BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH,NEW BOMBAY.

Tr. Application No.113/86.

Shri D.D.Samant,
Advocate,High Court,
45, K.B.Niwas,
Shankarshet Road,
Girgaon, Bombay.400 004. ... Applicant

V/s.

1. Union of India,through
Finance Ministry, Department of
Personnel and Administrative
Reformers Central Secretariat,
New Delhi.
2. The Controller and Auditor
General of India, through
Accountant General of
Maharashtra at Bombay.
3. The Director of Audit, Scientific
and Commercial Department, A.E.A.P.,
Old Yatch Club, C.S.M.Marg,
Bombay-400 039. ... Respondents.

Coram: Vice-Chairman, B.C.Gadgil,
Member(A), J.G.Rajadhyaksha.

Appearances:

1. Applicant in Person.
2. Mr. M.I.Sethna,
advocate for Respondents.

JUDGMENT:

(Per J.G.Rajadhyaksha, Member(A)) Dated: 18.12.1986

Writ Petition No.3711 of 1985 has been filed for and on behalf of Shri V.M.Parulekar by Shri D.D.Samant, Advocate, as the next friend of Shri Parulekar. By operation of the Administrative Tribunals Act, the Writ Petition has been transferred to this Tribunal and bears Transferred Application No.113 of 1986.

2. The application involves the question of Pension of Shri V.M.Parulekar.

3. It is common ground that Parulekar was in the service of the Central Government and was holding the substantive post of a Deputy Secretary immediately before

3.9.1956 on the pay of Rs.1,450 per month. He was appointed as Joint Secretary in the Department of Atomic Energy on the fixed pay of Rs.3,000 per month. This was an ex-cadre, non-tenure post. The applicant was due to retire on 31.12.1958. He applied for 6 months Earned Leave standing at his credit. In the exigency of public service Government refused to grant that leave under FR.86. The effect was that Shri Parulekar continued in Service upto 30.6.1959 on which day he was relieved on retirement. Shri Parulekar was granted a pension of Rs.675 p.m. being the maximum permissible to a non I.C.S. Officer under the then existing Rules as embodied in the Civil Service Regulations and the liberalised Pension Rules, 1950. Annexure.VIII at page 104 are calculations of Parulekar's Pension under Rule.2 of sec.1 of the liberalised Pension Rules read with Article.487 B(1) of the Civil Service Regulations. His substantive pay and special pay as Deputy Secretary, and officiating pay as Joint Secretary were taken into account. The average emoluments worked out on 36 months emoluments were put at Rs.1,450 p.m. and they were increased by Rs.483.33 being thirty three and one third per cent increase in emoluments under Article 487-B(i)(b). These were taken into account against his average emoluments which would have come to Rs.2,051.34 under Article 487B (i)(a). the lesser amount had to be taken into account. Parulekar had opted for the new Pension Rules in those days, His pension would have come to Rs.724.99 p.m. but was limited to Rs.675 p,m. as mentioned above. Government framed another set of Rules known as Central Civil Service (Pension) Rules, 1972 (hereinafter referred to as The Pension Rules, 1972) and made them effective from 1.7.1972.

Average of 36 months emoluments was to be taken into account for calculating Pension even under Pension Rules, 1972. In 1979, Government further liberalised the Pension Scheme rendering it more beneficial inasmuch as Pension was to be determined on the average of emoluments drawn over 10 months prior to retirement. Secondly, ceiling on the pension available was raised to Rs.1,500 p.m. and a formula for calculation was introduced facilitating calculation of Pension on a slab system. These liberalised Pension Rules were made applicable to Pensioners who retired on or after 31.3.1979. The Supreme Court was moved in this matter on the ground that classification of Pensioners between those who retired prior to 31.3.1979 and those who retired after that date was bad.

