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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved On: 24th July, 2010*
Judgment Delivered On:16th August, 2010

\+ **W.P.(C) 10928/2009**

Dr.SMT.USHA GOEL DED. THR.
HER LEGAL HEIR AND HUSBAND
DR.O.P.GOEL ..... Petitioner
Through: Mr.Puram Singh, Advocate for Mr.Shalini Kumar, Advocate

Versus

UOI & ORS. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.V.Sinha, Advocate for UOI

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

For orders, see W.P.(C) No.8973/2009.

(PRADEEP NANDRAJOG)
JUDGE

(MOOL CHAND GARG)
JUDGE

AUGUST 16, 2010
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved On: 24th July, 2010*
Judgment Delivered On:16th August, 2010

\+ **W.P.(C) 8973/2009**

DR.K.C.BAJAJ & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Sharma and Mr.Bhanu Sood, Advocates

Versus

UOI & ANR. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.N.Singh, Advocate for R-2

W.P.(C) 8968/2009

DR.DALIP SINGH RAWAT & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Sharma and Mr.Bhanu Sood, Advocates

Versus

UOI & ANR. ..... Respondents
4Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.N.Singh, Advocate for R-2

W.P.(C) 8969/2009

DR.VEENA WADHWA & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Sharma and Mr.Bhanu Sood, Advocates

Versus

UOI & ORS. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.N.Singh, Advocate for R-2

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W.P.(C) 8974/2009

DR.R.N.KAPUR & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Sharma and Mr.Bhanu Sood, Advocates

Versus

UOI & ORS. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.N.Singh, Advocate for R-2

W.P.(C) 8975/2009

DR.MRS.RENUKA JOLLY & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Sharma and Mr.Bhanu Sood, Advocates

Versus

UOI & ANR. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.N.Singh, Advocate for R-2

W.P.(C) 8976/2009

DR.BIMLA GOULATIA & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Shamra and Mr.Bhanu Sood, Advocates

Versus

UOI & ORS. ..... Respondents
Through: Mr.R.N.Singh, Advocate for R-2

W.P.(C) 8977/2009

Dr.S.C.SINHA & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Sharma and Mr.Bhanu Sood, Advocates

Versus

UOI & ANR. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.N.Singh, Advocate for R-2

W.P.(C) 8978/2009

Dr.SHUNILA MALIK & ORS. ..... Petitioners
Through: Mr.Prashant Bhushan, Advocate with Mr.Sumeet Sharma and Mr.Bhanu Sood, Advocate

Versus

UOI & ANR. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.N.Singh, Advocate for R-2

W.P.(C) 10928/2009

Dr.SMT.USHA GOEL DED. THR.
HER LEGAL HEIR AND HUSBAND
DR.O.P.GOEL ..... Petitioner
Through: Mr.Puram Singh, Advocate for Mr.Shalini Kumar, Advocate

Versus

UOI & ORS. ..... Respondents
Through: Mr.V.S.R.Krishna, Advocate for R-1

Mr.R.V.Sinha, Advocate for UOI

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W.P.(C) 11160/2009

DR.N.K.AGGARWAL ..... Petitioner
Through: Mr.Puram Singh, Advocate for Mr.Shalini Kumar, Advocate

Versus

UOI & ORS. ..... Respondents
Through: Mr.R.V.Sinha, Advocate for UOI

Mr.V.S.R.Krishna, Advocate for Railways

W.P.(C) 11238/2009

SHANTI SEN & ANR. ..... Petitioners
Through: Mr.Gyan Prakash, Advocate

Versus

UOI & ORS. ..... Respondents
Through: Mr.A.K.Bhardwaj, Advocate for UOI

W.P.(C) 11716/2009

DR.(MRS.) VIMLA K.AJWANI ..... Petitioner
Through: Mr.Gyan Prakash, Advocate

Versus

UOI ..... Respondent
Through: Mr.R.V.Sinha, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

MOOL CHAND GARG, J.

1. This batch of writ petitions (15 in numbers) have been filed by doctors, who retired from services prior to 01.01.1996 and who are

272 in numbers; majority of them having worked with Railways, few in the Directorate of Health Services, Delhi, one as Professor of Maulana Azad Medical College and the other one as Director General, Employees State Insurance Corporation. The writ petition arises out of a judgment delivered by the Full Bench of the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') in OA No. 1927/2006 along with 14 other connected OAs dated 12.09.2008 whereby the Full Bench dismissed the O.A.s seeking inclusion of Non Practicing Allowance (for short 'NPA') as part of minimum pay as on 01.01.1996 for calculation of pension payable to them in terms of 5th Central Pay Commission recommendations directing that those who retired prior to 01.01.1996 will be treated alike regarding calculation of their pension as on 01.01.1996 by allowing the same fitment weightage as may be allowed to the serving employees. However, consolidated pension will not be less than 50% of the minimum revised scale of pay of the post held by the pensioner at the time of retirement. These recommendations were accepted by the Government and notification dated 17.12.1998 to this effect was issued.

2. It is the case of the petitioners that while doctors who retired after 01.01.1996, got pension based upon the calculation of 50% of their basic pay and also by inclusion of 50% of NPA which is calculated at the rate of 25% of the basic pay, the petitioners who are retirees prior to 01.01.1996 does not get the benefit of inclusion of 50% of NPA as per the eligibility of the retirees who retire after 01.01.1996. This creates a discrimination qua them for the purpose of calculating the pension even though, the Government of India as per recommendations of the 5th Pay Commission wanted equivalence of pension to the extent of 50% of the minimum of the revised scale of pay w.e.f. 01.01.1996 even for the petitioners who form batch of retirees prior to 01.01.1996.

