

(2008) 01 DEL CK 0186

In the Delhi High Court

Case No : Writ Petition (C) No"s. 460, 557, 643 and 2115 of 2007

Asha Aggarwal (Dr.) and Others

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 11-01-2008

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19, 4(1)
Constitution of India, 1950 — Article 14, 16, 226

Citation : (2009) 1 SLJ 225

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Rajeev Sharma, in W.P. C No. 460/07, Dileep Tandon, in W.P. C No. 557/07, A.P. Dhamija, in W.P. C No. 643/07 and S.P. Mehta, in W.P. C No. 2115/0, for the Appellant; A.K. Bharadwaj and Shivender Chopra, in W.P. (C) Nos. 460, 557, 643/07 and Amit K. Paul, for MCD, for the Respondent

Judgement

A.K. Sikri, J.—All the petitioners in these petitions constitute one homogeneous group and raise common grievance. They were working as General Duty Medical Officers (GDMOs) with the Director General, Central Health Services, Ministry of Health and Family Welfare, Government of India. Their age of retirement was 60 years. In case of other three categories of doctors, namely, Teaching Specialists, Non-teaching Specialists and Public Health Specialists, the Government (respondents) herein decided to enhance the age of superannuation to 62 years vide notification dated 16.11.2006. Since same benefit of increase in age was not extended to GDMOs, the respondents felt that they were discriminated against, as according to them, they broadly fall in the same group in which other three categories of doctors belong to inasmuch as it is one service which is divided into four sub-cadres and, therefore, the impugned action of the respondents suffered from vice of inequality and, thus, violative of Articles 14 and 16 of the Constitution of India. All these petitioners filed separate application u/s 19 of the Administrative Tribunals Act before the Central Administrative Tribunal, Principal Bench, New Delhi. However, the Tribunal has not accepted their contention and

all these applications are dismissed. The orders passed by the Tribunal are assailed in these petitions.

2. In view of commonality of the subject-matter as well as the legal principles involved, we heard all these petition together. Naturally, one common judgment would suffice to cover these writ petitions and we propose to proceed accordingly.

3. For the sake of brevity, facts of W.P. (C) No. 460/2007 are taken note of. The Central Health Services (CHS) was constituted by the Government of India way back in the year 1960. It was declared a Class I Service in 1973. In 1982, this service was restructured by dividing into four categories, namely, General Duty Medical Officers, Teaching Specialists, Non-teaching Specialists and Public Health Specialists. After initial recruitment into their respective cadres, there are separate channel of promotions up to Senior Administrative Grade (SAG level). Beyond that, for promotion to Higher Administrative Grade (HAG level) all the four cadres are treated as feeder cadres. Thus, the four tributaries merge at HAG level and thereafter flow in the same/common direction. The highest post in the CHS is that of Director General, which can be manned by any doctor belonging to these four categories.

4. The petitioner was appointed as GDMO on 24.3.1971. She was promoted as Senior Duty Medical Officer with effect from 25.11.1982 and then as CMO on 15.1.1989. Further promotion as Chief Medical Officer (NMSG) was accorded to her with effect from 1.1.1992. She was given SAG pay scale on 8.2.2005.

5. As mentioned above, as per the recruitment rules, the age of retirement for all the doctors belonging to the four cadres is 60 years. The Government of India felt concerned with high attrition rate of Government doctors through voluntary retirement, resignation and foreign assignments. In order to diagnose the cause and to suggest the remedy/ treatment for this aforesaid sickness, a High Power Committee was constituted. The purpose, thus, was to examine as to why an unusual number of Government doctors were leaving their jobs to take employment in foreign countries/domestic private sector and to suggest measures to prevent abnormal attrition in Government cadres. This High Power Expert Committee was headed by Sh. Javed A. Chawdhury, former Health Secretary, Government of India along with seven other members.