4. The Supreme Court decided this controversy in the case of Shri D.S.Nakara V/s. Union of India reported in A.I.R. 1983 S.C. 130. The result of the decision was that the Liberalised Pension Scheme of 1979 was required to be applied even to those pensioners who retired prior to 31.3.1979 and to whom the Civil Service Pension Rules, 1972 were applicable. This necessitated re-calculation and fresh fixation of pension drawn by such pensioners on the basis of the Liberalised Pension Scheme. The Supreme Court further, directed that the increased Pension under the scheme will be payable from 1.4.1979 and not for any period earlier to that date.

5. The Government has implemented this scheme and issued directives in its Memorandum No.F.1(3)-EV/83 dated 22nd of October, 1983. It is not disputed that the applicant in this case got his pension re-fixed from 1.4.1979 according to the decision of the Supreme Court

as a gesture of good-will on the part of Government. The Govt. did take action in this direction and the pension of the applicant stood revised to Rs.829 p.m. from Rs.675 p.m., which he was earlier getting. Pensioners also became entitled to the relief and ad hoc relief as per rules. The basis for revision of the Pension of Parulekar was that the average emoluments for 10 months were calculated at a total average of Rs.1,760-00 under the Liberalised Scheme and he thus got benefit of the slab system and removal of the ceiling.

6. The grievance of the applicant is that the Respondents committed an error in determining his monthly average emoluments at Rs.1,760/- only. It is his ~~monthly~~ claim that since he was receiving monthly emoluments at Rs.3,000 per month till 31.12.1958 while in service, and these he continued to draw while on refused leave as leave salary, it was necessary that his average emoluments should have been taken at Rs.3,000 per month and his pension should have been fixed at Rs.1,325/- p.m. on that basis. What he expected was that his average monthly emoluments should have been determined on the basis of Central Civil Service (Pension) Rules, 1972 and not on the basis of Rules which were in force in 1959. He also maintains that under any set of Rules including the 1972 Rules, his average monthly emoluments should be Rs.3,000 and not Rs.1,760 for the purposes of calculation of his pension.

7. It will be useful at this stage to understand the provisions about emoluments, average emoluments and pensions under the Rules as revised from time to time. In the year 1959 "Civil Service Regulations" were in force, so far as Pension were concerned though for all other

matters they were superceded by the Financial Rules which were brought into force in 1922.

8. Article 486 of the Civil Service Regulations defines the term 'emoluments'. Only the relevant portion is reproduced here below:

1. Article 486:-

"The term "Emoluments" when used in this part of the Regulations means the emoluments which the officer was receiving immediately before his retirement and includes:

a) Pay other than that drawn in a tenure post.

b) Personal allowance, which is granted (i) in lieu of less of substantive pay in respect of a permanent post other than a tenure post, or (ii) with the specific sanction of the Government of India, for any other personal consideration.....

h) Acting allowances of an officer without a substantive appointment if the acting service counts under Article 371 and allowances drawn by an officer appointed provisionally under Article 389, or appointed substantively pretempore under Article 90 or in an officiating capacity under the rules in section I of Chapter VI to an office which is substantively vacant and on which no officer has a lien or to an office temporarily vacant in consequence of the absence of the permanent incumbent on leave without allowances or on transfer to foreign service.....(Clause (h) is reproduced as it was mentioned in arguments. We now find that it has no bearing on the case.)

2. In the case of an officer with a substantive appointment who officiates in another appointment or holds a temporary appointment "Emoluments" means:-

a) The emoluments which would be taken into account under this Article in respect of the appointment in which he officiates or of

the temporary appointment, as the case may be, or

b) the emoluments which would have been taken into account under this Article had he reminded in his substantive appointment, whichever are more favourable to him.

9. Article 487 defines the term "average emoluments" and reads as follows:

Article 487:-

"THE TERM 'AVERAGE EMOLUMENTS' MEANS THE AVERAGE CALCULATED UPON THE LAST THREE YEARS OF SERVICE

1. If during the last three years of his service, an officer has been absent from duty on leave with allowance, or having been suspended, has been reinstated without forfeiture of service, his emoluments, for the purposes of ascertaining the average, should be taken at what they would have been had he not been absent from duty or suspended: Provided always (a) that except as provided in Rule 1-A, his pension must not be increased on account of increases in pay not actually drawn and (b) that an officer will not during leave be allowed to count as emoluments the sub-pro-tem allowances or the allowances drawn by him in an officiating capacity in an office which is substantively vacant, which he would have been entitled to so count under Article 486(b) had he remained on duty, if another officer has been appointed sub-pro-tem to the same appointment during the period of such leave. But if his absence on Departmental or Recess leave is reckoned as service under Article 409, only the allowances, if any, actually received during such leave should be taken into account.

