

(2021) 05 SHI CK 0020
In the High Court Of Himachal Pradesh
Case No : CWPOA No. 1184 Of 2020

Dr. D. R. Barwal (Now Deceased) Through His Legal Representatives Smt. Usha Barwal & Others APPELLANT

Vs

State Of Himachal Pradesh And Others RESPONDENT

Date of Decision : 04-05-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

Citation : (2021) 05 SHI CK 0020

Hon'ble Judges : Ajay Mohan Goel, J

Bench : Single Bench

Advocate : S.P. Chatterji, Ajay Vaidya

Final Decision : Allowed

Judgement

Ajay Mohan Goel, J

1. By way of this petition, the petitioners have prayed for the following reliefs:

â??(A) That the order dated 4th August, 2016, Annexure AÂ?3 of the respondent No. 1, may kindly be quashed and set aside qua applicants.

(B) That vide Notification dated 28.07.1998 (Annexure AÂ5), the benefit of 25% NPA as basic pay for the purposes of calculating the retiral benefits including revised pension w.e.f. 1.9.1997, and further enhancing the basic pay plus NPA

limit to Rs.79,000/Â w.e.f. 1.1.2006 (Annexure AÂ8) have been extended to the serving as well as to the doctors who retired on and after 1.9.1997 and 1.1.2006 respectively but the same is being denied to the applicants who are pre 1.9.1997

and preÂ2006 retirees. Therefore these notifications are discriminatory in nature and are hit by Articles 14 and 16 of the Constitution of India. That the respondents be directed to bring necessary modifications in these notifications thereby

extending the same benefit to the pre-1.9.1997 and pre-2006 retirees-applicants.

(C) That similarly, the notifications dated 31.8.1989, 14.10.2009 and 21.5.2003 vide Annexure A6, A9 & A10 and all such notifications, orders, instructions or provision which denies the benefit of the component of 25% NPA as basic

pay for the purposes of calculating the retiral benefits including revised pension to the applicants w.e.f. 1.9.1997 and 1.1.2006 respectively, being arbitrary, discriminatory and ultra vires of Articles 14 & 16 of the Constitution of India, may

kindly be ordered to be modified to bring uniformity between pre and post 1.9.1997 and pre and post 1.1.2006 retirees and thereby obliterating the discrimination perpetuated by these notifications.

(D) That by an appropriate order or direction the respondents may be directed to:

(i) Pay applicants enhanced pension on emoluments of 25% NPA on and w.e.f. 1.9.1997.

(ii) Re-calculate the pension payable to the applicants by adding the element of 25% NPA on and w.e.f. 1.1.2006, irrespective of their date of retirement.

(E) That due and admissible arrears be ordered to be paid/released to each of the applicants with interest at market rate from due date till payment is made.

(F) Any other order which appears to be just and correct in the interest of justice may also be passed.

2. The case of the petitioners is that they served the respondent-State as General Duty Officers in the Himachal Pradesh Health Services, Class-I (Generalists) and retired before 01.09.1997.

There are seven petitioners in all. Petitioner No. 1-Dr. D. R. Barwal (who died during the pendency of this petition and whose legal representatives have been brought on record) joined as a Medical Officer in the year 1968 and

superannuated on 28.02.1993, petitioner No. 2-Dr. P.P. Vaidya superannuated as a Medical Officer on 31.05.1993, petitioner No. 3-Dr. (Mrs.) Raj Vaidya superannuated as such in the year 1996, petitioner No. 4-Dr. Ramesh Chand

Thakur joined as a Medical Officer on 10.07.1969 and superannuated as such on 28.02.1993, petitioner No. 5-Dr. B. L. Kapoor joined as a Medical Officer on 27.07.1962 and retired as such on 29.02.1994, petitioner No. 6-Dr. Prem Chand

joined as a Medical Officer on 30.09.1969 and superannuated as such on 30.07.1992 and petitioner No. 7-Dr. Randhir Singh Chandel joined as a Medical Officer on 18.05.1972 and superannuated as such on 31.03.1993.

3. Their case, in a nutshell, is that vide Notification dated 9th June, 1989 (Annexure A4), the respondent-State revised the rates of Non-Practicing

allowance of the Medical Officers serving with the Health Department of the State of

Himachal Pradesh in the following terms:

Pay range in the revised Pay Band of Rs. 10,000/- to Rs. 15,000/-
of N.P.A. admissible pay scale

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Rs. 10,000/- to Rs. 15,000/-

1. Basic pay below Rs.3000/- and Rs.600/- P.M.

2. Basic pay Rs.3000/- and

Rs.3700/- and Rs.750/- P.M.

P.M.

3. Basic pay Rs.3700/- and

above

Rs.900/- P.M.

Rs.900/- P.M.