6. After an indepth analysis of the situation, the Committee submitted its report in May 2006. In its detailed report, various nuances and intricacies of the problem were discussed, including their causes and number of recommendations made. One of the recommendations was that the retirement age of CHS doctors be enhanced from 60 to 62 years. Justification for such a move was also given to which we shall advert to at the appropriate stage. This report was considered by the Government of India which resulted in issuances of notification dated 16.11.2006. However, vide this notification while the age of superannuation for doctors belonging to other three categories was fixed as 62 years, insofar as GDMOs are concerned, they were left out and such a benefit was not extended to

them.

7. As mentioned above, the petitioners herein filed separate applications before the Tribunal challenging the notification dated 16.11.2006 as arbitrary, discriminatory and violative of the provisions of Articles 14 and 16 of the Constitution of India. There is a common judgment in the case of the petitioners in WP(C) Nos. 460/2007, 557/2007 and 643/2007. Insofar as the petitioner in WP(C) No. 2115/2007 is concerned, he is a medical doctor in MCD and, therefore, he has directly approached this Court by filing petition under Article 226 of the Constitution of India for same relief on same grounds.

8. In a brief order dated 11.1.2007 passed by the learned Tribunal, the entire reasoning given for dismissing the application is contained in para-6 alone and we reproduce the same to ascertain the mind of the Tribunal.

6. The subject matter of the application relating to enhancement of the age of superannuation of a class/category of officers is a matter of policy, which the Government is competent to decide. In a catena of judgments of the Apex Court, it has been held time and again that Courts should not interfere in policy matters. In the present case, again, the applicants have not been individually discriminated against in the impugned order of the Government. As stated by the applicants, the impugned order excludes an entire sub-cadre (GDMO). The applicants have also not established any mala fides. We, therefore, do not consider it necessary to interfere with the decision of the Government.

9. The Tribunal, thus, perceived it as a matter of policy of the Government in not extending the benefit to GDMOs and on the premise that not few individuals, but the entire sub-cadre of GHMO is excluded and there is no mala fides, there is no reason to interfere with the decision of the Government.

10. Before we reproduce the legal submissions made by the learned Counsel for the petitioners in these petitions, we may refer to one development which has taken place after the pronouncement of the impugned judgment by the Tribunal and during the pendency of these petitions. It is because of the reason that much sustenance in support of their arguments was sought to be drawn by the learned Counsel for the petitioners from this event.

11. It is well known that the Central Government has already constituted the Sixth Pay Commission (in short "Sixth CPC"), which, at present, is proceeding with the deliberations. The Ministry of Health and Family Welfare-CHS-V Section, Government of India, has addressed Office Memorandum dated 1.8.2007 to the Sixth CPC precisely on the same subject, namely, enhancement of superannuating age of the categories of officers to which the petitioners belong. This O.M. reads as under:

Subject: Proposal for enhancement of age of superannuation of General Duty Medical Officers of Central Health Service, from 60 to 62 years reg.-The undersigned is directed to forward herewith a proposal for enhancement of age

of superannuation of General Duty Medical Officers of Central Health Service from 60 to 62 years, for consideration of 6th Central Pay Commission.

12. Along with this memo, the proposal, which is forwarded, details the background and also highlights the problem of attrition of doctors from CHS. It traces out the history by pointing out the constitution of J.A. Chawdhury Committee and the decision to enhance the retirement age of the specialist doctors of CHS belonging to three sub-cadres. What is important is that this proposal highlights the justification for increasing the age of superannuation of the doctors of GDMO sub-cadre as well. It would be apt to reproduce that portion of the proposal in its entirety:

5. Justification

There is a strong case for increasing the age of superannuation of doctors of GDMO sub-cadre also. Some of the justifications for this have been discussed below:

(i) Imbalance among sub-cadres-The age of superannuation of CHS doctors of 3 sub-cadres, namely, (i) Teaching; (ii) Non-teaching; and Public Health, has already been increased from 60 to 62 years. The Central Health Service consist of 4 sub-cadres including GDMOs. As the Doctors belonging to GDMO sub-cadre have been kept out of purview of the benefit of enhancement of retirement age, the action has created an imbalance in the CHS cadre. Since the other service conditions of all doctors of CHS remain the same, it is desirable to remove the imbalance in the CHS cadre by extending the benefit of enhancement of the age of retirement of the doctors of left out sub-cadre, i.e. GDMO. As a matter of fact, when the proposal to enhance retirement age of teaching faculties was mooted in 2004, the Department of Personnel and Training had not agreed with the proposal as it was felt that it would not be possible to extend the age of superannuation in only one sub-cadre wi thought disturbing the balance in the CHS cadre. It was also observed that condition of services, within the CHS cadre has to remain the same.