Note:1 :- The effect of proviso (b) to this rule is that in the event of an officer proceeding on leave with allowances from his sub-pro-tem or officiating appointment the sub-pro-tem or officiating allowances will count as "emoluments" for pension for the period of leave to the extent indicated below:-

i) If no other officer is appointed in the leave vacancy, the Sub-pro-tem or officiating allowances

that would have been reckoned as emoluments but for the officer proceeding on leave, for the entire period of such leave with allowances:-

ii) If any other officer is appointed in the leave vacancy the sub-pro-tem or officiating allowances that would have reckoned as "emoluments" but for the officer proceeding on leave on average pay for the first four months, only, as the case may be provided that the officer retains a lien superior to that of his locamtenens on the post which he was holding before proceeding on such leave.

Note: 2 :- The proviso (b) to rule 1 and Note 1 above are not applicable to officers who retire on or after the 22nd April, 1960. The average emoluments mentioned here are directly related to emoluments as defined in Article 486 and refer primarily to substantive emoluments.

10. We then go to Article 487B which deals with average emoluments for the purposes of pension. The relevant portions read:-

Article 487-B:-

"In the case of a Government Servant who quits service on a superannuation, retiring, invalid or compensation pension, or invalid or compensation gratuity and who, during the period from the 1st January, 1948, to 21st April, 1960 holds or has held before retirement a permanent post in a provisionally substantive or officiating capacity, or a temporary post in a substantive or officiating capacity where such post carries a rate of pay higher than his substantive pay but the increase over substantive pay does not count for pension or gratuity under clause (h) of Article 486 of these Regulations:-

i) His average emoluments for pension as calculated with reference to Articles 486 and 487 shall be increased:-

either

a) by one-half of the difference between the

average emoluments so calculated and the average emoluments which would result if such post or posts were permanent and service rendered in the higher post or posts between the 1st January, 1948 and 21st April, 1960.

or

b) by thirty-three and one-third per cent, whichever is less".

(The rest of article 487-B is not relevant for our purposes).

11. The effect of these three articles from which only relevant portions have been quoted, is that substantive pay is taken into account for the purposes of calculating average emoluments on which pension is to be determined. The average emoluments for pension as calculated with reference to Articles 486 and 487 are to be increased either by one half or by $33\frac{1}{3}$ rd per cent of the difference between the average emoluments drawn in officiating capacity, and average emoluments drawn in the substantive capacity depending on individual cases.

12. We also gather from the Respondents that upto 31.12.1947 only substantive pay could be taken into account for the purposes of calculation of pension. Between 1.1.1948 and 21.4.1960 substantive emoluments and either Fifty per cent or Thirty-three and one-third per cent of the difference between the officiating average emoluments and substantive average emoluments whichever was less was to be taken into account.

13. From 22.4.1960 the limit of thirty-three and one-third per cent on the difference to be taken into account was removed. Thus half the difference between officiating and substantive pay could be taken into account. This introduction of Article 486 A w.e.f. 22.4.1960 was extended

to those who retired between 1.11.1959 and 12.4.1960 as a concession and it was possible for the pensioner to opt for, whichever formula was more beneficial.

14. On 1.9.1962 Article 486-B was introduced, whereby pay drawn in officiating capacity for a continuous period of 3 years was equated to substantive pay/emoluments, thus making a further concession to the pensioners. On 15.6.1968 Article 486 C was introduced where-under only the officiating pay would be taken into account for the calculation of pension without any bar as regards the period for which it was drawn.

15. When the Central Civil Service (Pension) Rules were issued in 1972 it actually meant a consolidation of the various Rules and Regulation regarding pensions in one set of Rules.

