

PENSION PROVISION TO LEGISLATURES-UNCONSTITUTIONAL

Recently, A burning point arose for discussion, with regard to pension provisions to legislatures. A writ petition has been filed before Hon'ble Supreme Court of Judging the validity of pension provision. This issue has gathered a momentum in view of economic crisis before the nation. It is important fact, that, originally pension provision to the legislatures were not in the constitution. But in the 1980 decade pension provision to the legislatures were incorporated by various enactments by the state legislature and by the parliament in India, At present, except Gujrat state, the pension provision have been made in all states. Gujrat is the only state which has refused to grant pension to state legislature. Why it has refused or it has not made provision for pension to state legislatures is not, obviously, known but it is sure that the state of Gujrat has not relished it. The state of Andhra Pradesh has although made provision to State legislatures, but, several important limitations have been imposed for obtaining pension. But it has fixed the amount which is monthly payable to pensioner state legislation. It has been provided that a state legislature who has not served the assembly for five years, He shall get a small but determined amount monthly. But if he has served state assembly for more than 5 years then he shall be entitled to 50 rupees per month for a period over 5 years and no maximum limit had been fixed for it. While, In other states a maximum amount of pension which is payable to a state legislature has been fixed but general and common fact is that a legislature who has served the state assembly or the Parliament over one year is entitled to pension upon the terms and conditions by that state assembly or parliament. The provision for pension has also been made to parliamentarian who have completed a term exceeding one year, amount of pension may be different according to the period and term of parliamentarian.

Now we should see other nations other than our own. In England, a parliamentarian is not entitled to pension from state fund but a amount like pension is awarded to him out of a fund created by the deduction from salaries from all Parliamentarian. At present 6% salary is deducted of each and every parliamentarian to create fund. House of commons in 1939 established a Sub-committee to decide about pension but it was considered that no pension should be given out of state fund to parliamentarian because it shall be a additional burden up on tax payers, which is not proper at all. Lastly, In the decade of 1950 it was decided that pension should be paid to state legislatures or Parliamentarians out of a fund created from deduction of salaries of parliamentarian themselves and that entire amount of deduction shall go to a trust created by the Government.

That trust shall gather up & consolidate the entire amount and shall disburse pension between old parliamentarian. A limitation has been imposed that a parliamentarian or legislature is entitled to pension only if he has served as legislature for more than 4 years and he has completed the age of 65 years.

In Germany, Pension is being paid to parliamentarian out of a fund created out of the deduction from salaries of parliamentarian just, like In England as described above by me. But in Germany a Parliamentarian is only entitled to pension if he has completed the age of 65 years and has served over 8 years as parliamentarian or age limit shall be 60 years for awarding pension if he has completed 12 years as legislature, and if he has served for 16 years then the age limit shall be reduced to 55 years.

In Japan, Australia and other European countries, similar provision like England, has been made for awarding pension. The amount of pension and eligibility of age shall vary upon the term of Parliamentarian but the amount which is paid as pension in Japan and Australia is just twice in comparison to England and Germany, because the contribution of Parliamentarian in this fund created for this purpose of pension is 7.6% in Japan and 11% in Australia.

As in England, there is no written constitution. Hence, Parliament is supreme and similar is the position with Australia. So any provision if made by an act of parliament is valid and legal. It can not be declared to be un-constitutional even by apex court of law. Japan has written constitutional likewise Germany has also a written constitution and both these constitutions have provided for pension to legislatures and parliamentarians. The position of India is quite different as the constitution is supreme here. Unless any thing is being provided in the constitution itself, Parliament for State legislatures have got no right to frame any law and if law has been framed then it is illegal, unconstitutional and is liable to be struck down.

Article 106 of the constitution provides for salaries and allowances to the members of either House of the Parliament. This article, pertinently, provides only with regard to salary and allowances and nothing with regard to pension. Obviously, pension can not be included with in the term salary because salary or allowances are being paid in consideration of certain kind of service being done. Hence, impliedly salary can not include pension in itself. Hence, there is not implied or express provision for pension. Article 106 says "Member of either House of Parliament shall be entitled to receive such salaries and allowances made from time to time and determined by Parliament by Law. Similarly, Article 195 provides about salaries and