(ii) Recommendation of J.A. Chawdhury Committee-As indicated earlier, the Ministry of Health had constituted an Expert Committee, after encountering the trend of Government doctors leaving the public sector job for green pastures in private sectors, to suggest remedies to arrest the further outflow of doctors. The Committee consisting of former Health Secretary Sh. Javed A. Chawdhury as Chairman, former Secretary, Ministry of Urban Development, Smt. Kiran Agarwal, Dr. Ranjit Roy Chaudhury, Dr. K.P. Mathur, DGHS, Director (AIIMS), Director (PGIMER) or their nominees as member, considered various issues relating to service conditions of doctors in Government including CHS officers. After detailed deliberations, the Committee recommended enhancement of age of retirement of all CHS doctors irrespective of their sub-cadre, from 60 to 62 years as one of the recommendations.

(iii) Supplementing the Shortage of Specialists-While the country is producing

about 25,000 medical graduates every year, medical specialists continue to be in short supply for taking up assignments in Government, particularly in posts in rural or semi-urban areas. This holds true not only for the Central Health Services but also for States. Expansion of medical education institutions and a proliferation of super speciality hospitals in the private sector has further aggravated the shortage. In order to alleviate the problem of shortage of specialist, the Government has recently enhanced the age of retirement of Specialists doctors from 60 to 62 years. Though this action will help in retaining the Specialists and remove the shortage of doctors in specialized streams to a certain extent, it remains a fact that there would still be a shortage of Specialists due to their ever growing demands in private sector. This gap between demand and supply of Specialists is being plugged by utilizing the service of GDMOs who are in possession, acquire the Post Graduate degree. As per information available, some of the GDMOs are in possession of PG Degree and it is essential to retain them in the service for supplementing the endeavour of Government to provide quality health care to its citizens.

(iv) Late Entry in Service-From the findings of Javad Chawdhury Committee, it has been observed that the average age of entry into service for GDMOs is around 29 years against 35 of Specialists. The CHS Rules, 1996 provide a maximum age of 32 years for appearing in the Combined Medical Service Examination, through which doctors are appointed to GDMO sub-cadre. Thus, doctors can join the service in the GDMO cadre by the age of 34-35 years after completion of requisite pre-appointment formalities. However, considering that the average age of entry is 29 years for GDMO, they are left with 31 years of pensionable service. It is therefore desirable that the benefit of increase of retirement age as has been given to Specialists is also extended to the officers belonging to GDMO sub-cadre of the same Central Health Service.

(v) Growing Need of Trained Health Manpower-With the increasing population, there is ever growing need of health manpower for delivering the health care facilities. The availability of specialists alone is not adequate to meet the growing demands. Further, the Government has announced increase of seats for general candidates to mitigate the effect of 27% reservation for OBC. This requires a huge expansion of infrastructural facilities in terms of physical as well as health manpower. This expansion of physical infrastructure would go side by side with increase in manpower for effective management and the services of the GDMOs can be utilized for endorsing the efforts put in by various medical personnel.

(vi) Experience Curve-In a scientific and technical field such as medicine, experience curve plays an important role. Unfortunately, in the case of doctors, by the time the experience curve can set in and his efficiency reaches its peak, it is time for him to retire. As a result, the Government loses an experienced hand. When the doctor is clinically fully mature and at his peak, his retirement age comes and at this stage the cream of Central Health Service is absorbed by the private sector and international agencies. This all had led to the recent trend

wherein the benefit of the experienced doctors is consumed by the leading private hospitals and nursing homes like Escorts, Apollo, Fortis, Max, etc. surely at the cost of Government sector.