16. It would further be useful to take into account Rules. 33 and 34 of the Central Civil Service (Pension) Rules, 1972 they have been reproduced here below:-

> 33. Emoluments:
>
> The expression "emoluments" means pay as defined in Rule 9(21) of the Fundamental Rules (including dearness pay, as determined by the order of the Government issued from time to time) which a Government servant was receiving immediately before his retirement or on the date of his death.
>
> and
>
> 34. Average Emoluments:
>
> Average emoluments shall be determined with reference to the emoluments drawn by a Government servant during the last (ten months) of his service.

17. Under Rule.34 the emoluments for 10 months for determination of the average could be taken into account w,e.f. 1st March, 1976, as a result of notification issued by the Government of India on the 19th May, 1980. Another

(10)

Rule which can, with advantage, be quoted is Rule.49 of the Central Civil Service (Pension)Rules, 1972. Only the relevant portion is quoted here below:-

> (2)(a) In the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than (thirty-three) years the amount of pension shall be determined as follows namely:-
>
> | Average emoluments | Amount of monthly pension |
> |---|---|
> | i) Up to first Rs.1,000 | 50% of average emoluments. |
> | ii) Next Rs.500 | 45% of average emoluments. |
> | iii) Balance | 40% of average emoluments subject to a maximum of Rs.1,500 per mensem including relief on pension (payable) up to index level 328; |

18. It is Parulekar's case that by not applying the Central Civil Service(Pension)Rules, 1972 as further liberalised in 1979, the Government had erred in the matter of taking his correct emoluments and average emoluments into account and thereby in revising his pension. It has been argued before us by the Learned Advocate Mr.D.D.Samant extensively that the principles enunciated in the 1972 Pension Rules have not been made applicable to him in toto, though only some of them have been applied. It is true that Government applied the slab system to him, that they did not enforce any ceiling on his pension in terms of 1972 Rules; they also took into account the 10 months' average emoluments for calculating the pension, but they did not take the entire pay or emoluments of the applicant into account. For the period 1.9.1958 to 31.12.1958 i.e. four months they took Rs.3,000 as the emoluments. For the further 6 months i.e. period of refused leave they took his substantive

pay as Deputy Secretary namely Rs.1,450 per month for the purposes of calculating the average emoluments. They did not take into account Rule.33 of the Civil Services Pension Rules, 1972 nor did they take into account average emoluments in terms of Rule.34 read with Rule.33. Admittedly, Parulekar is entitled to the application of the liberalised pension scheme. But they hold back the benefit available under Rule.33 and 34 of the Pension Rules. They insisted on applying Articles 486, 487 and 487 B, of the Civil Service Regulations. The net result is that instead of average emoluments at the rate of Rs.3,000 p.m. something much less has been taken into account. Shri Samant further points out that untill 1979 the Pensioner did not feel much perturbed, but only when basic changes were introduced, he started moving in the matter. He contests the very reference made by his Department namely the Atomic Energy Department to the Government of India for clarification and the reply given by the Government of India which have led to this anomaly. Drawing our attention to Ex.'C' attached to the application Shri Samant argues that the contention that the Supreme Court has not made any specific ruling abou-t the application of Rules and Orders irrespective of the date of retirement was the root cause of the problem. The ruling that average emoluments for 10 months are to be calculated only with reference to the Rules and Orders existing on the date of retirement of an individual pensioner has led to mis-calculation of Parulekar's Pension. It is Mr.Samant's further contention that if Rule.89 of the Central Civil Service Pension Rules, 1972 is properly read and construed, it would be clear that

old Rules ceased to be operative as per Clause 89(1). He argues that in terms of Rule.89(c) the Pension matter pending at that stage of time should only be governed by the old rules and it was open to Government to take up old cases for revision even if they had been settled, in terms of Rule.89(e) which is quoted herebelow:

> "(e) subject to the provisions of clauses (c) and (d), anything done or any action taken under the old rules shall be deemed to have been done or taken under the corresponding provisions of these rules."

