read with Clause (2) of Article 229 confers exclusive power not only in the matter of appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court by Rules on the Chief Justice of the Court. This is subject to any legislation by the State Legislature but only in respect of conditions of service. In the matter of appointments even the legislature cannot abridge or modify the powers conferred on the Chief Justice under Clause (1). The approval of the Governor, as noticed in the matter of Rules, is confined only to such rules as relate to salaries, allowances, leave or pension. All other rules in respect of conditions of service do not require his approval.

17. The above-mentioned passage has been considered as the locus classicus on the subject, inasmuch as in several decisions rendered by the Supreme Court on subsequent occasions either with reference to Article 146 of the Constitution dealing with the powers of the Chief Justice of India with Article 229 of the Constitution, the Court has drawn sustenance from the above-mentioned passage. The Supreme Court, therefore, held that Clause (1) read with Clause (2) of Article 229 deals with conferment of power on the Chief Justice firstly in the matter of appointments and secondly with regard to the conditions of service of officers and servants of a High Court. Insofar as the power to effect appointments are concerned, as has been noted by the Supreme Court, the conferment of power on the Chief Justice is in absolute terms. As has been noted above, in the matter of appointments even the legislature cannot abridge or modify the powers conferred on the Chief Justice under Clause (1) of Article 229.

18. The power under Article 229(2) of the Constitution is subject to two factors. In the matter of salary, allowances, leave and pension, the Rules require the

approval of the Governor. The second aspect relates to a law made by the State legislature with regard to the matters covered by Article 229(2) of the Constitution. It is up to the Chief Justice to prescribe the conditions of service of officers and servants of the High Court and obviously, this is done by the Hon''ble the Chief Justice by formulating the Rules in that behalf. The crucial question is whether the Rules framed under Article 229(2) of the Constitution are subject to the provisions of any law made by the State legislature. The Supreme Court itself has spoken on several occasions as to the nature of the power exercised by the Governor under the proviso to Article 229(2) of the Constitution, in the matter of grant of approval of the Rules made under Article 229(2) of the Constitution, by the Chief Justice, insofar as such Rules relate to the salaries, allowances, leave or pension.

19. But apparently, there is no judgment either of the Supreme Court or the other higher courts of the land dealing with the nature of the power exercised by the Hon''ble Chief Justice in relation to the operation of any Rule made by the Hon''ble Chief Justice under Article 229(2) vis-a-vis, any Rule made by the State legislature dealing with one of the aspects covered by the Rules made by the Hon''ble Chief Justice.

20. The answer to the question would obviously require an understanding of the nature of the powers exercised by the Hon''ble Chief Justice under Article 229 of the Constitution of India.

21. Insofar as Article 229(1) is concerned, as observed by the Hon''ble Supreme Court in *M. Gurumoorthy Vs. Accountant-General, Assam and Nagaland and Others*, , the power conferred on the Hon''ble Chief Justice is absolute and clear. It is a power conferred under the Constitution on a high constitutional functionary and it is not open even for the legislature to pass any law, which has the effect of interfering with or diluting the exercise of such power by the Hon''ble Chief Justice. The said position of law does not admit of any equivocation as such.

22. What is the nature of the power exercised by the Chief Justice, while formulating the Rules under Article 229(2) of the Constitution? Is it legislative or statutory?

23. The issue was considered by the Supreme Court in the decision reported in *Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another*, . In separate concurring judgments, M.M. Datt, J. and Dr. T. Kochu Thommen, J. held that the power exercised by the Hon''ble Chief Justice of India under Article 146(2) of the Constitution [Article 229(2) is in pari materia with Article 146(2) of the Constitution] is legislative in character. Paragraphs 46 and 96 of the judgment of the Supreme Court deal with this aspect. The Supreme Court also held that the conditions of service of the employees of the Supreme Court that are laid down by the Chief Justice of India, while framing the Rules, will be final and conclusive, except where the same relates to salaries,

allowances, leave or pension, in which case, the approval of the President of India is required. It was held that the power exercised by the President while considering the question of approval is also legislative in character.