3. It has been submitted that the petitioners are covered by the decision given by a Division Bench of this Court in *Dr.K.C. Garg & Ors. Vs. Union of India & Ors.* C.W.P. 7322/2001 and connected

cases decided on 18.05.2002 by a Division Bench of Jabalpur High Court in *Union of India & Ors. Vs. Dr.G.D.Hoonka, Retd. & Anr.*, W.P.(C)2539/2003 decided on 07.12.2004. It has also been submitted that the SLP filed against the judgment of both the cases stand dismissed as withdrawn and therefore the decision given in those cases has attained finality. It is further submitted that the Government of India has even implemented the decision in Dr.Garg's Case and Hoonka's Case and, therefore, by not granting a similar benefit to the petitioners they are violating Article 14 of the Constitution of India. In these cases benefit of NPA (as applicable on 01.01.1996) has been considered as inclusive of pay for the purpose of calculation of pension. It has been submitted that the judgment given in *Col.B.J. Akkara (Retd.) Vs. Government of India & Ors.* (2006) 11 SCC 709 relied upon by the Tribunal while deciding the matters against the petitioners, is not applicable to the petitioners in the peculiar facts as is sought to be addressed before us.

4. The contention raised before the Tribunal was that in view of Dr.K.C.Garg's case and Hoonka's case, the issue with regard to inclusion of NPA in the basic pay as on 01.01.1996 even in respect of petitioners so as to calculate their pension at the rate of 50% was no more *res integra.*

5. Initially the cases filed by the petitioners before the Tribunal were disposed of with a direction to the concerned authorities to dispose of their representation within the time specified whereas in some of the cases it was ordered that OAs be treated as representations. The representations were rejected by the authorities and thus applicants again filed OA 2295/2007 and OA No. 462/2007 for re-fixation of their pay. On the basis of B.J. Akkara's case, both the said petitions were dismissed. The Kolkata Bench of the Tribunal in *Dr. Shivpada Ghosh and 37 Others Vs. UOI & Ors.*, O.A. No. 475/1006 (hereinafter referred to as Ghosh's case) despite making reference to Akkara's case granted relief to the applicants before them and directed inclusion of NPA while fixing

the pension and the same promoted the Division Bench of the Tribunal to refer the matter to the larger Bench.

6. The larger Bench vide impugned order while dealing with the case of Dr.K.G. Garg and G.D. Hoonka and the orders passed by the Hon'ble Supreme Court in Akkara's case observed:-

(i) The decision in Dr.K.C. Garg's case and Hoonka'scase would not come to the rescue of the petitioners in view of the decision of the Supreme Court in Akkara's case to the same effect would be the decision of the Kolkata Bench in Ghosh's case.

(ii) The order of the Hon'ble Supreme Court dismissing the Civil Appeal as withdrawn is not a decision on reasons and therefore cannot be treated as precedent under Article 141.

7. At this stage, it would be appropriate to take note of the submissions made by Mr.Prashant Bhushan, learned counsel for the petitioners that as per Rule 49 of the CCS (Pension) Rules, 1972 (hereinafter referred to as 'the Rules') the amount of pension has to be calculated at 50% of the average emoluments to which a Civil Servant is entitled. The expression 'average emoluments' as per rule 33 of the Rules means: ***"The expression 'emoluments' means 'basic pay' which, as defined in Rule 9(21)(a)(1) of the Fundamental Rules means as what a Govt. Servant is receiving immediately before his retirement or on the date of his death and will also include non practicing allowances granted to the medical office in lieu of private practice."***

8. It is further stated that as per Rule 9(21)(a)(i) of the Fundamental Rules 'Pay' means the amount drawn monthly by the Government servant as:

(i) The pay, other than special pay or pay granted in view of his personal qualification, which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in a Cadre; and

(ii) Overseas pay, special pay and personal pay; and

(iii) Any other emoluments which may be specially classed as pay by President.

9. It is also submitted that as mentioned in Rule 7(D) of the Central Civil Service (Revised Pay) Rules, 1997 which are applicable to all the Government doctors who have elected to get their pay revised w.e.f. 01.01.1996. As per Rule 7(D) also, NPA is not to be included at the time of calculating 'basic pay' as it is a separate element altogether. The Rule specifically says that the NPA will be drawn by the Government Doctors in addition to the basic pay which they are drawing. The relevant portion of the Rule 7(D) is quoted hereunder:

> "7. Fixation of initial pay in the revised scale
>
> (1).....
>
> (A) to (C) .....
>
> (D) in the case of the medical officers who are in the receipt of the non-practicing allowance, the pay in the revised scale shall be fixed in accordance with the provisions of Clause (A) above except that in such cases the term "existing emolument" shall not include NPA and will comprise only the following:-
>
> (a) the basic pay in the existing scale;
>
> (b) dearness allowance appropriate to the basic pay and non-practicing allowance admissible at the index average 1510 (1960=100) under the relevant orders; and
>
> (c) the amount of first and second installments of the interim relief admissible on the basic pay in the existing scale and non-practicing allowance under the relevant orders.
>
> **And in such cases, non-practicing allowance at the new rates shall be drawn in addition to the pay so fixed in the revised scale."**

10. On the strength of the aforesaid rules it has been submitted that NPA is clearly a part of pension for retired medical officers as per the aforementioned rules which are of statutory nature and have received presidential assent. It is further stated that in accordance with the OM dated 07.04.1998, the President of India has declared that for all the Central Health Services Officers, NPA

will count as part of their pay for all service benefits including retirement benefits hitherto. It is thus, submitted that as per the aforesaid rules NPA is not part of the basic pay nor it is a part of basic pension, it is a separate element to be paid @25% of the basic pension fixed after orders of Government on 5th CPC recommendation came into force.