19. It is Mr.Samant's argument that anything done or action taken under the old rules shall be deemed to have been done or taken under the corresponding provisions of these rules that is the 1972 Pension Rules. Therefore, he feels that the calculation of emoluments and the average emoluments should have been done under Rule 33 and 34 of the Pension Rules, 1972 and not under Articles 486 487 and 487B of the Central Civil Service Regulations. In support of his contention, he points out that the Pension Rules 1972 came into force on 1.6.1972. Rule.34 provided that the average emoluments should be based on 36 months of emoluments drawn prior to retirement; Article.487 said the same. Since the Pension Rules 1972 are admittedly applicable to Parulekar's pay, which includes officiating pay under Rule.9(21) of the Financial Rules, it should have been taken into account and when w.e.f. 1.4.1976 the principle of 10 months average emoluments was introduced by liberalising Rule.34, automatically Parulekar's average emoluments based on Rs.3,000 per month should have been taken into account. Citing Nakara's case, he argues that Supreme Court overruled the classification made by Government

into pre-31.3.1979 and post-1.4.1979 Pensioners. Therefore if according to the Supreme Court all Pensioners prior to 1.4.1979 were to be treated under the Liberalised Pension Scheme of 1979 based on the Pension Rules of 1972, Government had no right to exclude Parulekar. Mr. Samant further argues that the Pension Rules 1972 apply to Government servants borne on pensionable establishment and Parulekar was one such Civil Servant. Therefore, even if it is argued that the Pension Rules, 1972 are prospective in their application, they still apply to Parulekar. Emphasizing his intrepretation of Rule 89(2)(e) he argues that Government have to act as if the Pension Rules, 1950 had not been made at all. The Pension Payment Order issued in 1959 should be deemed to have been issued under Rule 65 of Pension Rules 1972, and, if at all the pension was to be revised, it could be done only in terms of Pension Rules, 1972. He has further argued that the Pension Rules, 1972 or even the liberalised Pension Scheme of 1979 would have made no difference to applicant monetorily until Government of India's Memorandum of 1980 effective from 1.4.1976 introduced the 10 months average emoluments concept. It is Mr.Samant's argument that Nakara's case does away with the distinction between pensioners and pensioners. He draws our attention specially to paragraph 35 of the judgment about the challenge posed in Nakara's Petition. The paragraph.37 of the Supreme Court's Judgment refers to pensioners as a class for payment of pension. The 10 months average was meant to give a higher average for calculation of pension since it would definitely be higher than the average emoluments of 36 months preceding the date of retirement. In paragraph.39

the Supreme Court commented adversely on arbitrary selection of criteria for eligibility of the liberalised scheme. If the liberalised scheme was for augmenting social security in old age, then those who retired earlier could not be worse than those who retired later. Thus the classification was termed arbitrary and unprincipled. Paragraph 46 referred to the necessity of treating the liberalised pension scheme as both prospective and retro-active. The Supreme Court had observed that Pension was some kind of retirement wages for past services. It could not be denied to those who retired earlier, Revised retirement benefits being available to future retirees only. From paragraph.49 Mr. Samant relies upon the observation that in case of Pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. Mr. Samant adds that Parulekar is not asking for revision or payment of arrears prior to 1979. Then turning to paragraphs. 62 and 65 in which the 9th report of committee on Petitions (VIth Loksabha) April, 1979 has been referred to; it is pointed out:

> "The Committee are of the view that Government owe a moral responsibility to provide adequate relief to its retired employees including pre-1.1.1973 pensioners, whose actual value of pensions has been eroded by the phenomenal rise in the prices of essential commodities. In view of the present economic conditions in India and constant rise in the cost of living due to inflation, it is all the more important even from purely humanitarian considerations if not from the standpoint of fairness and justice, to protect the actual value of their meagre pensions to enable the pensioners to live in their declining years with dignity and in reasonable comfort".

Paragraph 65 is the final ruling of the Supreme Court striking down certain words in the Government Memoranda. Omitting the unconstitutional part and declaring that all pensioners governed by the 1972 rules etc. shall be entitled to pension as computed under the liberalised pension scheme from the specified date irrespective of the date of retirement etc. Mr.Samant argues that Annexures 6 and 7 to his application are contradictory to the Pension Rules, 1972 and the Judgment of the Supreme Court.