24. Once it is held that, while framing the Rules under Article 229(2) of the Constitution, the Hon'ble Chief Justice exercises legislative power, then it also follows that the exercise of power will be subject only to such limitations as are imposed by the Constitution. As noted by the Supreme Court in *M. Gurumoorthy Vs. Accountant-General, Assam and Nagaland and Others*, , there are limitations on the exercise of power by the Hon'ble Chief Justice under Article 229(2). One is with regard to the approval to be obtained from the Governor insofar as the Rules relate to four aspects mentioned in the proviso to Article 229(2). Though there is a contention that the prescription of any retirement age would be comprehended by the proviso to Article 229(2), both by reason of the earlier judgment of this Court and otherwise, I proceed on the premise that the prescription of age of retirement is not comprehended by the proviso to Article 229(2) of the Constitution. If that be so, the other limitation on the exercise of power by the Hon'ble Chief Justice under Article 229(2) is contained in the clause itself viz., that it is subject to the provisions of any law made by the legislature. Therefore, though the Hon'ble Chief Justice can exercise the legislative power with regard to the conditions of service of officers and servants of the High Court, the said conditions of service so prescribed, will be subject to the provisions of any law, which is made by the legislature of a State in relation to the subject-matter covered by Article 229(2) of the Constitution of India.

25. What is subject to the provisions of any law made by the legislature of a State, for the purpose of Article 229(2) of the Constitution of India, is the operation of the conditions of service that are prescribed by the Rules made by the Hon'ble Chief Justice under Article 229(2). The exercise of the power by the Chief Justice under Article 229(2) is "not subject to the provisions of any law made by the legislature of a State" since the power exercised by the Chief Justice is legislative in character and the power is exercised under the Constitution itself. The exercise of power by the Chief Justice is not "what is subject to the provisions of any law made by the State legislature". What could be subjected is only "the operation of any provisions prescribing the conditions of service of the officers and servants of the High Court".

26. It therefore follows, as a corollary, that the exercise of power by the Chief Justice under Article 229 in the matter of prescribing the conditions of service of officers and servants of the High Court is not conditioned or subjected to any other factor. It is pursuant to conferment of power by the Constitution and it is legislative in character. The exercise of power cannot be conditioned by any law including any plenary law passed by the State legislature and consequently, it cannot be conditioned by the provisions of any Ordinance.

27. Does this mean that the State legislature is bereft of the competence to exercise its constitutional functions conferred on it under Article 245 of the

Constitution, read with the legislative entries in Schedule 7 thereof, in relation to conditions of service of officers and servants of the High Court, as such? In my view, the conferment of power on the State legislature, in the matter of prescribing the conditions of service of officers and servants of the High Court, is not under Article 229(2), but under Article 245 of the Constitution, read with Entry 3 of List II of the 7th schedule of the Constitution. Entry 3 reads as follows:

Officers and servants of the High Court, procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.

28. Apparently, it is taking note of Entry 3 as well, that Article 229(2) of the Constitution opens with the words "subject to the provisions of any law made by the State legislature".

29. Though in *M. Gurumoorthy Vs. Accountant-General, Assam and Nagaland and Others*, and in *Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another*, the validity of a plenary statute vis-a-vis the operation of a Rule made by the Chief Justice either under Article 146 or Article 229, was not the issue in question, in considering the scope and ambit under Article 146 and 229, the Supreme Court recognised the existence of a power with the appropriate legislature; in relation to Articles 146(2) and 229(2) of the Constitution. Since the power of the competent legislature to enact law in terms of Article 245 of the Constitution extends to the subject delineated in the 3 lists in the 7th schedule of the Constitution, it follows that the competence of the State legislature extends to making of a law with regard to the conditions of service of officers and servants of the High Court. The conferment of power on the legislature is by the constitution and opening words in Article 229(2) of the Constitution only recognises the existence of such power and in fact juxtaposes the exercise of power by the Chief Justice with the conferment of power on the State legislature in the context comprehended by Article 229 of the Constitution.

30. But, having said this, it must be made clear beyond any controversy or doubt that the power exercised under Article 229(1) of the Constitution is absolute and plenary. It is constitutionally conferred and it is not subject to any legislative power either by the competent legislature or by the Governor in exercise of the power by the Governor under Article 213 of the Constitution. The conferment of such power on the Hon'ble Chief Justice under Article 229(1) of the Constitution is to secure the independence of the judiciary and obviously to insulate the officers and servants of the High Court also from the influence of the executive in any manner. Having said so, it also requires to be asserted and affirmed that any law made by the State legislature relating to the conditions of service of officers and servants of the High Court as comprehended by Article 229(2) shall not, in any manner, operate in such a manner as to interfere with the exercise of the plenary power by the Chief Justice under Article 229(1) of the Constitution.