The N.P.A. will be treated as pay for the grant of various allowances, such as Dearness allowance, TA/DA etc. as well as for the calculation of retirement benefits.

4. Thereafter, vide Notification dated 28th July, 1998 (Annexure A-5), the respondent State ordered that the Non-Practicing Allowance, presently admissible to certain categories in the Department of Health and Family Welfare as well as

Indira Gandhi Medical College and its allied Institutions, shall stand revised w.e.f. 01.09.1997 at the uniform rate of 25% of the basic pay in the revised pay scales sanctioned to the said categories from 01.01.1996, subject to the condition that

the pay plus Non-Practicing Allowance at revised rates shall not exceed Rs.25,500/- per month. It was further mentioned in the Notification that other

terms and conditions for the grant of Non-Practicing Allowance shall remain the same

and the Non-Practicing Allowance shall be paid in cash with effect from 1st July, 1998 and arrears payable from 01.09.1997 to 30.06.1998 shall be credited to the General Provident Fund of the concerned Officer. It was further mentioned

that the Non-Practicing Allowance shall be treated as pay for the purpose of grant of Dearness Allowance/T.A./D.A. as well as calculations of retirement benefits. This was followed by issuance of various Notifications from time to time, in

terms whereof, the Non-Practicing Allowance was ordered to be continued to be paid @25% of the basic pay, subject to the conditions mentioned in the Notifications, yet, the benefit thereof has been denied to the petitioners, only on the

ground that they stand superannuated before 01.09.1997. Vide one such Notification dated 26th August, 2009 (Annexure A-8), the limit of pay plus NPA was enhanced from Rs.38,500/- to Rs.79,000/-. This was followed by Office

Memorandum dated 21st May, 2013 (Annexure P-10), issued by the Finance (Pension) Department, Government of Himachal Pradesh, vide which, pension was ordered to be stepped up and a concordance table was enclosed with the said

Memorandum reflecting the pay scales w.e.f. 01.01.1986, 01.01.1996 and 01.01.2006.

5. The petitioners earlier approached the erstwhile learned Himachal Pradesh Administrative Tribunal by way of OA No. 5429 of 2015, which was disposed of by the learned Tribunal vide order dated 01.01.2016 by directing the competent

authority to consider the case of the original applicants therein, in terms of the decision of this Court rendered in CWP No. 4961 of 2010, titled as Keshav Sigh Vs. State of Himachal Pradesh and others and the connected matters. Thereafter,

vide order dated 04.08.2016, passed by the Principal Secretary (Health) to the Government of Himachal Pradesh, the case of the petitioners was rejected by holding that the case of the original applicants in O.A. No. 5429/2015 was not similar

to the petitioners in CWP No. 4961 of 2010 and their prayer for grant of 25% NPA on the analogy of the judgment dated 13th June, 2012, passed in CWP No. 4961 of 2010, could not be accepted. It is in this background that the petitioners

have filed this petition, which was originally filed before the learned Tribunal, praying for the reliefs already enumerated hereinabove.

6. The stand of the respondent-State is that the matter of Non-Practicing allowance, as claimed by the petitioners, was taken up with the Finance Department, which vide its letter dated 19th August, 2016, issued instructions to

the effect that

the State Government does not follow the Government of India and the cases of Allowances and NPA are decided by the State Government independently. The Government of India's Office Memorandums are not applicable to the

employees of the State of Himachal Pradesh, unless the same have been adopted by the Government of Himachal Pradesh and Office Memorandum dated 18th February, 2015, issued by the Government of India was not adopted by the State

Government. Further, the serving Doctors were granted NPA @25% of the basic pay so that they may not do any private practice during service, but Non-Practicing Allowance granted to the Medical Officers does not form part of the scale

of pay. It is further the stand of the respondent-State that Non-Practicing Allowance is calculated @25% of the basic pay drawn by a doctor from time to time and it may not form part of pay under FR(21)(a)(i) of the Fundamental and

Supplementary Rules. As per the State, pension is subject to limitation and in the case of Himachal Pradesh Government employees, maximum pension and family pension could not be more than Rs.39500/- and Rs.23700/-, respectively, i.e.,

50% and 30% of the maximum pay of Rs.79000/- per month. According to the State, the contention of the petitioners has been rightly decided by the competent authority vide order dated 04.08.2016 (Annexure A-3) and the petitioners are in

the habit of litigating. Since the grievance of the petitioners is not genuine and the same is not sustainable, therefore, the writ petition be dismissed.

7. By way of rejoinder, the petitioners have reiterated their contentions and denied the stand taken by the respondents.

8. I have heard learned counsel for the parties and gone through the impugned order as well as the documents appended with the petition.