allowances to the members of legislative Assembly and Legislative council of state which shall be determined from time to time by the legislatures of that state. Nothing has been provided with regard to pension here also. On the other side if we see the position of Union and State Judiciary that is on different footing. Article 125(2) speaks about Supreme Court judges. It provides that every judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament. Similarly, Article 221(2) speaks about High Court Judges. It provides that every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by Law or under Law made by the Parliament. Now the position is quite clear, the constitution has expressly provided with regard to pension out of the consolidated fund of India to Supreme Court and High Court Judge and if constitutions framers might have thought to provide pension to the Parliamentarian and State Legislatures, then certainly Article 106 and 195 must have had provided specifically with regard to pension. The omission of pension from Article 106 and 195 and its inclusion in Article 125 and 221 shows that constitution framers were not of opinion to grant pension to the legislature. It also can not be said that pension provision were not under implementation. In U.K. when the constitutions of India was being framed. We know that large part of our constitution has been borrowed from United Kingdom. But this provisions of pension, which was in force in U.K. while the constitution of India was under preparation, was not borrowed. It also clearly shows that it was not borrowed. It also clearly shows that it was not thought proper by the framers to grant pension to Legislature. Poverty and backwardness of the nation might be one of the important factor for opting it.

Similarly, Seventh schedule of the constitution dispenses law making power to the Union of India and to the state legislature. In this schedule Union list item no 73 provide for salaries and allowances to the Members of Parliament, Chairman and Dy. Chairman of council of states, the speaker and the Dy. Speaker of the House of People. Similarly in the state lists item no. 38 provide about salary and allowances to members of state legislature, speaker and Dy. Speaker of Legislative Assembly and if there is any Legislative council then chairman and Dy. Chairman thereof. Hence, This schedule has not also empowered to parliament under Union list and to state legislatures in State list for making provision of pension to legislatures and Parliamentarian. For the sake of, argument it may be said that union lists Item no. 71 can empower parliament to frame

Law and Item no. 42 can empower to state Legislature to frame law for pension to state legislature s. the careful reading of Item no. 71 and Item no. 42 do not empower to frame Law for awarding pension because Item no. 71 provides for Union pension, that is to say, pension payable by the Govt. of India or out of consolidated fund of India. Similarly, Item no. 42 provides for state pension, that is to say. Pension payable by the state Government. These Items (71 and 42) are on similar footing. These provide for pension payable by the Government of India or by the State Government, but to whom. The answer is that pension is always payable according to the fiscal and financial rules (fundamental rules) created by the Parliament or by State Legislatures. In consideration of the past services rendered by Government servant or any other public servant declared to be benefited for it. The pension is payable only to Government servants or to other kinds of Public servants which are under the control of Government. Expressly, undoubtedly, Legislatures or Parliamentarian are neither Govt. servant nor under the control of Govt. They, themselves are Govt. whether, state or central. After all legislatures may be public servant but they are not Govt. servant. There exist vast difference between Govt. Servant and public servant and public servant but each and every public servant is not a Govt. Servant. For Example, corporators, Sarpanch, Pradhan & Arbitrator etc. are public servant within the meaning of Sec. 121 I.P.C. but they are not Govt. Servant. Although, In the case of R.S. Nayak Vs. A.R. Antolay, (S.C.C. 1984 page 138) M.L.A. was not considered as a public servant on this score, alone, Legislatures are not entitled to pension.

In poor country like India, which has suffered from backwardness and economic miseries, it is still suffering from backwardness and miseries today, the constitution framers never thought it proper to award pension to legislature otherwise if they could have thought it proper then pension provision must have been introduced in the constitution itself. Hence, It may be concluded that the pension provision are un-constitutional and beyond the power of Parliament and state legislatures. Hence, Ultra vires, If government or the present society or legislature think it proper to provide pension to legislatures then the constitution itself must be amended and pension provision should be incorporated so that present provision of pension may be saved from its invalidity. But if constitution is amended then one question may arise. Whether, the proposed amendment shall hit the basic features of the constitution or not, if it destroys or in some way affects the basic features of the constitution then certainly that amendment shall be void and Ultra Vires, If it does not affect the basic features of the constitution then the proposed

amendment shall come into effect without any kind of disturbance. I want to mention here that if constitution is amended. Then amendment showed have been brought by the legislatures from retrospective effect of years and months from which the pension provision were brought into effect by the Parliament or State Legislature respectively. Hence, constitutional Experts must be considered in this respect and their experts opinion and other juristic opinion should also be obtained before any steps is taken in this matter by the Legislatures themselves.

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