13. So much so, this proposal also outlines the benefits and additions, which would be advantageous in case the retirement age of GDMOs is increased to 62 years. According to the proposal, following are going to be the beneficial effect of increasing the retirement age from 60 to 62 years:

(i) Deferment of retirement benefits by two years apart from reduced amount of gratuity as the factor for calculating gratuity is linked to the age and keeps on reducing with advancement in age.

(ii) Service delivery would improve as GDMOs including those possessing P.G. Qualification would be available for longer periods to fill in gaps created by shortage of Specialists.

(iii) GDMOs who supplement Specialists would become available for a longer period.

(iv) Discontentment vis-a-vis Specialists would be eliminated and thus the GDMOs would supplement and Assist Specialist in a cordial atmosphere.

(v) Central Health Service will be attractive and more doctors would opt for the same.

(vi) Experienced manpower would be available for a longer period.

14. Based on the aforesaid, first argument of Mr. Rajeev Sharma, learned Counsel appearing for the petitioner in one of the petitions, was that when the Government itself recognizes the need to increase the age of retirement and has itself made out "a strong case for increasing the retirement age of the GDMOs from 60 to 62 years on the lines of special doctors in the same CHS and is submitted for consideration of the Sixth CPC, there was no reason to exclude GDMOs from this benefit, in the first instance, when recommendations of the J.A. Chawdhury Committee were implemented. He further submitted that reading of the report of the high-power committee headed by Sh. Chawdhury would reveal that exercise was done for all the sub-cadres of CHS including GDMOs and there was no reason or occasion to exclude the GDMOs while conferring the benefit upon the other three sub-cadres. Mr. Sharma took us to the relevant passages of the said report highlighting the reasons which prevailed with the Committee in recommending the increase in age. Therefore, according to the learned Counsel, it was a totally irrational and arbitrary decision not to extend the benefit to the categories of the petitioners. On legal front he submitted that such a decision was clearly violative of Articles 14 and 16 of the Constitution as it was discriminatory in nature by treating the GDMOs differently from other three categories, though they were at par insofar as the objective behind the move to increase the retirement age is concerned. He further submitted that the reasons, which were sought to be given by the respondents in the counter affidavit

denying the extension of benefit of the said action to the petitioner, were totally illusory and make-belief. He also submitted that all four sub-cadres were part of the main cadre of CHS and there could have been no discrimination between these sub-cadres as it was not open to the Government to create separate class within the class. He referred to certain judgments of the Apex Court to buttress his legal submissions. These are:

(i) Union of India and another Vs. K.T. Shastri,

(ii) T.S. Thiruvengadam Vs. Secretary to Government of India, Ministry of Finance, Department of Expenditure, New Delhi and Others,

15. Other Counsel adopted the aforesaid arguments. In addition, submission was made that because of the fact that these GDMOs entered the service at the average age of 29 years, with age of retirement as 60 years, they are not able to complete 33 years of service, which is needed to earn maximum pension and that in itself is a justification for enhancing the age of retirement to 62 years. Reference was also made to para-20 of the judgment of the Supreme Court in the case of B. Prabhakar Rao and Others Vs. State of Andhra Pradesh and Others, which reads as under:

20. In the course of our narration, we have already stated our conclusions on several of the questions at issue, both factual and legal. The final situation that emerges is that almost immediately after the age of superannuation was reduced from 58 to 55 years, it was realised by the Government of Andhra Pradesh that they had taken a step in the wrong direction and that serious wrong and grave injustice had been done to their employees. A decision was very soon taken to redress the wrong by reversing the decision but an unfortunate rider was added that they should wait till the pronouncement of the judgment of the Supreme Court, which was perhaps expected to be pronounced shortly. As the judgment was not pronounced for long, it became imperative for the Government to implement their decision of their own accord and so they passed Ordinance No. 24 of 1984 and Act No. 3 of 1985, amending Act No. 23 of 1984 by substituting 58 years for 55 years. While doing so, unfortunately again, those that had suffered most by being compelled to retire between 28.2.1983 and 23.8.1984 were denied the benefit of the legislation by Clause 3(1) of the Ordinance and Section 4(1) of Act No. 3 of 1985. Now if all affected employees hit by the reduction of the age of superannuation formed a class and no sooner than the age of superannuation was reduced, it was realised that injustice had been done and it was decided that steps should be taken to undo what had been done, there was no reason to pick up out a class of persons who deserved the same treatment and exclude from the benefits of the beneficent treatment by classifying them as a separate group merely because of the delay in taking the remedial action already decided upon. We do not doubt that the Judge's friend and Counsellor, "the common man", if asked, will unhesitatingly respond that it would be plainly unfair to make any such classification. The common sense response that may be expected from the common man, untrammelled by legal