20. Mr.Samant also argues on the basis of sec.6 of the General Clauses Act with special reference to Clause'b' and'c' and states that the old rules will not survive for any purposes whatsoever. Section 6 of the General Clauses Act is reproduced herebelow:

> Section.6 General Clauses Act, 1897
> Effect of repeal: Where this Act or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-
>
> a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
>
> c) affect any right, privilege, obligation or liability acquired, accord or incurred under any enactment so repealed; or
>
> d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, libbility, penalty, forfeiture or punishment as aforesaid;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or

Regulation had not been passed."

Its reading does not yield to the construction sought to be put on it by the learned advocate applicant. He continues; therefore, Articles 486, 487 and 487B also do not survive after 1.6.1972 in the absence of specified intention that they should continue. Adverting to these provisions, Mr.Samant seeks to distinguish between past action which has been saved or legalised and the future which should be according to the new law. He says that the pension authorised in 1959 under Articles.486, 487 and 487 B on the basis of average emoluments of 1959 cannot survive any more. It is applicant's right and Government's liability to pay Pension and this position which lasted till 31.5.1972 had to change on 1.6.1972 with the Pension Rules, 1972 coming into effect, whereby all rights and liabilities acquired earlier are deemed to have been acquired under new Rules.33, 34, 49 and 65 of the Pension Rules, 1972. He argues that Rule.89 of the Pension Rules would not have been made at all if old cases were not to be reopened for consideration under Pension Rules, 1972. Rule 5 would have prospectively dealt with new Pensioners. Parulekar's Pension has to be refixed under the new rules, as there are no other rules now in existence. His emoluments and average emoluments have also to be re-calculated after 1.6.1972 in terms of Pension Rules, 1972. Mr. Samant emphasizes that in Parulekar's case the period from 1.1.1959 to 30.6.1959 was in fact extension of service being refused leave in terms of rule.86 of Financial Rules read with Government of India, Finance Department Memorandum 520-CSR dated 31.5.1972. Therefore, the question of certifying that

Parulekar "would have continued to officiate" should not arise. He had not been reverted prior to 31.12.1958 and, therefore, his status as a Joint Secretary continues. He cites 1969, Supreme Court 1225 to emphasize his points that a right once vested cannot be ~~distributed~~ disturbed.

21. Mr.Samant's concluding argument therefore, is that the Pension Rules, 1972 as liberalised in 1979 and explained in Government Memorandum 22nd October, 1983 should be properly intrepreted and applied to Parulekar and his pension refixed at Rs.1,325/- p.m. w.e.f. 1.4.1979.

22. We may now deal briefly with the contentions of the Respondents. Mr.M.I.Sethna appeared for the Respondents and explained that in the case of Parulekar the question of 10 months average has not been disputed. He asked whether Article.486(h) would apply if Parulekar was acting in a Higher Post for the purpose of determining encashments. Such was not the case, nor the claim of Parulekar. He also argued that what is once decided viz. the pension case of Parulekar, cannot be reopened. Referring to the Supreme Court's decision in Nakara's case, he pointed out that Supreme Court did away with the distinction between pre-31.3.1979 and post-1.4.1979 retirees. But Supreme Court also ruled that those who were governed by the Pension Rules, 1972 would alone get this benefit. The question, he said, was admittedly the 1979 liberalised policy applies to Parulekar for certain purposes, but which are the Pension Rules? Is it the 1950 Rules or the 1972 Rules that apply to the applicant? He submitted that Note.II to Rule.33 of the Central Civil Service(Pension) Rules 1972 would not be applicable in this case. Mr. Sethna points out that Parulekar had not

completed three years as Joint Secretary, even including the refused leave and therefore in terms of Articles 487 he was not entitled to take into account his officiating pay, and his average emoluments had to be worked out in terms of Articles 486 and 487, and then for the purposes of calculation of Pension, Article.487B applied. Mr.Samant admits that Parulekar had not completed three years of service as Joint Secretary.