11. It would be relevant to mention here that all the petitioners in the present case had opted for the revised pay scale and their pay was accordingly revised w.e.f. 01.01.1996.

12. Mr.Bhushan also submitted that initially the NPA was granted at a fixed rate, in accordance to the rank held by the Government doctor, and was revised from time to time by the successive pay commissions. The 5th Pay Commission, however, revised the whole formula of calculating NPA as per which the NPA was now to be calculated at 25% of the basic pay of the Government doctor. The 5th Pay Commission recommended that w.e.f. 01.01.1996, the pension of all retirees irrespective of the date of retirement shall not be less than 50% of the minimum pay in the revised pay scale of the post held by them at the time of retirement and that the NPA will be granted to the doctors at 25% of the basic pay of the Government doctor. The 5th Pay Commission recommended that w.e.f. 1.1.1996, the pension of all retirees, irrespective of the date of retirement shall not be less than 50% of the minimum pay in the revised pay scale of the post held by them at the time of retirement and that the NPA will be granted to the doctors at 25% of their basic pay. The above-said recommendation of the 5th Pay Commission was thereafter adopted by the Ministry of Health and Family Welfare vide their OM dated April 7, 1998 and the NPA to the doctors belonging to the Central Health Services was fixed at the rate of 25% of the basic pay and it was also declared that this NPA will count as part of the pay of the Central Health Services Officers for all service benefits including retirements benefits hitherto. It would be relevant to mention here that the abovementioned OM dated April 7, 1998 also received the presidential assent.

13. It is submitted by Mr. Bhushan that in view of the aforesaid Rules notification dated 29.10.1999 (impugned notification) issued without the approval of the President of India wherein they stated that benefit of grant of NPA will not be extended to the Government doctors who retired prior to 01.01.1996 and will only be given to doctors who retired post 01.01.1996 clearly discriminated between pre and post 01.01.1996 retirees in complete violation and disregard of fundamental rules and pension rules. This decision is in the teeth of the judgment of the Supreme Court in the case of *D.S.Nakara & Ors. Vs. Union of India* AIR 1983 Supreme Court 130. It is also the submission that not only there will be two classes created between the post 1996 retirees and pre 1996 retirees but also another class will be created of all those who are beneficiaries of Dr. Garg's case and Hoonka's case which has attained finality in view of the fact that the SLP filed against those two cases stand withdrawn.

14. The above mentioned notification was initially challenged by one Dr.K.C.Garg and 73 other doctors before this Court. This Court vide its final judgment and order dated 18.05.2002 quashed the impugned notification in view of the provisions of Pension Rules and Fundamental Rules as aforesaid. This Court has taken a view that the impugned notification was bad in law and the same was discriminatory between pre and post 1996 retirees.

15. It has also been submitted that in fact the SLPs which were converted into Civil Appeals No.1972/2003 was withdrawn by the Union of India on the basis of a written opinion given by the Attorney General of India wherein he stated that it was incumbent upon the Union of India to include NPA for fixation of pensionary benefits. It has also been submitted that Central Administrative Tribunal while distinguishing the judgments in Dr.K.C.Garg's case and Hoonka's case in the light of Akkara's case was bound to also consider law laid down by the Supreme Court in *Amrit Lal Beri Vs. Collector Central Excise*, SLR 1975 (1) 153 wherein the Apex Court has been pleased to lay down that once a Government servant

obtains a declaration of law from a court of law, others placed in a similar situation can depend upon the sense of responsibility of the respondents to extend the benefit of the judgment to them also without forcing them to approach the Court for obtaining similar declarations. This is also the view taken by the Supreme Court in *K.I. Shepherd and Ors. Vs. Union of India & Ors*. AIR 1988 Supreme Court 686.

16. Sh.Bhushan also tried to make an attempt to submit that Dr.Akkara's case does not apply to the petitioners herein by submitting that Akkara's case dealt with pensionary benefits of doctors belonging to the defence services whereas the petitioners before this Court are doctors who were employed in civil services. It has been submitted that in Akkara's case, the Court was also influenced by the Rules as were applicable to the persons working in Ministry of Defence. The Supreme Court had themselves relied upon the judgment in Dr.K.C.Garg's case to have a notification issued in their favour. Even though it was also held that the respondents will be in a position to resist subsequent petitions seeking extension of benefit in public interest. However, it is submitted that the Supreme Court did not deal with the merits in Dr.K.C.Garg's case nor did it overrule the same. Reference is also made by the petitioners to the judgment in *Union of India Vs. S.P.S. Vains (Retd.) & Ors*., 2008 (12) SCALE 360 where it has been held that the discrimination between pre and post 1996 retired Major Generals was not correct as the *"Fixation of a cut-off date as a result of which equals were treated as unequals is wholly arbitrary and violative of Article 14."*

17. One of the basic argument to highlight the inequalities in the two class of the pensioners retiring prior to 01.01.1996 and retiring after 01.01.1996 with respect to inclusion/ exclusion of NPA, the learned counsel for the petitioners submits that even, the factual basis on which the Supreme Court proceeded with was different from the situation in the present case as, in the present case, the petitioners have not received the NPA components of their **pension**

at all and there is no question of double payment of pension. In this regard they have given tabulation of Dr.Bajaj's pension, the petitioner in W.P.(C) 8973/2004 as follows:

Basic Pay at retirement	Rs.1900+Rs.500(NPA)
Revised basic pay (4th CPC)	Rs.5000+Rs.500(NPA)
Fixation of Pension w.e.f.January 1,1996 under the 5th CPC	
Dearness Relief (96% of pay + NPA)	Rs.5280 (i)
First Interim Relief	Rs.100(ii)
Second Interim Relief	Rs.550(iii)
Fitment Weightage	Rs.2000(iv)
Total(revised basic pay, 5th CPC)	Rs.12930 *(NPA not included)*
(Basic pay 4th CPC (not including NPA) +I + ii + iii + iv	
Revised basic pension at 50% of basic pay	Rs.6465 *(NPA not included)*
Pension received	Rs.6469

18. It has been submitted that the aforementioned calculations, as well as information regarding the pension details of Dr.Bajaj as provided by the Pay and Accounts Officer, Railway Board, Ministry of Railway, New Delhi, the component of NPA, though included while calculating Dearness and Interim relief, has not itself been included as a component of the pay while fixing pension. It is further submitted that as per the 5th CPC, NPA is to be granted at a rate of 25% of the revised basic pay, i.e., 25% of Rs.12930/- which would amount to Rs.3232.5 and hence as per the 5th CPC a person who has completed 33 years of service is entitled to a total of Rs.6465/- (50%of revised basic pay) + Rs. 1616.25 (50% of 25% of the revised basic pay as the NPA component) which would amount to Rs.8081.25. Dr.Bajaj had completed only 30 years of service and hence would be entitled to 30/33 of Rs.8081.25 which amounts to Rs.7346.6 as opposed to Rs.6469/- which he received.

19. However, at this juncture it would be relevant to take note of the submissions made on behalf of the respondents denying this factual averment made by the petitioners. The respondents have relied upon the calculation of pension in the case of Dr.Shanti Sen who is also a petitioner in the batch of the petitions. In this regard

they have pointed out that the fixation of pension in the case of Dr.(Mrs.) Shanti Sen which is in accordance with the Rule 49(2)(a) of CCS(Pension) Rules. Relevant formula mentioned in the counter affidavit filed on behalf of the respondents in W.P.(C).11238/2009 reads as follows:

> "Fixation of pension in pursuance of above rule in respect of Dr.(Mrs.) Shanti Sen is illustrated.

(a)	Pay Scale in which Dr.Sen was drawing her pay at the time of retirement i.e. 31.07.1987	Rs.3700-5000
(b)	Basic pay at the time of retirement	Rs.,5000/-
(c)	Non-Practicing Allowance (NPA)	Rs.900/-
(d)	Emoluments calculated for pension(Basic Pay +NPA):	Rs.5000+Rs.900 =Rs.5900
(e)	Length of service rendered by Dr.Sen	31 years 11 months 23 days which is rounded to 32 years.
(f)	Pension=Average emoluments/2 x No. of completed half year service/66	Rs.5900/2x64/66 =2860.60=Rs.28 61

> Pension fixed in respect of Dr.Sen at the time of retirement is Rs.2861/-"

20. **This formula if has been applied in all the cases, the stand of the petitioner that NPA which was payable to retirees prior to 01.01.1996 was not taken into consideration as part of the basic pay for the purpose of calculation of pension is belied**. However, as per the respondents, the element of NPA is not part of basic pay and thus is not required for the purpose of equalizing the pension payable to retirees prior to 01.01.1996. NPA stand included into their pay for the purpose of calculating pension as on the date of their retirement prior to 01.01.1996 and therefore the only thing required to be done by the respondent is to equalize that pension by taking into consideration the minimum pay now payable to a doctor as on 01.01.1996.

21. It would now be appropriate to take note of some of the observations made by the Supreme Court in B.J.Akkara's case which of course was with respect to doctors working in defence services

but which certainly deals with the controversy raised by the petitioners in this case also. The issues which were crystallized for consideration by the Apex Court needs mention in this regard:

> "3. The recommendations of Fourth Central Pay Commission in regard to pensionary benefits for Armed Force Officers retiring on or after 1.1.1986 were implemented by Ministry Circular dated 30.10.1987. The said Circular provided that retiring pension of all commissioned officers of the three services, shall be calculated at 50 per cent of the **reckonable emoluments**, for a qualifying service of 33 years (to be reduced proportionately for lesser qualifying service). It defined 'reckonable emoluments' for purposes of retiring/service pension as average of pay, NPA and rank pay, if any, drawn by the officer during the last 10 months of his service. It defined the term 'pay' as basic pay in the revised pay scales.
>
> 4. The recommendations of the Fifth Central Pay Commission were accepted and accorded sanction by the President on 24.11.1997. Consequently, the Ministry issued various circulars implementing the recommendations in regard to pensioners.
>
> Re: Pre 1996 Pensioners
>
> The Ministry issued a Circular dated 27.5.1998 (read with earlier circular dated 24.11.1997) rationalizing the pension of pre 1996 pensioners of the Armed Forces, by providing that the consolidated pension of existing pre 1996 pensioners will be calculated with effect from 1.1.1996, by aggregating the following : i) the existing pension; ii) dearness relief up to CPI 1510 (i.e. @148%, 111% and 96% as the case may be, of basic pension as admissible on 1.1.1996 vide DP & PWs OM dated 20.3.19996); iii) Interim relief I; iv) Interim relief II; and v) Fitment weightage @ 40 per cent of the existing pension.
>
> Re : Pensioners retiring on and after 1.1.1996
>
> The Ministry issued a circular dated 3.2.1998, providing that the retiring pension of Armed Force Officer retiring on or after 1.1.1996 shall be calculated at 50% of average of **reckonable emoluments** during the last 10 months of service, (reckonable emoluments being basic pay including rank pay, stagnation increment and NPA) for a qualifying service of 33 years, to be reduced proportionately for lesser period of qualifying service.