9. According to me, the issue raised in this petition is in a very narrow compass. The same is as to whether the petitioners are entitled for calculation of their retiral benefits by treating the Non-Practicing Allowance to be 25% of the basic pay, as revised from time to time w.e.f. 1.1.1997 onwards?

10. It is not in dispute that before the issuance of Notification dated 28th July, 1998, the petitioners were being paid pension by treating Non-Practicing Allowance to be a part of their Pay Scale, in terms of various Notifications issued by the

respondent-State from time to time, including Notification dated 9th June, 1989 (Annexure A-4). The only difference which exists between Notification dated 9th

June, 1989 and Notification dated 28th July, 1998 is that whereas as per earlier Notification the rate of NPA was fixed on the basis of basic pay, vide the latter Notification, Non-Practicing Allowance was made applicable at the uniform rate of 25% of basic pay.

11. The stand of the respondent-State that Non-Practicing Allowance cannot be treated to be a part of pay etc. or the same cannot be taken into consideration for calculating retirement benefit, is outrightly liable to be rejected in view of the language of Notification dated 28th July, 1998 (Annexure A-5), issued by the Financial Commissioner-Cum-Secretary (Finance) to the Government of Himachal Pradesh, in which, in para-3, it is specifically mentioned that Non-Practicing

Allowance shall also be treated as pay for the purpose of grant of Dearness Allowance/T.A./D.A as well as calculations of retirement benefits. In other words, the Non-Practicing Allowance was to be treated as pay for the purpose of

calculations of retirement benefits and simply because the petitioners stood superannuated before 01.09.1997 can be no ground for denying the same to the petitioners by the Government. In fact, because Notification dated 28th July, 1998 is to

be given effect from 01.09.1997, its natural corollary is that the calculations of retiral benefits by treating NPA to be 25% of the basic pay in the revised pay, is to be conferred upon the petitioners from 01.09.1997 with prospective effect and

they cannot claim its benefit from the date of their retirement. However, the stand of the Government that as the petitioners stood superannuated before 01.09.1997, therefore, they are not entitled for the benefit of this Notification, is not

sustainable in law. Similarly, the contention of the State that in terms of the Finance Department letters, NPA is the domain of the State Government and they are not bound by the Office Memorandums of the Central Government etc. also has

no force in the facts of this case, because the petitioners are laying their claim primarily on the basis of Notification dated 28th July, 1998, which has been issued by the State Government and subsequent Notification of the State, which is also

to the same and similar effect.

12. Rejection of representation of the petitioners vide order dated 04.08.2016 is also not sustainable in the eyes of law, because while issuing the said order, the Principal Secretary (Health) to the Government of Himachal Pradesh, in fact, has

not appreciated the contention of the petitioners in right perspective. The competent authority erred in not appreciating that in Keshav Singh's case

(supra), one of the moot issue decided by this Court, as affirmed by the Honâ??ble

Division Bench in LPA, was as to whether distinction could be carved on the basis of date of retirement of employees to deny them the benefit of subsequent Notifications pertaining to enhancement of NPA and its effect on retirement

benefits. This is evident from parasÂ?13 onwards of the judgment of this Court in CWP No. 4961 of 2010, titled as Keshav Singh Vs. State of Himachal Pradesh and others, decided on 13th June, 2012, which read as under:

â??â?|.13. As already stated above, earlier the NPA was allowed only to the Ayurvedic Doctors, but thereafter respondentÂ?State took a conscious decision to extend it to Veterinary Doctors on and with effect from 1.4.1997. Thereafter

there was a revision of pay scales, as indicated in the letter dated 10.6.2005, supra, but this enhancement of 25% NPA was kept as a separate entity and was not counted/taken into account for any other purpose like calculation of allowances

etc. as indicated therein. Vide Office Memorandum dated 7.7.2007 quoted above, it was conveyed that the reckoning of DP for the purpose of calculation of NPA in respect of Veterinary Doctors and reckoning of element of enhanced NPA

at the rate of 25% of pay for calculation of all allowances/benefits in respect of Veterinary Doctors was allowed w.e.f. 1.7.2007, as mentioned therein and the upper limit for basic pay plus NPA plus DP of the Doctors was kept Rs.38,500/Â?

per month from that date. To my mind this Office Memorandum does not make any distinction to such employees retiring prior to 1.7.2007 or thereafter. Rather its careful perusal would reveal that the enhancement of 25% NPA of Veterinary

Doctors would be taken into account for calculation of all allowances, DP and retirement benefits to retirees who would even retire on and with effect from 1.7.2007. Therefore, this is an upward revision of the existing benefit from the date

mentioned above. No arrears are involved to the retiree doctors prior to 1.7.2007 because to that extent the scheme is prospective. All the pensioners whenever they retire, in my opinion, are covered by the liberalized pension scheme because

the scheme for payment of pension to a pensioner is governed by 1972 Pension Rules. Thus, the date of retirement appears to be wholly irrelevant. As stated supra, the Office Memorandum dated 7.7.2007 is operative from the date mentioned

therein and would bring under its umbrella all existing pensioners who even retired subsequent to 1.7.2007, but in case of the retirees prior to the specified date aforesaid their pension would be computed afresh in view of the liberalized scheme

and would become payable in future commencing from specified date and no arrears would be payable prior to it, which would take care of the grievance of retrospectively, making a marginal difference in the case of past pensioners because

their emoluments are not revised and these stood already granted to them, as per the Office Memorandum issued in the year 2005 quoted above.

