

(2018) 01 AHC CK 0034
In the Allahabad High Court
Case No : 1482 of 2015

Dr. Sabhajeet Singh and others

APPELLANT

Vs

State Of U.P. and others

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

Constitution of India, Article 309 -
Uttar Pradesh Government Doctors (Allopathic) Restriction on Private Practice Rules,
1978, Rule 4, Rule 3, Rule 2(c), Rules 9(1)

Citation : (2018) 01 AHC CK 0034

Hon'ble Judges : Sudhir Agarwal, Virendra Kumar

Bench : Division Bench

Advocate : Hari Prasad Gupta

Final Decision : Dismissed

Judgement

1. Writ Petition No. 1482 (SB) of 2015 (hereinafter referred to as, "First Writ Petition") has been filed by five petitioners, who have already retired from the post of Medical Officer, Level IV, working in U.P. Medical and Health Department. The date of appointment of petitioners and their date of retirement is given in the following chart:-

Sl. No.

Name	Date of appointment / date of joining	Date of retirement
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1 Dr. Sabhajeet Singh	28.01.1973/ 08.02.1973	30.09.2007
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2 Dr. Ramshankar Prasad	07.02.1973/ 12.02.1973	30.06.2007
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3 Dr. Yogendra Nath Pandey	14.12.1973/ 20.12.1973	31.07.2008
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4 Dr. Kushal Kumar Jain	20.05.1974/ 15.06.1974	31.05.2007
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5 Dr. (Smt.) Malti Pandey	22.05.1974/ 10.06.1974	31.05.2007
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2. In 1978, Governor of Uttar Pradesh, in exercise of powers under proviso to

Article 309 of Constitution of India promulgated "U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1978" (hereinafter referred to as, "Rules, 1978"). These Rules were applicable to all Government Doctors whether working as teachers in State Medical Colleges or in Government Hospitals being part of Provincial Medical Services. Validity of these Rules was challenged and negatived in Dr. Y. K. Singh and others Vs. State of U.P. and others : AIR 1982 Allahabad 439.

3. Rules 1978 were replaced by "U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1982" (hereinafter referred to as, "Rules, 1982") published vide notification dated 31.10.1982 but within a week, same also stood superseded and replaced by "U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1983" (hereinafter referred to as, "Rules, 1983"). The aforesaid rules came into force on 01.09.1983.

4. Rules, 1983 imposes restriction on private practice of "Government Doctors". Rule 2(c) of aforesaid rules defines "Government Doctors" and Rule 2(e) defines "private practice", and read as under:- 2(c). "Government doctors" means the doctor working on any post in the Pradeshik, Medical Services, Pradeshik Health Services, Pradeshik Medical and Health Services, Uttar Pradesh Dental Surgeon Service or on the post of a teacher or on any ex-cadre post, created by the Government from time to time;

2(e). "Private Practice" means medical aid, including giving consultation, for pecuniary consideration in case or kind;

(emphasis added)

5. Rule 3 of Rules, 1983 imposes restriction on private practice of Government Doctors and Rule 4 provides payment in lieu of private practice (commonly known as "Non Practicing Pay" or "Allowance") (hereinafter referred to as, "NPA"). Aforesaid Rules-3 and 4 read as under:- 3. Restriction on private practice.-Notwithstanding anything to the contrary contained in any rules or orders, contract or any other instrument and subject to the provisions of Rule 4, a Government doctor shall not be entitled to private practice.

4. Payment in lieu of private practice.-(1) In lieu of private practice a Government doctor shall be paid such amount, by way of non-practising pay or allowance or both, as the Government may specify from time to time; Provided that non-practising pay or allowance, referred to in this sub-rule shall not be payable to :

(a) a government doctor who-

(i) does not possess M.B.B.S., degree or B.D.S. Or L.S.M.F. (L.M.P.) diploma, or

(ii) is not entitled to be registered by the Indian Medical Council/ Indian Dental Council, or

(iii) is debarred by the Indian Medical Council/ Indian Dental Council, or

- (b)(i) Director and Additional Director, Medical, Health and Family Welfare;
- (ii) Director and Additional Director, Medical Education and Training; and
- (iii) Principals of the State Medical Colleges.