5. The Ministry by Circular dated 7.6.1999, conveyed the decision of the President that 'with effect from 1.1.1996, pension of all 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 pensioner.*' The circular provided that the revision of pension should be undertaken as follows in case of commissioned officers (both post and pre 1.1.1996 retirees):

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 upto 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. 1.1.96 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-1.1.96 pensioners are not beneficial to him/her under these orders and is either equal to or less than existing consolidated pension under this Ministry's letters dated 24.11.97, 27.5.98 and 14.7.98, as the case may be, his/her pension will not be revised to the disadvantage of the pensioner [vide Clause 4].

The pension of the petitioners were stepped up, re-fixed and paid accordingly.

6. The implementing departments had some doubts in regard to interpretation of the circular dated 7.6.1999. They therefore, sought clarifications from the Ministry on the following two issues - (i) whether 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 (ii) whether NPA is to be added to the minimum of the revised scale while considering stepping up the consolidated pension on 1.1.1996. The Ministry issued the following clarification, vide Circular dated 11.9.2001, in regard to the Circular dated 7.6.1999:

"The undersigned is directed to refer to Ministry of Defence letter No. 1(1)/99/D(Pension/Services) dated 7th June, 1999, 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 the revised scale of pay introduced with effect from 1.1.96 of the post last held by the pensioner was communicated....

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 Deptt. of Pension and Pensioners' Welfare and the Department of Expenditure and it is clarified that NPA is not to be taken into consideration after re-fixation 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 is to be stepped up to 50%, in terms of Ministry of Defence Letter No. 1(1)/99/D (Pension/Services) dated 7th June, 1999.[Emphasis supplied]

The Circular also directed the Controller General of Defence Accounts to recalculate the pension by excluding NPA from Basic Pay and await further instructions regarding recovery of excess payments made with effect from 1.1.1996. In view of it, the pension of the petitioners have been revised by excluding the NPA element, by issuing corrigenda to their PPOs.

7. The writ petitioners are aggrieved by the said clarification contained in the Circular dated 11.9.2001 and the consequential corrigenda to their PPOs reducing their pension. The petitioners therefore filed writ petitions, in different High Courts for the following reliefs:

i) For quashing the circular dated 11.9.2001 and/or for a direction to respondents not to give effect to the said circular.

ii) For quashing the consequential corrigenda PPOs, issued to the petitioners by the Controller of Defence Accounts.

iii) For a direction to the respondents, to take into account, NPA at the rate of 25% of the basic pay, including Rank Pay as was being done till the issue of circular dated 11.9.2001, while calculating their pension.

[Note : The actual prayers in each case vary slightly in form. What is given above is the general purport of the prayers in these petitions].

The said writ petitions have been transferred to this Court, in pursuance of applications for transfer filed by the Union of India. "

22. The interpretation of circular dated 07.06.1999 (in this case circular dated 07.04.1998) and clarification given in the subsequent circular dated 11.09.2001 (in this case circular dated 29.10.1999) are very much of concern to the petitioners in this case also.

23. To appreciate the controversy the Apex Court also took note of calculation of pension in the case of one of the petitioners, namely, Lt.Gen.R.K.Upadhyay to clarify the issue which was confronted before the Supreme Court in Akkara's case. Paragraph 8 deals with such calculation which is also reproduced for the sake of reference:

"8. To understand the grievance of the petitioners, it is necessary to give an illustration:

Lt. General R.K. Upadhyay - (Petitioner No. 2 in W.P. No. 1845/2002 on the file of Delhi High Court corresponding to T.P.(C) No. 833/2002):

<u>Pension with effect from 1.7.1991</u>

Original pension sanctioned as per PPO No. M/003476/91 (50 per cent of average reckonable emoluments, that is pay plus NPA)

[Note: There was no Rank pay as it was admissible only to the Ranks from Captain to Brigadier]

<u>Pension with effect from 1.1.1996</u>

Stage I : Pension as per Ministry's Circulars dated 24.11.1997 and 27.5.1998

i) Existing pension	Rs. 4185
ii) Dearness Relief (96% of existing pension)	Rs. 4018
iii) Int. Relief I	Rs. 50
iv) Int. Relief II	Rs. 419
Fitment Weightage (40% of existing pension)	Rs. 1674

Rs. 10346

Stage II : Pension as per Ministry's circular dated 7.6.1999
(vide corrigendum PPO No. M/MODP/030332/1999)

Pay scale of pensioner : Rs. 7300-100-7600
Corresponding revised scale of pay: Rs. 22400-525 -24500

Minimum pay in the revised pay scale	Rs. 22400
Add NPA (25% of Rs. 22400)	Rs. 5600
Total	Rs. 28000

50% of the aggregate (Rs. 28000) as pension Rs. 14,000

Stage III : Pension as per Ministry's circular dated 7.6.1999 , as clarified by circular dated 11.9.2001

(vide corrigendum PPO No. M/MODP/16129/ 2001)

Pay scale of Pensioner : Rs. 7300-100-7600

Revised scale of pay : Rs. 22400-525-24500

50% of minimum in the revised scale of pay (Rs. 22400) as pension Rs. 11,200

Thus, the pension which had been fixed at Rs. 10,346/- per month with effect from 1.1.1996, was increased to Rs. 14,000/- per month by reason of stepping up as per Circular dated 7.6.1999 and later reduced to Rs. 11,200/- in view of the clarification dated 11.9.2001."