lore and learning, should always help the Judge in deciding questions of fairness, arbitrariness, etc. Viewed from whatever angle, to our minds, the action of the Government and the provisions of the legislation were plainly arbitrary and discriminatory. The principle of Nakara clearly applies. The diversion of Government employees into two classes, those who had already attained the age of 55 on 28.2.1983 and those who attained the age of 55 on 28.2.1983 and 23.8.1984 on the one hand, and the rest on the other and denying the benefit of the higher age of superannuation to the former class is as arbitrary as the division of Government employees entitled to pension in the past and in the future into two classes, that is, those that had retired prior to a specified date and those that retired or would retire after the specified date and confining the benefits of the new pension rules to the latter class only. Legislations to remedy wrongs ought not to exclude from their purview persons a few of the wronged persons unless the situation and the circumstances make the redressal of the wrong, in their case, either impossible or so detrimental to the public interest that the mischief of the remedy outweighs the mischief sought to be remedied. We do not find that there is any such impossibility or detriment to the public interest involved in reinducting into service those who had retired as a consequence of the legislation which was since thought to be inequitable and sought to be remedied. As observed in Nakara, the burden of establishing the reasonableness of a classification and its nexus with the object of the legislation is on the State. Though no calamitous consequences were, mentioned in any of the counter-affidavits, one of the submissions strenuously urged before us by the learned Advocate-General of Andhra Pradesh and the several other Counsel who followed him was the oft-repeated and now familiar argument of "administrative chaos". It was said that there would be considerable chaos in the administration if those who had already retired are now directed to be reinducted into service. We are afraid we are unable to agree with this submission. Those that have stirred up a hornet's nest cannot complain of being stung. The argument about administrative chaos has been well met by Lord Denning M.R. in *Bredbury and Ors. v. London Borough of Enfield* (1967) 3 All E.R. 434, where the Master of Rolls in his characteristic and forceful way observed:

It has been suggested by the Chief Education Officer that, if an injunction is granted, chaos will supervene. All the arrangements have been made for the next term, the teachers appointed to the new comprehensive schools, the pupils allotted their places, and so forth. It would be next to impossible, he says, to reverse all these arrangements without complete chaos and damage to teachers, pupils and public. I must say this: if a local authority does not fulfil the requirements of the law, this Court will see that it does fulfil them. It will not listen readily to suggestions of "chaos". The department of education and the council are subject to the rule of law and must comply with it, just like everyone else. Even if chaos should result, still the law must be obeyed; but I do not think, that, chaos will result. The evidence convinces me that the "chaos" is much overstated... I see no reason why the position should not be restored, so that the