(c) an incumbent of a post for which M.B.B.S. Degree or B.D.S. Or L.S.M.F. (LMP) diploma qualifications are not essential. (emphasis added)

6. Pursuant to the aforesaid Rules, a Government Order (hereinafter referred to as, "G.O.") dated 27.09.1983 was issued prescribing rates of "NPA". The aforesaid rates were revised vide G.O. dated 31.08.1989 and made applicable with effect from 14.08.1988 as follows:-

Salary Limit (Rupees) Rate of Non Practicing Allowance

(A) Less than Rs. 3000/- Rs. 600/-

(B) Rs. 3000/- or more but less than Rs. 3700/- Rs. 800/-

(C) Rs. 3700/- or more Rs. 900/-

(English translation by Court)

7. Paragraph-2 of the G.O. dated 31.8.1989 provided that NPA with respect to all service matters including retiral benefits, dearness allowance, etc., shall be treated as part of salary. Paragraph-3 also shows that there shall be no restriction with respect to pay scale for attracting "NPA". Paragraphs-2 and 3 of aforesaid G.O. are reproduced as under:-

2- The non-practicing allowance shall be considered as the part of salary for the purpose of calculation of all the service related benefits such as retirement benefits, dearness allowance, Travel/Daily Allowance and other allowances.

3- For the grant of the aforesaid allowance, there shall be no bar of the salary limit.

(English translation by Court) (emphasis added)

8. The Director, Treasury had some confusion and therefore, a clarificatory G.O. dated 19.02.1990 was issued stating that "NPA" shall be treated as "part of salary" under Fundamental Rules 9(1) and therefore, no unnecessary objection should be raised. The said clarification reads as under:-

With regard to Government Order No. 05584-Sek-14- Panch-325/83 Date 31st August 1989 of the Medical Section- 14 regarding aforementioned subject, I have been directed to say that this question has been raised before the Government that whether against the Non Practicing Allowance, House Rent Allowance, other allowances and retirement benefits shall be admissible which is suo moto clear in aforesaid Government Order according to the definition of salary given in Rule 9 (21) 1 of Financial Hand Book Volume- II, Part II-IV, in which aforesaid allowance has been considered as the part of the salary, and accordingly do not object in

granting Retirement Benefits, Dearness Allowance, Travel Allowance/ Daily Allowance and other allowance on the aforesaid allowance despite mentioned as Salary in the concerned Government Orders, according to Fundamental Rule 9 (21) 1.

(English translation by Court)

9. Basic pay scales were further revised after acceptance of 5th Pay Commission recommendations with effect from 01.01.1996. Thereafter, Government issued another G.O. dated 01.02.2003 revising rates of "NPA" with effect from the date of issue of G.O. dated 01.02.2002 and revised rates were as follows:-

Sr. No.	Earlier Salary Limit (Rupees)	Earlier sanctioned per month rate of Non Practicing Allowance	Present Salary Limit (Rs.)	Present sanctioned/ revised Non-Practicing Allowance
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1.	Less than Rs.3000/-	Rs. 600/-	Less than Rs. 10,000/-	Rs. 1500/-
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2.	Rs. 3000/- or more but less than Rs. 3700/-	Rs. 800/-	Rs. 10,000/- to Rs. 11,999/-	Rs. 2000/-
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3.	Rs. 3700/- or more	Rs. 900/-	Rs. 12000 or more	Rs. 2250/-
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In the aforesaid revised pay scale the highest limit of the sum of salary and Non Practicing Allowance shall be Rs. 25550/- per month.

(English translation by Court)

(emphasis added)

10. Thus, aforesaid G.O. added a condition and provides that maximum amount of "NPA", as per revised rates under G.O. dated 01.02.2003 would be Rs. 25,500/-. However, paragraph-2 of G.O. dated 01.2.2003, also said as under:-

2. Aforesaid Non-practicing Allowance shall be payable subject to the following terms and conditions :-

1. Non-Practicing Allowance shall be considered as the part of salary for the purpose of calculation of all the service related benefits such as army retirement benefits, dearness allowance, travel/daily allowance and other allowances.