24. **Before the Supreme Court it was contended that, word minimum pay as used in the circular dated 07.06.1999 should be interpreted as minimum pay in revised pay scale plus NPA, insofar as the medical doctors entitled to NPA, as in their cases, the term "pay" wherever it occurs, means and includes pay plus NPA**. In that case it was contended that the circular dated 07.06.1999 which provided for pension to be

calculated at the rate of 50% of minimum pay in the revised pay scale plus NPA was correctly understood but after circular dated 11.09.2001, the NPA was omitted while calculating 50% of the minimum pay of the revised scale. It was highlighted that in the case of medical officers who retired on or after 01.01.1996 even after the clarificatory circular dated 11.09.2001 NPA is added to their basic pay in the revised pay whereas it was not being done in the case of retirees prior to 01.01.1996 which it was stated was contrary to the principles laid down by D.S.Nakara's case. Reliance was also placed to the judgment delivered by this Court in Dr.K.C.Garg's case where also a similar clarificatory circular dated 19.10.1999 relating to civilian medical officers (corresponding to Defence Ministry Circular) dated 11.09.2001 was under challenge. It was pleaded that the said decision attained finality and decision also stand implemented by UOI.

25. The Apex Court framed the following questions for consideration in that case:

(i) Whether the Circular dated 11.9.2001, is only a clarification, or an amendment, to the Circular dated 7.6.1999(in this case circular dated 07.04.1998).

(ii) Whether the Circular dated 7.6.1999 as clarified by Circular dated 11.9.2001 (in this case circular dated 29.10.1999), leads to unequal treatment of those who retired prior to 1.1.1996 and those who retired after 1.1.1996 solely with reference to date of retirement.

(iii) Whether the respondents having accepted and implemented the decision of the Delhi High Court (in *Dr. K.C. Garg* v. *Union of India* C.M.P. No. 7322/2001 and connected cases decided on 18.5.2002) on a similar issue, are required to extend a similar treatment to Defence Service Medical Officers also, by cancelling the Circular dated 11.9.2001.

(iv) Even if the Circular dated 11.9.2001 is found to be valid, whether Respondents are not entitled to recover the excess payments made.

26. Insofar as we are concerned, we are not concerned with findings given on question No.(iv) but we are certainly concerned with the findings returned with respect to questions No.(i), (ii) and

(iii). It may be observed here that while answering question No.(i) with respect to the implication of circular dated 11.09.2001 which in this case is the circular dated 29.10.1999, the Apex Court has observed that the earlier circular dated 07.06.1999 (similar to 17.12.1998) neither prescribes the requirements/qualifications for entitlement to pension nor the method of determination of pension. It only effectuates the President's decision that the pension (which has already been determined in accordance with the applicable rules/orders) irrespective of the date of retirement, ***shall not be less than 50% of the minimum pay in the revised scales of pay introduced with effect from 01.01.1996***. Pension is determined as per relevant rules/orders, by calculating the average of reckonable emoluments (basic pay, Rank Pay and NPA) drawn during the last 10 months of service and then taking 50% thereof as the retiring pension applicable to retirees with 33 years of qualifying service, with proportionate reduction for retirees with lesser period of qualifying service. The basis for calculating the pension in respect of those who retired prior to 1.1.1996, and those retired on or after 1.1.1996 happens to be the same. The retiring pension is 50% of the average reckonable emoluments for retirees with 33 years of qualifying service, with proportionate reduction for those with lesser years of qualifying service. The President's decision given effect by Circular dated 07.06.1999 only extends to all pre 1996 retirees, who did not have the benefit of fixation of pension with reference to the revised pay scales which came into effect on 1.1.1996, the benefit of the said revised pay scales, albeit in a limited manner. In so doing, it also puts those who retired on or after 1.1.1986 and pre 1986 retirees on par and on a common platform, removing the disparity, if any, in their pensions.

27. The Apex Court further observed:

> "12. When the Fifth Central Pay Commission recommendations were implemented, the pension of those who retired prior to 1.1.1996, was rationalized by directing that their pension shall be the aggregate of (a) existing pension; (b) dearness relief; (c) interim relief I; (d) interim relief II, and (e) fitment weightage of 40% of

the existing pension. The 'existing pension' referred to therein was the pension which had been arrived at by calculating 50% of the average pay, NPA and Rank Pay during the last 10 months of service. The Circular dated 7.6.1999 made it clear that pension of retirees shall continue to be calculated at 50% of average of reckonable emoluments for the last 10 months before retirement, but only stipulated that the 'full' pension (that is pension for 33 years service) shall not be less than the 50% of the minimum pay in the revised pay scale introduced with effect from 1.1.1996. The Circular dated 7.6.1999 also made it clear that if the minimum prescribed therein was not beneficial to the pensioner, that is, where it was either equal to or less than the existing consolidated pension, his pension will not be reduced to his disadvantage. In short, the Circular dated 7.6.1999, merely stepped up the pension (for a qualifying service of 33 years) to 50% of the minimum pay in the revised scale of pay introduced with effect from 1.1.1996 of the rank held by such pensioner, where his pension was less. We may here note that whenever the reference is to stepping up pension to 50% of the minimum pay in the revised scale of pay, it applies to those with 33 years of qualifying service and gets proportionately reduced for lesser period of qualifying service.