23. The Learned Advocate Shri Samant had contended that the Pension of one Mr.Venkateshwaran was fixed at Rs.1,325 p.m. though he had retired very much in circumstances similar to Parulekar's and had thus reaped full benefit of the liberalised Pension Scheme, 1979. He had promised to submit affidavit on this matter. He accordingly submitted an affidavit which was contested by the Respondents pointing out that Venkateshwaran had worked from 13th June, 1960 to 20th June 1966 as Joint Secretary. At the time he retired Article 486-B had already been introduced in the Civil Service Regulations which enabled the authorities to take into account three years officiating pay for the purposes of calculation of Pension and this is what was done in the case of Venkateshwaran. Shri Samant then did not press for comparison of Parulekar's case with that of Venkateshwaran.

24. Shri T.K.Ayyar, Senior Deputy Accountant General and Mr.Vakil, Accounts Officer appeared for Respondents on 1.12.1986 to assist the Government Counsel and they explained the Respondents' stand to the Tribunal. Mr.Ayyar pointed out that the main issue before the Supreme Court was whether the formula under the liberalised pension scheme was applicable to old pensioners? Supreme Court

decided that all persons who retired prior to 31.3.1979 and to whom Pension Rules, 1972 applied would be governed by the 1979 liberalised pension scheme. There was no automatic application thereof to persons who retired prior to 1.6.1972. Yet as a gesture of goodwill Government applied the liberalised pension formula even to the old pensioners who retired prior to 1.6.1972. He emphasized that Civil Service Regulation 486, 487 and 487B continued to govern the question of emoluments and average emoluments of pensioners who retired prior to 1.6.1972. He urges that Rule.89 of the Pension Rules, 1972, does say that old rules, Government Memoranda etc. ceased to operate; but if clauses (c) and (d) are read together it will be clear that what has already been authorised or is pending at the time all these rules came into force will be dealt with, as if the Pension Rules 1972 were not made at all. Admittedly, after 15.6.1968 with the introduction of Article 486-C, pensioners got a lot of relief, but until then the pensioners were governed by Articles 486, 486-A and 486-B. Article 487-B applied to Pensioners between 1st January, 1948 and 21st April,1960. Parulekar's case fell within this period and there could, therefore, be no revision in his case in terms of Articles 486A, 486B and 486C. He argues that the ruling of the Supreme Court did not extend to calculation of emoluments and average emoluments under the Civil Services Regulations at different points of time. Rule 89(e) of the Pension Rules, 1972 being subject to clauses (c) & (d) there is no 'fiction' in these provisions, and old cases are clearly excluded by Clauses (b), (c) and (d). One point however, is conceded by the

Respondents; that there has been a mistake in the calculation of emoluments and average emoluments in the case of the applicant. That mistake is that refused leave being extension of service, the leave salary should have been calculated on the basis of officiating pay being treated as duty pay. In other words, it was a mistake to take only 4 months officiating pay at Rs.3,000 into account and then taking 6 months' substantive pay at Rs.1,450 into account. The correct approach would have been to take all 10 months' pay at Rs.3,000 as officiating pay and then taking all 10 months' pay at Rs.1,450/- as substantive pay for working out the difference between the officiating pay and the substantive pay. If this was done the basis for working out the Pension would have come to about Rs.1,933 or so p.m. If this is done, there would be some upward revision in the pension of Parulekar.

25. Having heard both the sides and studied the Civil Service Regulations as well as the Pension Rules, 1972 and the liberalised formula introduced under the Government Memorandum of 1983, in the light of the General Clause Act, and further the decision of the Hon'ble Supreme Court in the case of D.S.Nakara V/s. The Union of India, we come to the following conclusions:-

26. Section.6 of the General Clauses Act would not permit us to interpret the Pension Rules, 1972 to mean that the new rules totally supplant the old rules for all purposes. What ceased to operate is the old rules and memoranda. But in such a repeal the saving clause is introduced to protect and legalise action which is already taken under the old provisions. By

no stretch of imagination can Rule 89(e) of the Pension Rules, 1972 mean that calculation of emoluments, average emoluments and pension is to be done in terms of the new Rules overruling and erasing whatever was done under the old rules. Mr. Samant has quoted extensively from the Supreme Court's ruling, but we also find that this ruling observes as follows:

> "Only the Pension will have to be re-computed in the light of the formula enacted in the liberalised pension scheme and effective from the date the revised scheme comes into force and beware that it is not a new scheme, it is only a revision of existing scheme. It is not a new retiral benefit."