2. Aforesaid sanctioned Non-Practicing Allowance shall be paid in the revised pay scale with this condition that its grant shall remain limited to the posts of the Doctors admissible in every Government Hospital, Primary Health Centre, Dispensary etc.

3. The revised rate of the Non-Practicing Allowance shall be effective from the date of the issuance of Government Order. (English translation by Court)

(emphasis added)

11. After implementation of 6th Pay Commission recommendations with effect

form 01.01.2006, a G.O. was issued on 24.08.2009 revising rates of "NPA" as 25% of basic pay, i.e., prescribed pay in pay band plus grade pay, but it also imposes ceiling of Rs. 25,500/- on the amount of "NPA". Rest conditions imposed in paragraph-2 were same as were in paragraph-2 of G.O. dated 01.02.2003. Aforesaid revised rates were also made effective from date of issue of G.O. i.e., 24.08.2009.

12. All these petitioners who had already retired before issue of G.O. dated 24.08.2009, claiming computation of retiral benefits by taking into consideration, "NPA" at 25% of basic pay with effect from 01.01.2006, made representations to this effect and then filed present writ petition.

13. Relief prayed for by petitioners in First Writ Petition reads as under:- "(i) Issue a writ order or direction in the nature of mandamus commanding the opposite parties to revise the pension of the petitioners counting the element of NPA at the rate of 25% of basic pay as the NPA is the part and parcel of the basic pay.

(1A) Issue a writ order or direction in the nature of certiorari quashing the clause-III of the government order dated 24.08.2009 (contained in annexure no. 6 to the writ petition) directing the opposite parties to count the element of NPA atleast from 01.01.2016, i.e., the date from which the recommendation of the 6th Pay Commission has been accepted by the State of U.P.

(ii) Issue an order or direction commanding the opposite parties to pay the difference of pension to the petitioners and also pay the interest on delayed payment from the date of due till the date of actual payment."

14. Reliance has been placed on the judgment of Supreme Court in K.C. Bajaj and others Vs. Union of India and others : (2014) 3 SCC 777 stating that State Government cannot make a distinction in same category of employees by making available benefit of "NPA", prospectively, by G.O. dated 24.08.2009 and therefore, aforesaid classification is arbitrary and petitioners are entitled for N.P.A. at 25% of basic pay with effect from 01.01.2006. Petitioners have also placed reliance before us on the judgment of Supreme Court in State of Madhya Pradesh and others Vs Yogendra Shrivastava : (2010) SCC 538 and a Division Bench judgment of Patna High Court in Writ Petition No. 11114 of 2006 (Union of India and another vs. Dr. Naw Nath Prasad) decided on 09.02.2010 whereagainst Special Leave to Appeal (Civil) No..... of 2010 (CC 15134 of 2010) was dismissed on 04.10.2010.

15. Writ Petition No. 1239 (SB) of 2012 (hereinafter referred to as, "Second Writ Petition,) has been filed by 29 petitioners, who were Medical Officers in the cadre of Joint Director, Medical and Health Department and retired on various dates as detailed in the following chart:-