31. Subject to this, it has to be held that the State legislature is competent to enact a law dealing with the determination of age of retirement of employees of

the High Court.

32. Learned Counsel for the Petitioners have raised a contention that even assuming that a primary legislation passed by the State legislature, dealing with the prescription of age of retirement of the employees of the High Court, would be within the competence of the State legislature, an Ordinance promulgated by the Governor under Article 213 of the Constitution cannot aspire for a similar status. I will deal with this contention separately at the appropriate stage.

33. Mr. Kannamthanam, learned Senior Counsel for the Petitioners, in some of the writ petitions, contended that even if the State legislature is conceded to have competence to enact a law on the subject by referring to Entry 3 of List II and Article 245 of the Constitution of India, read with Article 229(2) thereof, the law for the purpose of Article 229(2) of the Constitution, according to him, should be a law which must have existed, valid and operative when the Chief Justice exercises the legislative power under Article 229 of the Constitution. In other words, according to him, the words "subject to the provisions of any law made by the legislature of the State" should be treated as a law which existed at a point of time when the Chief Justice exercises his power under Article 229(2), and frames the Rules prescribing the conditions of service of officers and servants of the High Court. That there was no law made by the legislature of the State, in force, when the Rules 2007 were framed and brought into force by the Chief Justice (which was published in the extraordinary Gazette dated 13-2-2007 with effect from 1-1-2007). Going by the context in which reference is made to the provisions of law made by the legislature of a State, it is contended, an ex post facto legislation cannot be operated in such a manner as to interfere with or otherwise dilute the effect of a Rule made by the Chief Justice under Article 229(2) of the Constitution. Conflict between legislative exercise by the Chief Justice and the legislative power exercised by the competent State legislature will have to be avoided and consequently, a harmonious interpretation of the opening portion of Article 229(2) of the Constitution behooves that the "law made by the legislature of the State" as occurring in Article 229(2) of the Constitution must be a law, which must have been brought into existence prior to the Chief Justice formulating the Rules under Article 229(2) and valid and operative at the time when the Chief Justice proceeds to frame the Rule.

34. The argument is persuasive, and with respect to the learned Senior Counsel, it merits a serious consideration as well. But, in my view, to accept the same, would require adoption of an interpretative process which will have to keep at bay, two salient features, that commend themselves for acceptance without any equivocation whatsoever. Firstly the competence of the State legislature to enact a law on the subject is sourced to Article 245 of the Constitution; that the State legislature is competent to enact a law dealing with the conditions of service of officers and servants of the High Court cannot be doubted, by virtue of Entry 3 of List II in the 7th schedule of the Constitution. That the legislative power under Article 245(1) of the Constitution is "subject to the provisions of this

Constitution", according to the Supreme Court, must be construed as to mean the application of the general doctrine that all authority and power must be in conformity with the Constitution [Tata Iron and Steel Co. v. State of Bihar A.I.R.1958 S.C. 452 and The State of Bihar and Others Vs. Charusila Dasi, . Is there anything in Article 229 of the Constitution, as such, which suggests limitation on the competence of the State legislature to enact a law under Article 245, dealing with a subject-matter which is comprehended by Entry 3 of List II of the Constitution?

35. Does Sub-clause (2) of Article 229 of the Constitution suggest any constitutional limitation insofar as the competence of the State legislature is concerned? In my view, subject to conformity with the provisions of Part III of the Constitution, which of course, is a matter of general application to any law enacted by any legislature, it is open to the State legislature to pass a law dealing with the conditions of service of employees of the High Court. The fact that the opening words in Clause (2) of Article 229 of the Constitution refers to a law made by the legislature of the State should obviously reiterate and affirm the competence of the State legislature to enact a law on the subject. At any rate, the opening words cannot inferentially result in a dilution of the competence of the State legislature in that behalf.

36. The second aspect, as mentioned by me above also, does not admit of any equivocation. It is the principle repeatedly made by the Supreme Court viz., that if the legislature is competent to enact a law on the subject, it is equally competent to enact a law with retrospective effect. The position has been so laid down by the Supreme Court in several decisions. But, I consider it suffice to refer only to a few major decisions on this point. [Refer to Rai Ramkrishna and Others Vs. The State of Bihar, , Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, , In the matter of In the matter of : CAUVERY WATER DISPUTES TRIBUNAL, . Though the decisions have been rendered in the context of considering the validity of a Validation Act, the Supreme Court has dealt with the question of competence of the legislature to enact a law with retrospective effect as well.