13. The emoluments of those who retired on or after 1.1.1996, calculated with reference to the basic pay in the revised scale of pay plus NPA will certainly be more than the minimum pay in the revised scale of pay and therefore, in their cases, the question of stepping up will not arise. On the other hand, as the pension of pre-1996 retirees was based on the basic pay under the old pay scale plus NPA, and as the old pay scale was much less than the 1996 revised pay scale, their pension required to be stepped up. The extent to which the existing pension should be stepped up is clearly specified in the Circular as "minimum pay in the revised scale of pay". The words used do not give room for any confusion or doubt. A 'pay scale' has basically three elements. The first is the minimum pay or initial pay in the pay scale. The second is the periodical increment. The third is the maximum pay in the pay scale. An employee starts with the initial pay in the pay scale and gets periodical increases (increments) and reaches the maximum or ceiling in the pay scale. Each stage in the pay scale starting from the initial pay and ending with the ceiling in the pay scale, when applied to an employee is referred to as 'basic pay' of the employee. ***Whenever the government revises the pay scales, a fitment exercise takes place as per the***

principle of fitment (formula) provided in the rules governing the revision of pay so that the 'basic pay' in the old scale is converted into a 'basic pay' in the revised pay scale. When the circular dated 7.6.1999 used the words '50% of the minimum pay in the revised scale of pay', it referred to 50% of the initial pay in the revised scale of pay. If the old scale of pay was Rs. 7300- 100-7600 and if the revised scale of pay was Rs. 22400-525-24500, the minimum pay in the revised scale of pay would be Rs. 22400 and 50% of the minimum pay in the revised scale of pay would be Rs. 11200/-.

14. It is no doubt true that the term 'pay', with reference to medical officers, includes the basic pay and NPA. But the term 'basic pay' does not include NPA. In the absence of any special definition, the term 'basic pay of a government servant' refers to the applicable stage of pay in the pay scale to which he is entitled, and does not include NPA even in the case of Medical Officers. What the circular dated 7.6.1999 intended to extend by way of benefit to all pensioners, was a minimum pension, that is, 50% of the minimum pay in the 1996 revised scale of pay. NPA has no part to play in the minimum that is sought to be assured. NPA has relevance only for initial fixation of pension and not for stepping up pension under Circular dated 7.6.1999.

The Apex Court has, concluded that as a result, if the pension of a retiree is determined by taking into account NPA as part of 'pay' and the pension so determined is more than 50% of minimum pay in the revised scale of pay, he would continue to get such higher pension. This would happen in the case of all those who retired on or after 1.1.1996. If the pension determined by taking into account NPA as part of pay, is less than 50% of the minimum pay in the revised scale of pay, his pension would be stepped up to 50% of the minimum pay in the revised scale of pay. This would happen in the case of pre 1996 retirees.

28. On the basis of the aforesaid findings the Apex Court also answered question No.(ii) and repelled the contention of the petitioner in that case that the NPA which is being taken into account in the case of post 01.01.1996 retirees pay be also included in the case of pre-1996 retirees for the purpose of taking the

minimum pay for equalizing the pensions payable to them by observing that:

> "22. The contention that NPA is taken into account in the case of post 1.1.1996 retirees but not pre 1996 retirees is untenable. NPA is taken as part of 'pay' in the case of both pre and post 1.1.1996 retirees. NPA is not taken into account in the case of any retiree for applying the stepping up benefit under circular dated 7.6.1999. It is a different matter that post 1.1.1996 retirees do not require the benefit under the circular dated 7.6.1999. As already noticed, while calculating pension of the pre 1996 retirees, NPA had already been taken into account as part of 'pay', and that pension which was determined after taking into account NPA, is found to be less than the minimum guaranteed under the circular dated 7.6.1999, their pension is being increased to the minimum provided in the circular dated 7.6.1999. NPA cannot again be added to the minimum to step up the pension. If that is done, it will amount to taking NPA into account twice for purposes of pension, which is impermissible. The contention of discrimination between pre 1.1.1996 retirees and post 1.1.1996 retirees is, therefore, imaginary."

29. Now coming to the judgment delivered by this Court in *Dr.K.C.Garg's* case and withdrawal of Civil Appeal before the Apex Court and the effect of withdrawing of civil appeal before the Apex Court, the Apex Court has taken note of the affidavit dated 01.08.2006 filed by the respondents '*admitting that in pursuance of the decision of the Delhi High Court, the circular dated 29.10.999 had been withdrawn but clarified that it was withdrawn only in regard to the civilian medical officers who were petitioners in the said writ petitions and not in regard to all civilian medical officers. It is contended that the fact that a decision of the High Court had been accepted or implemented in the case of some persons, will not come in the way of the Union of India resisting similar petitions filed by others, in public interest.*

realized, the State is not prevented or barred from challenging the subsequent decisions or resisting subsequent writ petitions, even though judgment in a case involving similar issue was allowed to reach finality in the case of others. Of course, the position would be viewed differently, if petitioners plead and prove that the State had adopted a 'pick and choose' method only to exclude petitioners on account of malafides or ulterior motives. Be that as it may. On the facts and circumstances, neither the principle of res judicata nor the principle of estoppel is attracted. The Administrative Law principles of legitimate expectation or fairness in action are also not attracted. Therefore, the fact that in some cases the validity of the circular dated 29.10.1999 (corresponding to the Defence Ministry circular dated 11.9.2001) has been upheld and that decision has attained finality will not come in the way of State defending or enforcing its circular dated 11.9.2001."

31. In view of the aforesaid observation given by the Supreme Court in Akkara's case it is apparent:

i) NPA which is added for the purpose of determining the emolument for calculating pension for a retiree prior to 01.01.1986 is not to be included in the minimum pay calculated in the case of a retiree after 01.01.1986 for the purpose of equalization. The equalization of pension has to be made only by taking into consideration the pension which is calculated on the basis of emoluments which is available to pre-retiree with the minimum scale of post which is payable to incumbent who comes in service as on 01.01.1996 excluding NPA which of course would be payable to those employees as service benefits but would not be included for the purpose of upgrading the pension of a retiree prior to 01.01.1996.

ii) The judgment delivered in the Dr.K.C. Garg's case and for that reason in Hoonka's case need not be followed, taking into consideration Akkara's case delivered by the Supreme Court where those judgments have been discussed.