Sl. No. Name Date of Retirement

1 Anand Kumar Bharadwaj 30.06.2008

2 Dr. Adarsh Kumar Gautam 31.08.2008

3 Dr. Chhittar Mal Mittal 31.01.2007

4 Dr. Deen Dayal Bansal 30.09.2005

5 Dr. Diwakar Sharma 30.11.2008

6 Dr. Daya Nand Tripathi 31.12.2004

7 Dr. Ganga Vishan 31.08.2006

8 Dr. Harish Chandra Pachauri 31.08.2008

9 Dr. Jai Singh Shekhawat 31.05.2008 (VRS)

10 Dr. Narendra Bahadur Saxena 31.08.2005

11 Dr. Om Prakash Gupta 31.07.2005

12

Dr. Padam Kumar Sharma 31.01.2008

13 Dr. Prem Bihari Manocha 31.08.2007

14 Dr. Pratap Singh Takhur 30/06/05

15 Dr. Ramesh Chandr Srivastava 31.07.2007

16 Dr. Shamsheer Singh 31.08.2007

17 Dr. Sohan Prasad Gaud 31.05.1999

18 Dr. Virendra Singh Pachhra 31.03.2005

19 Dr. Vinod Kumar Khare 30.11.2008

20 Dr. Vinod Chandra Jain 30.04.2005

21 Dr. Virendra Prasad Kulshreshtha 31.01.2007

22 Dr. Viresh Chandra Goel 31.07.2009

23 Dr. Rameshwar Prasad Pamboo 31.05.2009

24 Dr. Rajendra Singh 31.08.2007

25 Dr. Krishna Prakash Chauhan 31.01.2007

26 Dr. Laxmi Prasad Kulshrestha 28.02.2006

27 Dr. (Smt.) Ashaa Tandon 09.07.2004 (VRS)

28 Dr. Yashpal Singh 31.07.2008 (VRS)

29 Dr. (Smt.) Malini Singh 31.07.2008 (VRS)

16. These petitioners also claim 25% "N.P.A." at 25% of basic pay for

computation of retiral benefits with effect from 01.01.2006 in respect of those medical officers, who retired thereafter. They filed Claim Petition No. 2348 of 2010 before State Public Services Tribunal (hereinafter referred as to, "Tribunal") but same has been dismissed vide judgment dated 26.06.2012. Hence aforesaid judgment of Tribunal has been challenged in the writ petition and a mandamus has been prayed that respondents should revise pension of petitioners by counting NPA at 25% of basic pay and pay all arrears, etc. Rest of the facts in this writ petition are similar to that of First Writ Petition, hence we are not repeating the same.

17. Heard Shri Hari Prasad Gupta, learned counsel for petitioners and learned Standing Counsel for the State.

18. Having gone through record as also rival submissions, we find no force and substance in both writ petitions and in our view, both deserve to be dismissed.

19. Rule 4 of Rules, 1983 clearly provides that a Government Doctor shall be paid such amount by way of "NPA" as Government may specify from time to time. Further definition of "Government Doctor" in Rule 2(c) clearly contemplates that restriction on private practice as also applicability of NPA is in respect of a "Government Doctor" who is working on any post and not a person who has already retired. The rates of "NPA" introduced by G.O. dated 31.08.1989 and 01.02.2003, both were prospective. These G.Os. did not speak in terms of percentage of basic pay but provides specific amount with reference to basic pay. Thus only basis of determination of "NPA" was fixed but in all other respects, there was no difference. All these G.Os. were prospective. In G.O. dated 31.08.1989 there was no ceiling but in the subsequent G.Os. dated 01.02.2003 and 24.08.2009 a ceiling on maximum amount of "NPA" has been applied. Since amount of "NPA" as per rules is to be determined by State Government from time to time, it is well within the rights of State Government and cannot be said to be contrary to Rules, 1983. The rate of "NPA" in terms of percentage of basic pay has been introduced only by G.O. dated 24.08.2009 and it is also prospective. The G.O. dated 24.8.2009, therefore, ex facie, is not applicable to government doctors who had already retired, i.e. who retired before 24.8.2009 for the reason that they did not come within the definition of "Government Doctors" as defined in Rule 2(c) of Rules, 1983. Therefore rate of NPA which came into force in terms of Rule 4 of Rules 1983 vide G.O. dated 24.8.2009 will not be applicable to them. For the purpose of "NPA", a G.O. as was applicable on the date of functioning as also on the date of retirement would obviously apply. It is nobody's case that such G.O. has not been followed in their case.

20. Submission of learned counsel for petitioners that by making G.O. dated 24.08.2009 prospective, two classes have been constituted and, therefore, it is arbitrary, thoroughly misconceived and virtually a non-est argument. Admittedly, all Medical Officers, who were working before issuance of Government Order dated 24.08.2009, have been paid NPA as per existing G.O. dated 01.2.2003. NPA is payable during the period a Government doctor is functioning for the

reason that it is an allowance in lieu of restriction on private practice. Those, who are retired, are not within the ambit of such restriction and they can engage themselves in any profession including private practice, therefore, question of payment of NPA to them does not arise. Those, who are still working when Government Order dated 24.08.2009 was issued, will get NPA as per aforesaid Government Order prospectively. Revision of pay is w.e.f. 01.01.2006 but rate of NPA is as per relevant Government Order applicable from time to time and no one has been paid any arrears under the head of "NPA", therefore, argument of creation of two classes is thoroughly misconceived and has no basis whatsoever. There does not exist any such classification.