eight schools retain their previous character until the statutory requirements are fulfilled. I can well see that there may be a considerable upset for a number of people, but I think it far more important to uphold the rule of law. Parliament has laid down these requirements so as to ensure that the electors can make their objections and have them properly considered. We must see that their rights are upheld. In the present case too, we think that the case of chaos is much overstated. The affidavits do not disclose what disastrous consequences, insoluble problems and unsurmountable difficulties will follow and how chaos will inevitably result. True quite a large number of employees who have been promoted will have to be reverted, but their promotions and promotional appointments are all temporary (and, we take care to add here it would make no difference even if a few were regularly promoted) and it is not as if they lose for ever their promotional opportunities. The promotional opportunities are merely postponed to the dates on which they would be entitled to be promoted had not the fundamental rules and the Hyderabad Civil Services, Rules been amended and Act No. 23 of 1984 passed. What has now happened is that these persons have secured a double advantage. First, by the initial reduction of the age of superannuation, they obtained early and unanticipated promotion, that is to say, promotion ahead of the normal date on which they would have otherwise been promoted; and second their tenure in the promoted post was increased by a further three years as a result of the subsequent increase of the age of superannuation. Having secured this double advantage they naturally desire to stick to them and talk glibly of hardship and inconvenience. On the other hand, it would be a great injustice to deny justice to those who have suffered injustice must merely because it may cause inconvenience to the administration. We are governed by the Constitution and constitutional rights have to be upheld. Surely the Constitution must take precedence over convenience and a Judge may not turn a bureaucrat. We do not mean to suggest that creation of a chaotic state of administration is not a circumstance to be taken into account. It may be possible that in a given set of circumstances, portentous administrative complexity may itself justify a classification. But, there must be sufficient evidence of that -how the circumstances will lead to chaos. Ups and downs of career bureaucrats do not by themselves justify such a classification. It may however be of some consequence in the matter of granting relief. For instance there would be really no point in reinducting an employee if he has but a month or two to go to attain the age of 58 years and to retire. Reinduction of such a person is not likely to be of any use to the administration and may indeed be detrimental to the public interest. It is bound to be wasteful. In such cases as well as in cases where they cannot be reinducted because they have already completed 58 years by now, they cannot obviously be reinducted. So other ways of compensating them must be found. The obvious course is to compensate them monetarily. In Industrial Law we do award back and future wages on quite a large scale and there is no reason why we cannot adopt the same principle here. If as a rule private employers in such situations are asked to pay back wages, we see no impediment in doing so in the case of those that are expected to be model

employers i.e. the Government, public corporations and local authorities.

16. Mr. A.K. Bharadwaj, Advocate, who appeared for the respondents in all these petitions, except the writ petition relating to MCD (wherein Mr. Amit K. Paul, Advocate appeared for MCD), countered the aforesaid submission by arguing that it was a policy decision to enhance or not to enhance the age of retirement. No person had any legal right to claim enhancement of age of retirement. Submission of Mr. Bharadwaj was that it was the prerogative of the Government to decrease or enhance the age of retirement and claim for increase of age of retirement was clearly inadmissible as held by the Supreme Court in the case of Union of India (UOI) and Others Vs. Bhola Dutt Pandey, . He further submitted that in so far as the petitioners are concerned, they could not be felt aggrieved as their service conditions remained the same. If the age of retirement was enhanced in other three categories, good luck of doctors belonging to those categories could not be viewed as the bad luck of the petitioners. He also submitted that it was a conscious decision taken as the doctors in those three services were not comparable to GDMOs. There were some differences and it was the job of the Expert Committee to look into those. For this reason, the learned Counsel argued, the matter was referred to Sixth CPC and the GDMOs were required to await the recommendation of the CPC. He also submitted that the Chawdhury Committee had itself demarcated the difference between the said three cadres and the GDMOs by observing: "The average age of entry of GDMOs is around 29 years and that of Specialists is 35 years. Therefore, for the Specialists who generally have a service span of 25 years, the benefit of maximum period of five years of added pensionable service is not sufficient and they still fall short of the maximum pensionable service of 33 years."

17. Referring to the CHS Rules for Recruitment/Promotion of these sub-cadres, he submitted that the terms and conditions attached to GDMOs and other Specialists cadres are different. He also tried to explain that the CHS consists of four sub-cadres, viz., (i) Teaching; (ii) Non-teaching; (iii) Public Health; and (iv) General Duty Medical Officer (GDMO) with cadre strength of approximately 4700. They are mostly posted in Medical Colleges, Hospitals and Dispensaries. The recruitment to the Specialists sub-cadres is made through UPSC in the minimum pay scale of Rs. 10,000-15,200 whereas in case of GDMOs to which the applicant belongs, the entry level is in the pay scale of Rs. 8,000-13,500/-. The minimum qualification for appointment of doctors to Specialist sub-cadres is Post Graduate. On the other hand, the GDMOs are only medical graduate possessing MBBS qualification. Thus, the doctors like the applicant belonging to GDMO sub-cadre are not on similar footings as that of Specialists. He referred to the following observations of the Supreme Court in the case of Union of India and Ors. v. Lt. (Mrs.) E. Lakats 1998(1) SLJ 82 (SC) : 1997(2) SCSLJ 364:

3. The respondent contended that the denial of the benefits of pension to the respondent was discriminatory and that although she retired in 1981, she should also be given pensionary benefits in the same manner as those who had retired

after 1st of October, 1983. On the question of the age of retirement, though the respondent contended that Army Instruction No. 14 does not contain the age of retirement, the position relating to the age of retirement is unambiguous. All appointees in this service hold the rank of Lieutenant with no eligibility for further promotion. Therefore, they must retire at the same age as a Lieutenant, which is at 55. The contention of the respondent that it is discriminatory not to have prescribed the same age of retirement for her as is prescribed for other military nursing service cannot be accepted. The terms and conditions attaching to the other two military nursing services are different from the terms and conditions attaching to Military Nursing Service (Local). One major difference lies in the fact that those who are appointed to Military Nursing Service (Local) are not liable to transfer and that married women or widows with children can avail of this service without any problem. We are told that under the terms and conditions of service of the other two military nursing services the person appointed is liable to transfer from one place to another and that there are also restrictions on married women or women with children being appointed to the other two services. If different nursing services are constituted under separate army instructions carrying their own separate terms and conditions of service, one cannot complain of discrimination if the ages of retirement prescribed under these different services are different. Each will be governed by its own rules and regulations. The respondent is, therefore, not justified in claiming that she has been discriminated against because she has retired at the age of 55.

18. According to him, following were the reasons in meeting out different treatments to GDMOs and the other three Specialists services:

- (a) Shortage of doctors in Specialist sub-cadres;
- (b) Late entry into services;
- (c) Implementation of Government decision to reserve 27% seats in Central Educational Institutions for OBC candidates.

19. We have considered the respective submission. At the outset, we may point out that insofar as the Chawdhury Committee is concerned, it went into the question of enhancement of age for the entire cadre of CHS, including GDMOs and did not draw any distinction. The recommendation also generally covers all the sub-cadres and is not limited to the three Specialists sub-cadres. Para 2.5 of the report, which mentions unattractive prospects in CHS, specifically includes GDMOs' sub-cadre as well. The genesis of the entire problem, because of which the matter was referred to the said Committee, was that the members of the CHS were leaving their jobs to take employment in foreign countries/domestic private sector. The Government felt that it was a disturbing trend as it points to a dangerous attrition of professional manpower from the public health system. The brief given to the said Committee was, thus, "to examine/analyse the circumstances causing this trend and to suggest short-term and medium-term measures to prevent abnormal attrition in Government cadres." Sub-cadre of