37. Once, therefore, competence, as regards the subject-matter of the legislation is beyond dispute, then the competence to enact a law with reference to an earlier date will also have to be accepted.

38. If this be the position, then it is not possible to accept the contention that "law" for the purpose of Article 229(2) of the Constitution will necessarily have to be "a law" that was enacted and was operative prior to the legislative power being exercised by the Hon"ble Chief Justice under Article 229 of the Constitution.

39. In the circumstances, the validity and the constitutionality of the law of the State legislature relatable to Article 229(2) of the Constitution cannot be tested with reference to the question as to whether it was passed by the legislature, prior to the exercise of power by the Chief Justice or subsequent thereto.

Competence of the State legislature is not determined with reference to the point of time, but with reference to the conferment of power by the Constitution. I am unable to accept the contention raised by Mr. Kannamthanam on this point.

40. Mr. P. Sreekumar, learned Counsel for the Petitioners in some of the writ petitions, contended that though an Ordinance promulgated by the Governor under Article 213 of the Constitution has all the attributes of a law passed by the legislature, going by the context in which the words "subject to the provisions of a law made by the State legislature" are used in Article 229(2) of the Constitution, the "law" for the purpose of Article 229(2) should be a primary legislation made by the State legislature and the Ordinance cannot be a substitute for the same. I am unable to accept this contention. An Ordinance, promulgated under Article 213 of the Constitution, has all the attributes of a law passed by the competent legislature. This position has been, time and again, reiterated by the Supreme Court in several decisions [refer to A.K. Roy and Others Vs. Union of India (UOI) and Others, , R.K. Garg v. Union of India AIR 1981 S.C. 2138, K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, . It is relevant to note that in the last among the decisions, the Supreme Court was specifically concerned with the validity of an Ordinance passed by the Governor of Andhra Pradesh, reducing the age of retirement of the State Government Employees from 58 to 55. An Ordinance is a "law" under Article 13 of the Constitution of India as well. It is subject to the same limitations and inhibitions as a primary legislation passed by any competent legislature. It, therefore obviously, is entitled to the same respect as a primary legislation. The constitutional restrictions and inhibitions as regards an Ordinance are spelt out under Article 213 of the, Constitution. The contention, that an Ordinance promulgated by the Governor cannot be a "law" for the purpose of Article 229(2) of the Constitution, cannot be accepted.

41. Mr. Sreekumar then contended that there is a colourable or even a mala fide exercise of power in the matter of promulgation of the Ordinance in question. That the Chief Justice has already exercised a legislative power by prescribing the age of retirement as 58 in the case of the employees of the High Court. The Hon'ble Chief Justice must have taken note of several factors before effecting such prescription. The report of the Pay Commission, as such, was accepted by the State Government. The Hon'ble Chief Justice would have taken note of the recommendations of the Pay Commission as such, the nature of the work discharged by the employees of the High Court and the availability of more experienced staff, at the disposal of the High Court. Apparently, there is a total non-application of the mind to any of these relevant aspects, before the Governor had promulgated the Ordinance, or before the executive Government had advised him to promulgate such an Ordinance, it is contended.

42. Learned Advocate General Sri C.P. Sudhakara Prasad, contended that the satisfaction of the Governor as to the necessity to promulgate an Ordinance is not justiciable. Further, the doctrine of "transferred malice" cannot be invoked in

the case of an Ordinance which is, as much, a legislative instrument as a law made by the State Legislature. Learned Advocate General, referred to the decisions of the Supreme Court in S.K.G. Sugar Ltd. Vs. State of Bihar and Others, , K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, and T. Venkata Reddy and Others Vs. State of Andhra Pradesh, in this regard. The Constitution Bench in the case of S.K.G. Sugar Ltd. Vs. State of Bihar and Others, . 1533 categorically laid down the principle in para 16 of the judgment. The same principle has been reiterated in the decision in A.K. Roy v. Union of India, 1982 (1) SCC 270 and K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, .