21. The basic submission of petitioners, in fact, is that executive order in regard to NPA should have been applied retrospectively from the date basic pay was revised, but, if such Government Order has been made effective prospectively, we have not been shown any law, which will render such Government Order bad or illegal or arbitrary. No right vested in Government doctor to claim NPA, at the rate, which is revised prospectively, from a back date. Rules contemplate rates of NPA as per decision of Government taken from time to time, and, this decision is reflected in various Government Orders, which, in past, also have been issued prospectively and have never been found objectionable, invalid or illegal. For that reason alone, normally, a Government Order, even otherwise, is prospective unless there is a clear intention or any obligation under law that it must be given effect to from an anterior date. It is not case in hand. Therefore, this argument has no basis and rejected.

22. Now coming to the authorities relied by counsel for petitioners, we find that judgments have been rendered in the context of Rules as applicable in those cases.

23. In *State of Madhya Pradesh and others Vs Yogendra Shrivastava (supra)*, Insurance Medical Officers, came before Court, were employed in State of Madhya Pradesh and governed by Madhya Pradesh Employees and Government of Madhya Pradesh Employees" State Insurance Service and Recruitment Rules, 1981. Under Rules itself a classification of service and scale of pay was provided and NPA at 25% of pay was specifically mentioned therein. Dispute was that under Rules pay scale was provided as also it was mentioned that "NPA" at 25% of pay shall be payable but in appointment letters, instead of "NPA" shown as 25% of basic pay, a lump sum amount was mentioned. The result of not linking of 25% of NPA was that whenever there was increase in basic pay on account of annual increments, etc., there was no corresponding increase in "NPA". The grievance was that mention of lump sum amount in appointment letter towards NPA was not in accordance with Rules. This was accepted by Court and in reference of rules applicable to Medical Officers of Madhya Pradesh Employees State Government Services, Court held, when Rules contemplate NPA of 25% of basic pay, it was not open to Government to mention a lump sum amount. This is evident from para-10, 11, 12 and 13 of the judgment which we reproduce here

as under : "10. The appellants contend that the Rules do not contain any specific provision for payment of non-practicing allowance. They point out that Schedule I to the Rules merely refers to "plus NPA @ 25% of the pay in the column relating to the pay scale, without defining the term "pay". It is submitted that when the "pay" is not defined, it can refer to the minimum or initial pay in the pay scale, or to each stage in the pay scale commencing from the initial pay and ending with the maximum pay in the pay scale.

11. It is contended that the State Government had proceeded on the basis that "25% of the pay" referred to the "25% of initial pay" and had fixed the NPA keeping the said figure in view, by means of executive orders. It is submitted that fixing of a lump sum as NPA, approximately equal to 25% of the initial pay in the applicable pay scale, by executive orders issued by the Government from time to time, was therefore inconsonance with the Rules. Alternatively, it was contended that incidental matters relating to number of posts, pay scales and NPA referred to the Schedule to the Rules, were subject to periodical revision/ changes and it was common practice to make such revisions/ changes, by executive orders instead of adopting the process of amending the Rules every time, and that such executive orders were binding on the employees and were never challenged.

12. The Rules made under Article 309 of the Constitution clearly provided that the employees concerned (medical officers) were entitled to NPA @ 25% of pay, in addition to the pay in the pay scale. In fact, it formed part of the pay scale. Consequently, whatever was the basic pay, 25% thereof had to be paid as NPA. Whenever the benefit of increments in the pay scale, or revision in pay scale were extended, NPA also got correspondingly increased so that NPA always remained as one-fourth by the Tribunal and upheld by the High Court and we find no reason to interfere with the same.