GDMO was clearly included in this study. One of the reasons found by the said Expert Committee for high rate of attrition was that the doctors had to wait for a very long period in the NFSG scale before they were prompted to SAG level. Para 4.5.3 of the report reveals that whereas it was taking 22 years to get into SAG as a Specialist, the period for GDMO was around 30 years. Thus, considering that the average age of entry for Specialists is around 35 years and GDMOs is around 29 years, many are unlikely to get the SAG scale during their service. As compared to this, in many Central Service cadres, officers achieved SAG scale after 17-18 years of service i.e. by the age of 45. Two things follow from the reading of para 4.5.3, namely, (i) reason for attrition is the late promotion to SAG level which applied to both Specialists as well as GDMOs. Thus, the GDMOs are covered not only in the study but by the same reason for attrition; (ii) even when average age of entry for GDMOs was 29 years and that of Specialists 35 years,, for promotion to SAG it takes 22 years for the Specialists and 30 years for GDMOs. Thus, the early entry into the service by about 6 years is offset by late promotion to SAG as compared to Specialists where the GDMOs lag behind by 8 years. Therefore, the reason given by the respondents that for Specialists, age of retirement was enhanced because they were entering the service at the age of 35 years, whereas the GDMOs were entering the service at the average age of 29 years loses its sheen. Moreover, we find that this was not at all the reason given by the Committee as the extracted portion highlighted by Mr. Bharadwaj, learned Counsel for the respondents, is under the head "Terminal Benefits" contained in para 4.8. In that para, the Committee has pointed out that these doctors are not able to earn maximum pension, which again is a cause common to GDMOs as well as Specialists. In any case, in the said para, the measure suggested was there should be better terminal benefits. The suggestion of retirement is dealt, with distinctively in para 4.7. These two suggestions to deal with the problem, along with many others, namely, increase in retirement age and giving better terminal benefits, are totally distinct from each other. No doubt, the report of any such High-Power Committee is recommendatory in nature and it is for the Government to accept or not to accept the suggestion and it is also the prerogative of the Government to accept such suggestions with modifications. However, when suggestions are given in respect of all four sub-cadres and the Government denies the benefit thereof to one particular cadre, there have to be justifiable reasons for doing so to avoid the criticism of the action on the ground of arbitrariness and hostile discrimination. In this context, we may consider the validity of reasons given by the respondents. As extracted above, the reasons given are shortage of doctors in specialist sub-cadres, late entry into service, implementation of Government decision to reserve 27% seats for OBC. No doubt, it is for the Government to consider this aspect and if the reasons are well founded, Courts are not to interfere with such an exercise undertaken by the Government. However, if the so-called reasons in reality are non-existence, or the reasons because of which benefit is extended to specialist sub-cadres are applicable in case of GDMOs as well, the case of discrimination is made out. For comparison of this nature, obviously Courts are not to embark

upon such inquiries. However, here we find that the exercise is done by the Government itself in its proposal to the Sixth Central Pay Commission where "strong case" is made out for enhancing the age of retirement GDMOs as well. From the portion of the said proposal reproduced above, it is manifest that one of the justifications given is to enhance the age of superannuation is that it is needed to supplement the shortage of specialists. Late entry into service in support of GDMOs is also accepted and recognised by the Government in its proposal, which aspect CAT has also dealt with in detail by analysing the recommendations of the Chawdhury Committee. As far as implementation of the Government decision to reserve seats for OBC candidates is concerned, not only as per the counter affidavit there is only a proposal to this effect, we fail to understand as to how it would not be applicable to GDMOs once such a reservation is provided. In view of our examination of the issue in the aforesaid perspective, judgments cited by the learned Counsel for the respondents would be of no avail. The moot question in the circumstances arises as to what should be the direction in such a case. After all, vide O.M. dated 1.8.2007 proposal is sent to the Sixth CPC for consideration to enhance the age of superannuation of GDMOs from 60 to 62 years. In view of this proposal, matter is yet to be looked into by the Sixth CPC. Though we find prima facie that it was not justified to exclude GDMOs and action of the Government suffers from vice of hostile discrimination and is, therefore, violative of Articles 14 and 16 of the Constitution, we do not express our final opinion on this aspect and would leave the matter to the Sixth CPC to decide about the justification for the enhancement of the age of GDMOs (However, at the same time we are of the opinion that if the Sixth CPC recommends enhancement of age of retirement of GDMOs to 62 years and the Government accepts that recommendation, it would be clear vindication of the stand of the petitioners who belong to the category of GDMOs. In such a case, the interest of justice would be subserved by giving effect to the decision of enhancement of age from the date the other sub-cadres were given, i.e., vide O.M. dated 16.11.2006.

20. We may note that all these petitioners have retired as they were made to retire at the age of 60 years. If and when the age of retirement of GDMOs is increased with effect from 16.11.2006, the petitioners shall also be accorded benefit thereof and their deemed date of retirement shall be extended by two years and consequential benefits of arrears of pay, etc. shall be given to them.

21. These writ petitions are allowed partly to the aforesaid extent and disposed of accordingly.