43. In so far as the contention regarding legislative mala fides, in the light of the judgment of the Supreme Court in K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, , and in Gurudevdatla VKSSS Maryadit and Others Vs. State of Maharashtra and Others, , the issue of legislative mala fides is beyond the jurisdictions of the Courts. The Supreme Court in the said decision, referred to the law laid down by the Constitution Bench in T. Venkata Reddy and Others Vs. State of Andhra Pradesh, . The motive of the legislature in passing a statute is beyond the scrutiny of the Courts. Interference is restrictive in nature and that too on the constitutionality aspect and not beyond the same. It would apply in the case of an Ordinance, considering the position of any law that an Ordinance is also a law within the meaning of Article 13. Therefore, it has the same attributes, inhibitions and restrictions as the primary legislation made by the State legislature. This, of course, is subject to the conditions and restrictions specified in the provisions in Article 213.

44. Ms. Pinku Thaliath, learned Counsel in one of the writ petitions, contended that the power of appointment of the Chief Justice under Article 229(1) of the Constitution would include the power of termination also and that consequently, the power to prescribe the age of retirement of the staff of the High Court on superannuation, which carries in its wake the consequence of the cessation of the service of the particular employee on attaining the age of superannuation should be treated as one which is comprehended by the exclusive powers of the Chief Justice under Article 229(1) of the Constitution. Ms. Pinku Thaliath made reference to Article 367 of the Constitution, which incorporates the provisions of Section 16 of the General Clauses Act, for the purpose of contending that the power of appointment would include the power of termination as such. In other words, the contention is that a law made by the State Legislature for the purpose of Article 229(2) of the Constitution of India should not prescribe the age of retirement of the High Court staff.

45. I am unable to accept this contention for more than one reason. Firstly, the conditions of service as contemplated by Article 229(2) of the Constitution of India would obviously comprehend the prescription of age of retirement also. Rule 37(1) of the Rules, 2007 prescribing the age of retirement of the High Court staff will also have to be sourced to Article 229(2) of the Constitution. The

competence of the legislative power to be exercised by the Hon'ble Chief Justice or by the competent State Legislature, either under Article 229(2) of the Constitution (in the case of the Chief Justice or under Article 245 of the Constitution in the case of State Legislature), so as to prescribe the age of retirement of the staff of the High Court, is not a matter which is in dispute or one which can be disputed legitimately. If that be so, there is no warrant or necessity to interfere with the exercise of power of termination of service, which is implicit in the power of appointment, while considering the power of the Chief Justice to make appointment under Article 229(1) of the Constitution. It is not disputed by anybody that the power to terminate the services of the staff of the High Court is exclusively conferred on the Chief Justice, and in that regard, the power to terminate the services will have to be treated as part of the power of appointment and inferentially the same will have to be treated as part of the power conferred on the Hon'ble Chief Justice exclusively by the Constitution under Article 229(1) thereof. But, that cannot lead to a conclusion that the retirement of an employee on attaining the age of superannuation will have to be treated as one involving the termination of service of the employee. The two are entirely different cases. The decisions referred to by Ms. Pinku Thaliath, i.e., Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, and State of Bihar and Another Vs. Bal Mukund Sah and Others, do not advance her case in any other respect. In fact, I do not think, the said decisions have any particular application insofar as the present cases are concerned.

46. Learned Counsel for the Petitioners also raised a contention, though I must mention not very vehemently, that the reduction in the age of retirement from 58 to 55 as per the Ordinance should be treated as arbitrary and violative of fundamental rights of the Petitioners guaranteed under Articles 14 and 16 of the Constitution.

47. Learned Advocate General submits that the prescription of the age of retirement, which might involve the reduction of the age from 58 to 55, cannot be construed as arbitrary and this position has been laid down by the Supreme Court in K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, , which position significantly was laid down in clear terms, by the Full Bench of this Court as early as in 1969 in N. Srinivasan v. State of Kerala 1967 KLT 853. Learned Advocate General further contended that notwithstanding the recommendation of the Pay Commission, the State Government has not decided to enhance the retirement age of the State Government employees from 55 to 58, No arbitrariness can be inferred as regards the decision of the State Government to maintain parity in the age of retirement between the staff of the State Government and the staff of the High Court.

48. The exposition of the law laid down by the Full Bench of this Court in N. Srinivasan 1967 KLT 853 and the law laid down by the Supreme Court in K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, , really concludes this issue as against the petitioners. I do not think that any further elaboration is

required on this point I am unable to accept this contention of the Petitioner as well.