13. The contention that the executive orders issued from time to time or the appointment letters issued in accordance with such executive orders will prevail over the Rules cannot be accepted. When there is conflict between the statutory rules and the executive orders, the statutory rules will prevail (see *K. Dayanandalal v. State of Kerala* : (1996) 9 SCC 728, *T.N. Housing Board v. N. Balasubramiun* : (2004) 6 SCC 85, *State of Karnataka v. KGSD Canteen Employees' Welfare Assn.* : (2006) 1 SCC 567 and *Punjab National Bank v. Astamija Dash* : (2008) 14 SCC 370). Executive orders cannot be made or given effect in violation of what is mandated by the Rules. If appointment letters provide for payment of NPA which is not in consonance with the Rules, they can be corrected or set right by the tribunals/courts." (emphasis added)

24. Aforesaid discussion clearly shows that judgment in *State of Madhya Pradesh and others Vs Yogendra Shrivastava* (supra) has no application to the present case governed by different sets of Rules and Government Orders and it is nobody's case and has also not been demonstrated that Government Orders applicable to petitioners or subject matter of discussion in the present writ

petition issued by State Government of U.P. in reference to Rule-4 of Rules, 1983 are in any manner contrary to Rules. Therefore, judgment in State of Madhya Pradesh and others Vs Yogendra Shrivastava (supra) does not help petitioners at all.

25. Similarly, judgment in K. C. Bajaj and others Vs. Union of India and others : (2014) 3 SCC 777 is also in reference to specific Rules applicable to Medical Officers of Central Health Services, Railways, etc. The employees before Supreme Court were Medical Officers employed in Central Health Services, Government of India and Railways. They were paid NPA as part of their monthly pay in lieu of private practice, availability of less promotional avenues and late entry in service. NPA was paid at the fixed rate, commensurate with the rank of doctors and their pay scale. Recommendations of Vth Pay Commission were accepted by Central Government in respect of employees of Central Government including formula of calculation of NPA. It was made 25% of basic pay of a Government Doctor. It also recommended that pension of pre 01.01.1996 as well as post 01.01.1996 should not be less than 50% of minimum pay in the revised pay scale at the time of retirement. Government of India issued an Office Memorandum dated 10.02.1998 for grant of revised pension to those who were in receipt of specified type of pension as on 01.01.1996 under Liberalised Pension Rules, 1950, Central Civil Services (Pension) Rules, 1972 as amended from time to time and corresponding Rules applicable to railway pensioners and pensioners of all India Services. Office Memorandum dated 10.02.1998 further said that pay of employees who had retired prior to 01.01.1996 was to be fixed on notional basis at par with the serving employees and their pension was to be fixed at par with those who retired after 01.01.1996. Then another Office Memorandum was issued by Ministry of Personnel on 07.04.1998 fixing NPA at the rate of 25% of Basic Pay subject to the condition that pay plus NPA should not exceed Rs.25,900/- for doctors belong to Central Health Services. It also says that NPA shall count for all service benefits including retiral benefits. Then another Office Memorandum was issued by Ministry of Personnel on 17.12.1998 stating that with effect from 01.01.1996, pension of petitioners, irrespective of their date of retirement, shall not be less than 50% of minimum pay in the revised scale of pay introduced from 01.01.1996, on the post held by pensioners. However, with regard to computation of NPA, a clarification was issued by Ministry of Personnel vide Office Memorandum dated 29.10.1999 and it is said that NPA is not to be taken into consideration after refixation of pay on notional basis on 01.01.1986 and same was not to be revised as on 01.01.1996. The aforesaid clarification as reproduced in para-7 of judgment, relevant extract thereof is reproduced as under: The undersigned is directed to refer to this Department's OM No. 45/10/98-P&PW(A) dated 17-12- 1998 wherein decision of the Government that pension of all pensioners irrespective of their date of retirement shall not be less than 50% of the minimum of revised scale of pay introduced w.e.f. 1-1-1996 of the post last held by the pensioner was communicated, clarifications have been sought by the departments/Ministries as to whether nonpractising allowance

(NPA) admissible as on 1-1-1986 is to be taken into consideration after refixation of pay on notional basis as on 1-1-1986 and whether NPA is to be added to the minimum of the revised scale while considering stepping up consolidated pension on 1-1- 1996. NPA granted to medical officers does not form part of the scales of pay. It is a separate element although it is taken into account for the purpose of computation of pension. This has been examined in consultation with the Department of Expenditure and it is clarified that NPA is not to be taken into consideration after refixation of pay on notional basis on 1-1-1986. It is also not to be added to the minimum of the revised scale of pay as on 1-1-1996 in cases where consolidated pension/family pension is to be stepped up to 50%/30% respectively, in terms of OM No.45/10/98- P&PW(A) dated 17-12-1998. (emphasis added)