14. The interpretation of any other decision of the State Government as ventilated by the learned Additional Advocate General, qua the Office Memorandum dated 7.7.2007, that it is applicable only to the retirees on and w.e.f. 1. 7.2007, is

introducing a mischief and is vulnerable as denying equality and introducing an arbitrary fortuitous circumstance to a homogenous class, which can easily be severed being arbitrary and discriminatory.

18. It is well settled that whenever a classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class, that is, what is called reading down the measures.

19. Non-contributory pension under 1972 Rules is a State obligation. It is an item of expenditure voted year to year depending upon the number of pensioners and the estimated expenditure. Now when the liberalized pension scheme was

introduced, it is justifiably assumed that the government servants would retire from the next day of the coming into operation of the scheme and the burden will have to be computed as imposed by the liberalized scheme. Even the government has been granting since nearly a decade temporary increases from time to time to pensioners. Therefore, there will be a marginal difference as the old pensioners are on the way out and their number is fast decreasing. This number will keep

on dwindling. Therefore, the financial burden is no ground which could detract the government from covering pre 2007 pensioners.

20. In *V. Kasturi v. Managing Director, State Bank of India, Bombay and another*, (1998) 8 SCC 30, the Supreme Court observed that if the person retiring is eligible for pension at the time of his retirement and if he survives till the time of subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per formula of computation of pension subsequently brought into force, he would be

entitled to get the benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when

the additional benefit is being conferred on all of them. In such a situation, the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners

who had survived by the time the scheme granting additional benefit to these pensioners came into force. It was observed that the line of decisions tracing their roots to the ratio of *Nakara's* case (supra), would cover this category of cases.

21. In my opinion, the object sought to be achieved by the Office Memorandum dated 7. 7.2007 is not to create a class within a class, but to ensure that the benefit of pension was made available to all persons of the same class equally. The

decision of the State Government as projected or to hold otherwise would cause violation to the provisions of Article 14 of the Constitution. It is well settled law that when there is a clear violation of a statute or a constitutional provision or

there is arbitrariness in the "Wednesbury sense", the Court has every right to interfere even with the policy decisions.

The above referred judgment was upheld by the Hon'ble Division Bench of this Court in the Letters Patent Appeal, which was filed by the State and the SLP preferred by the State was dismissed.

13. The above clearly demonstrates that the petitioners were rightly relying upon the judgment of this Court in *Keshav Singh's* case (supra), especially in view of the findings returned therein that petitioners whenever they retire, are

covered by the liberalized pension scheme and the date of retirement is wholly irrelevant. More so, it was also held in *Keshav Singh's* case (supra) that in case of the retirees prior to the specified date, their pension would be computed

afresh in view of the liberalized scheme and would become payable in future commencing from specified date and no arrears would be payable prior to it.

14. From the discussion held hereinabove as well as the findings returned in the case of *Keshav Singh* (supra), the act of the respondent's Department of denying the benefit of Notification dated 28th July, 1998 as well as subsequent

Notifications to the petitioners on the ground that they superannuated before 01.01.1997, is arbitrary and not sustainable in law. The denial of the same in fact is a complete misreading of the Notifications so issued, because the petitioners were

entitled for the benefit of revision of their pay scale by taking NPA to be 25% of the basic pay, w.e.f. 01.01.1997 and thereafter, in terms of Notification dated

28th July, 1998 and subsequent Notifications issued on the subject by the State Government.

15. In view of the observations made hereinabove, this writ petition is allowed by quashing order dated 4th August, 2016 (Annexure AÂ3) and by holding that the petitioners are entitled to the benefit of Notification dated 28th July, 1998

(Annexure AÂ5) and subsequent Notifications issued by the Government, pertaining to Non-Practicing Allowance and calculations of retiral benefits thereupon w.e.f. 01.09.1997 onwards. The arrears be paid to the petitioners within a period

of four months from today, failing which, the same shall entail simple interest @6% per annum from the date of pronouncement of the judgment. Revised pension/family pension be paid to the petitioners in terms of the present judgment.

Miscellaneous applications, if any, also stand disposed of.