49. At the opening portion of the judgment, I have mentioned about the contentions of Mr. K.R.B. Kaimal, learned senior Counsel, who appeared for the High Court. I have also stated that I will deal with his contentions at the appropriate stage. Mr. Kaimal submits, on instructions, that the Ordinance in question may not be a law for the purpose of Article 229(2) of the Constitution. He contends that the law made by the State Legislature, as occurring in Article 229(2) of the Constitution, should be a "law", which provides the modalities of the power to be exercised by the Chief Justice under Article 229(2) of the Constitution of India. In other words, according to him, the law will not actually deal with the prescription of the conditions of service of officers and servants of the High Court. He elaborates on this aspect submitting that "subject to the law made by the Legislature of the State" is relatable to the rule making power of the Chief Justice of a High Court, as is mentioned in the latter part of Clause (2) of Article 229. The law made by the Legislature of the State, as such, for the purpose of Article 229(2) of the Constitution will not prescribe the conditions of service of the staff of the High Court, as such. It is intended to lay down the parameters and the modalities of exercise of the power by the Chief Justice. He, therefore, contends that the present Ordinance, which on its own, prescribes the age of retirement of the staff of the High Court cannot fit the bill, for the purpose of Article 229(2) of the Constitution.

50. I am afraid, I cannot accept the contention of the learned Senior Counsel. Firstly, the competence of the State Legislature to enact a law dealing with the conditions of service of staff of the High Court is sourced to Article 245 of the Constitution, read with Entry 3 of List II of the 7th Schedule of the Constitution. The said competence of the State Legislature would be seriously affected, if one were to accept the interpretation that the State Legislature would be incompetent to pass a law, which prescribes the conditions of service of staff of the High Court. The legislative entry will have to be re-read and re-cast, if such an interpretation is made. Secondly, the more serious aspect, which prevents me from accepting this interpretation, is that it involves acceptance of a principle that the State Legislature would be competent to regulate the exercise of the Legislative power of the Chief Justice conferred under Article 229(2) of the Constitution. Acceptance of any such power with the State Legislature, in any manner, to regulate the exercise of the legislative power of the Chief Justice under Article 229(2) of the Constitution would be anathema to the concept of independence of the judiciary, which is one of the basic features of the Constitution of India. It also goes against the scope and ambit of the legislative power available to the Hon'ble Chief Justice as has been adumbrated by the Supreme Court in the case of *Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI)* and *Another*. In my view, it would be wholly incompetent for the State Legislature, in any manner, to provide for the modalities of the exercise of power by the Chief Justice under Article 229(2) of the Constitution. The prescription of

the age of retirement of the staff of the High Court, by the Ordinance in question, is a Legislative exercise on its own and need not be construed as one intended to modify or repeal the Rule framed by the Chief Justice independently under Article 229(2) of the Constitution. But, by virtue of Article 229(2) of the Constitution, the enforcement of Rule 37(1) of the Rules, 2007, will be subject to the provisions of the Ordinance in question.

51. Consequent upon the elaborate discussion as undertaken above, I consider it appropriate to formulate my conclusions as hereunder:

(a) Ordinance No. 61/07 dated 22-10-2007 viz., "The Kerala High Court Services (Detennination of Retirement Age) Ordinance, 2007" is constitutional and valid.

(b) The retrospective effect given to the provisions of the Ordinance with effect from 1-1-2007 cannot be considered as invalid, unconstitutional or otherwise arbitrary. The Ordinance is a "valid piece of law" within the meaning of Article 13 of the Constitution of India.

(c)The subjective satisfaction of the Governor and promulgation of the Ordinance under Article 213 of the Constitution is beyond the pale of judicial scrutiny.

(d) The doctrine of "transferred malice" is not available to be invoked in the case of an Ordinance promulgated under Article 213 of the Constitution of India, which has all die attributes and features of a primary legislation passed by the competent legislature.

(e) Any legislative exercise undertaken by the State Legislature will be confined to Article 229(2) of the Constitution and will not, in any manner, impinge upon the conferment of the exclusive constitutional power on the Chief Justice under Article 229(1) of the Constitution of India.

(f) The provisions of the Ordinance, which only prescribe the age of retirement of the staff of the High Court, do not impinge upon the exclusive constitutional power of the Chief Justice under Article 229(1) of the Constitution. It does not suffer from any unconstitutionality or infirmity.

For all these reasons, I do not find any merit in these writ petitions. They are, therefore, liable to be dismissed and I do so.