26. It is this clarification which creates two classes. Since benefit of NPA which was part of pay, sought to be denied to those who retired prior to 01.01.1996, Dr. K. C. Garg and other Medical Officers who had retired prior to 01.01.1996 challenged Office Memorandum dated 29.10.1999 and sought direction from Government of India to include element of NPA for the purpose of computing pension to them. Before Central Administrative Tribunal, they failed but judgment was reversed by Delhi High Court, hence Government of India came before Supreme Court in Civil Appeal No. 1972-74 of 2003. When appeal was pending, Government of India sought opinion of Attorney General who opined that judgment of Delhi High Court was correct, hence, appeals filed by Government of India were got dismissed as withdrawn on 23.05.2005. On 22.06.2005 Department of Pension and Pensioner Welfare, Ministry of Personnel issued instructions for implementation of Delhi High Court judgment dated 12.05.2002 in K. C. Garg Vs. Union of India, which became final after dismissal of appeals by Supreme Court on 13.05.2005. It also proposed to withdraw Office Memorandum dated 29.10.1999. Ministry of Finance, however did not agree with the latter part of proposal but on 29.07.2000, Prime Minister sanctioned proposal for withdrawal of Office Memorandum dated 29.10.1999. Before decision of Prime Minister could become an order, Supreme Court decided another matter, B. J. Akkara Vs. Union of India : 6 (2006) 11 SCC 709 which was related to doctors of defence services and in the light of that decision, Prime Minister approved proposal that Office Memorandum dated 29.10.1999 may not be withdrawn. Railways, then took a decision in the light of Office Memorandum dated 12.11.1999 that NPA would not be treated as a part of basic pay for the purpose of calculation of pension in the matter of one Dr. G. D. Hoonka, who retired as Chief Medical Superintendent, Central Railway, Jabalpur. He challenged aforesaid Office Memorandum before Central Administrative Tribunal. Original application of Hoonka was allowed by Tribunal in O.A. No. 499 of 2000 decided on 05.09.2003, whereagainst Writ Petition No. 2539 of 2003 filed by Government of India was dismissed by a Division Bench of Madhya Pradesh High Court vide judgment dated 07.12.2004 and SLP (C) No. 14834 of 2006 filed by Union of India was also dismissed by Supreme Court on 28.08.2006. Review application filed by Government of India

was also dismissed on 17.01.2008 on the ground of limitation as well as merit. Then comes forth matter of Dr. Naw Nath Prasad who retired as Medical Director, LNM, Railway Hospital, Gorakhpur. He was also denied benefit of NPA since he retired before 01.01.1996. He filed O.A. No. 215 of 2005 before Central Administrative Tribunal, Patna Bench which was allowed vide judgement dated 17.01.2006. Government of India challenged Tribunal's order in Writ Petition No. 11114 of 2006 which was dismissed by Patna High Court vide judgment dated 09.02.2010 and again appeal of Government of India was dismissed by the Supreme Court in SLP (C) No. 15134 of 2010 on 04.10.2010. Dr. K. C. Bajaj also sought a similar direction for addition of NPA for the purpose of calculation of pension. Tribunal disposed of matter issuing such direction but Railway department, referring to B. J. Akkara Vs. Union of India (supra) judgment, rejected representation of Dr. Bajaj. Again he filed Original Application No. 1369 of 2007 which was dismissed by Tribunal vide order dated 12.09.2008. Relying on aforesaid judgment of B. J. Akkara Vs. Union of India (supra) writ petition was also dismissed and that is how matter went to Supreme Court in K. C. Bajaj Vs. Union of India (supra). On behalf of Government of India, it was argued that despite dismissal of appeals in various other matters and extension of benefit to Medical Officers in Railways, and Government of India, still similar benefits cannot be claimed by others. Castigating it, Supreme Court in para-28 and 29 of judgment has said as under: 28. In view of the above discussion, we hold that the ratio of State of Maharashtra v. Digambar : (1995) 4 SCC 683 cannot be invoked to justify the pick-and-chose methodology adopted by the Union of India in resisting the claim of similarly situated doctors that NPA payable to them shall be taken into consideration for calculating the pension. Such an approach by the Union of India is ex facie arbitrary, unjust and has resulted in violation of Article 14 of the Constitution.