27. The Supreme Court has made it clear that all Pensioners whenever they retired, would be covered by the liberalised pension scheme because the scheme is a scheme for payment of pension to a pensioner governed by 1972 Rules. In case of Pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. No arrears would be payable. In our opinion, it would make a marginal difference in the case of past pensioners, because the emoluments are not revised. If the emoluments remain the same, the computation of average emoluments under amended rule 34 may raise the average emoluments, period of average being reduced from last 36 months to last 10 months. The Supreme Court made it abundantly clear that in respect of all pensioners governed by the Pension Rules, 1972 the pension of each may be recomputed as on 1st April, 1979. The date of retirement of each employee remains as it is. The average emoluments have to be worked

(22)

out keeping in view the emoluments drawn by him before retirement, but in accordance with the principles of the liberalised pension scheme. In conclusion, the Supreme Court ruled that the date mentioned in Ex.P 1, P 2 before them will be relevant as being one from which the liberalised pension scheme becomes operative to all pensioners governed by the Pension Rules, 1972 irrespective of the date of retirement. We have to accept the Respondents' contention that the emoluments and the average emoluments of Parulekar as on the date of his retirement are relevant, and there is no scope for revising those in terms of the Pension Rules, 1972, as liberalised in 1979 or implemented in 1983. We appreciate that, though strictly speaking Parulekar might not have fallen within the ambits of the liberalised pension rules, 1972, the Government have in fact given him the benefit of the slab system, the average of 10 months emoluments, as against 36 months emoluments, and the removal of the ceiling as per the new Pension Rules and liberalisation thereof. We see from pages 104 and 105 of the reply of the Respondents containing Annexures 8 and 9 that there has been recalculation of Parulekar's Pension. They have obviously erred in taking the substantive pay from 1.1.1959 to 30.6.1959 for the purposes of calculating average emoluments. Government have taken Rs.1,760/- as the basis for calculating pension and fixed it at Rs.829. In fact they should have taken into account Rs.1,933/33 as the basis. If they did so, the amount of pension due to Parulekar would be Rs.~~899/-~~ Rs 899/- p.m. as the basic pension to which

relief and ad hoc relief will be added from time to time, according to the rules. It is true that Parulekar is missing the benefit of Article 486A which became operative for those who retired on or after 1.11.1959. But this is inevitable as a line has to be drawn by Government some time, some where. In view of this discussion, we are unable to wholly accept the application for revision of Pension on the basis of Rs.3,000 p.m. as average emoluments for all purposes. We would accept the Respondents' admission of a mistake and permit them to recalculate Parulekar's Pension on the basis of average pay in the officiating period including the period of refused leave reduced by the substantive pay of Parulekar and increase the same by thirty-three and one-third per cent of the difference between the two, which would bring the basis of calculation to Rs.1,933.33 p.m. leading to the recalculation of basic pension to Rs.899/- p.m.

28. We therefore, hereby sanction Rs.899/- p.m. as the Revised Pension in favour of Parulekar. ~~Those~~ This will be effective from 1.4.1979, this is the basic pension and it is needless to add that Parulekar would be entitled to all temporary increases, reliefs or ad hoc reliefs as are permissible under the rules. The authorities shall calculate the arrears due to Parulekar on the basis of this sanction and shall effect payment to him within three months from the date of this order and in any case before 31.3.1987.

29. The application is thus partly allowed, with orders as above. Parties to bear their own costs.

(B.C.GADGIL)
VICE - CHAIRMAN

14/7/86

(V.G. RAJADHYAKSHA)
MEMBER(A).