29. The judgment in B. J. Akkara v. Govt. of India : (2006) 11 SCC 709 cannot be applied to the appellants' case because the circulars which fell for interpretation in that case and those under consideration in these appeals are different in material aspect. By Circular dated 7-6-1999, the Ministry of Defence conveyed the decision of the President that "with effect from 1-1-1996, pension of armed forces pensioners irrespective of their date of retirement shall not be less than 50% of the minimum pay in the revised scale of pay introduced with effect from 1-1-1996 of the rank, held by the petitioner". The circular provided that the revision of pension should be undertaken as follows in case of commissioned officers (both post- and pre-1-1996 retirees) : (B.J. Akkara case, SCC p.717, para 5)

"5. "(i) Pension shall continue to be calculated at 50% of the average emoluments in all cases and shall be subject to a minimum of Rs 1275 p.m. and a maximum of up to 50% of the highest pay applicable to armed forces personnel but the full pension in no case shall be less than 50% of the minimum of the revised scale of pay introduced w.e.f. 1-1-1996 for the rank last held by the commissioned officer at the time of his/her retirement. However, such

pension shall be reduced pro rata, where the pensioner has less than the maximum required service for full pension.[Vide Clause 2.1(a).]

(ii) Where the revised and consolidated pension of pre-1-1996 pensioners are not beneficial to him/her are under these orders and is either equal to or less than existing consolidated pension under this Ministry's Letters dated 24-11-1997, 27-5-1998 and 14-7-1998, as the case may be, his/her pension will not be revised to the disadvantage of the pensioner (vide Clause 4)."

27. Supreme Court, thus distinguished judgment in B. J. Akkara Vs. Union of India (supra) and in para-31 of judgment in K. C. Bajaj Vs. Union of India (supra) , said as under:

31. This Court treated the Circular dated 11-9-2001 as clarifactory in nature and held that it neither amends nor modifies the Circular dated 7-6-1999. The most striking difference between OM dated 7-4-1998 issued by the Department of Pension and Pensioners' Welfare, Ministry of Personnel (Public Grievances and Pension) and Circular dated 7-6-1999 by the Defence Ministry is that the decision of the President conveyed vide OM dated 7-4-1998 was that NPA shall count as pay for all service benefits including retirement benefits but no such decision was contained in the Circular dated 7-6-1999. Therefore, the clarification issued by the Ministry of Defence vide Circular dated 11-9- 2001 cannot be equated with OM dated 29.10.1999 which had the effect of modifying the decision of the President but was issued without his approval. Unfortunately, the Tribunal and the Division Bench of the High Court overlooked this vital distinction between OM dated 7-4- 1998 issued by the Ministry of Personnel (Public Grievances and Pension), Department of Pension and Pensioners' Welfare and Circular dated 7-6-1999 issued by the Ministry of Defence and mechanically applied the ratio of B. J. Akkara case for deciding the cases of the doctors, who served in Central Health Services, the Railways and other departments of the Government. Therefore, the impugned order is legally unsustainable. (emphasis added)

28. Above facts are self evident to show that this judgment has no application in the case in hand. There the matter was decided in respect of different provisions, different G.Os. and Office Memorandums and different context. The mere fact that aforesaid judgment relates to "NPA", cannot equate medical officers of State Government of U.P. governed by different sets of Rules to that of Medical Officers of Central Government governed by different sets of Rules and Executive orders issued thereunder.

29. In view of above discussion, we do not find that petitioners are entitled to any relief and judgment of Tribunal dismissing claim petition of petitioners in Second Writ Petition, i.e., Writ Petition No. 1239 (SB) of 2012 also cannot be said to be erroneous in any manner.

30. Both the aforesaid writ petitions lack merit. Dismissed accordingly.

31. No order as to costs.