30. In this regard the Court referred to an earlier judgment of the Apex Court in the case of *State of Maharashtra Vs. Digambar* (1995) 4 SCC 683 wherein it was held:

> "Sometimes, as it was stated on behalf of the State, the State Government may not choose to file appeals against certain judgments of the High Court rendered in Writ petitions when they are considered as stray cases and not worthwhile invoking the discretionary jurisdiction of this Court under Article 136 of the Constitution, for seeking redressal therefore. At other times, it is also possible for the State, not to file appeals before this Court in some matters on account of improper advice or negligence or improper conduct of officers concerned. It is further possible, that even where S.L.Ps are filed by the State against judgments of High Court, such S.L.Ps may not be entertained by this Court in exercise of its discretionary jurisdiction under Article 136 of the Constitution either because they are considered as individual cases or because they are considered as cases not involving stakes which may adversely affect the interest of the State. Therefore, the circumstance of the non-filing of the appeals by the State in some similar matters or the rejection of some S.L.Ps in limine by this Court in some other similar matters by itself, in our view, cannot be held as a bar against the State in filing an S.L.P. or S.L.Ps in other similar matters where it is considered on behalf of the State that non-filing of such S.L.P. or S.L.Ps and pursuing them is likely to seriously jeopardize the interest of the State or public interest."

The Court further observed:

> "The said observations apply to this case. A particular judgment of the High Court may not be challenged by the State where the financial repercussions are negligible or where the appeal is barred by limitation. It may also not be challenged due to negligence or oversight of the dealing officers or on account of wrong legal advice, or on account of the non-comprehension of the seriousness or magnitude of the issue involved. However, when similar matters subsequently crop up and the magnitude of the financial implications is

32. According to the Tribunal the answer provided by the Supreme Court to the aforesaid question puts a quietus to the argument that the applicants are entitled to the benefit of the order of Dr.K.C.Garg's judgment. It was specifically held on the basis of Akkara's case while answering **question No.II** while calculating pension of Pre-1996 retirees, NPA has already been taken into account as part of 'pay' and that pension which has been determined after taking into account NPA, is found to be less than the minimum guaranteed under the circular dated 07.06.1999, their pension is being increased to minimum provided in the circular dated 07.06.1999 and thus NPA cannot again be added to the minimum of stepped up pension and if that is done, it will amount to taking NPA into account twice for purposes of pension which is impermissible and would create a discriminatory situation between pre-1996 and post-1996 retirees. It was held that in view of Akkara's case neither the law laid down in K.C. Garg's case nor in the Hoonka's case helps the petitioners.

33. In view of the discussion held above and the observation made by the Supreme Court in Akkara's case which is a judgment binding upon this Court in view of Article 142 of the Constitution of India and wherein the decision given in Dr.K.C. Garg's case and Hoonka's case has been discussed and distinguished, we have to go by the judgment delivered by the Apex Court as aforesaid in Akkara's case and therefore, we do not find any reason to differ with the view taken by the Tribunal and accordingly the writ petitions are dismissed with no orders as to costs.

(MOOL CHAND GARG)
JUDGE

AUGUST 16, 2010
anb

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PRADEEP NANDRAJOG, J.

1. Having perused the opinion of brother Mool Chand Garg, J., and expressing concurrence with the conclusion that the writ petitions have to be dismissed, my reason for penning a separate opinion is to highlight the issue and the reasoning, with reference to the historical perspective of the debate pertaining to Non-Practising Allowance; whether or not it has to be treated as part of "pay", "basic pay" or "emoluments" and how issue of pension has been affected from time to time with reference to Non-Practising Allowance. Since decades, Non-Practising Allowance (hereinafter referred to as "NPA") is being paid to the doctors working under Central Government. The NPA has been a fixed percent of the basic pay drawn by the doctors. NPA is paid to compensate the doctors for loss of private practice, loss of promotional avenues and late entry into service for the reason most of the doctors are post-graduates and including residency join service at around 27 years or 28 years of age.

2. The recommendations of Fifth Central Pay Commission (hereinafter referred to as "5th CPC") envisaged a sea change in the manner of determination of amount of NPA payable to the doctors. It is apposite to note following observations made by 5th CPC in its report with regard to NPA:-

> "52.16. Non-practicing allowance
>
> Non-practicing allowance is presently granted under a slab system with amounts ranging from Rs. 600 per month at the lowest level and Rs. 1000 at the highest. It has been represented to us that prior to the Third CPC, NPA was granted as a percentage of basic pay, ranging from 25 to 40% at different levels, working out to an average of about 27%, which has, under the present arrangements dropped to as low as 12.5 to 16%. Doctors are also aggrieved that it

does not count forwards Housing accommodation, though it is countable for all other purposes, including pension. There are also related demands for extension of NPA to other categories of professionals and Government servants who have opportunities to earn in the open market, as also the demand for discontinuance of NPA by permitting private practice. The Third CPC observed that NPA was granted to doctors in lieu of private practice on account of a traditionally enjoyed privilege as well as lesser effective service and promotion prospects caused by late entry into service. It did not favor private practice by doctors, and favored NPA as a separate element from pay-scales. It suggested a switchover to a slab system instead of the existing rates with monetary limits. The Fourth CPC enhanced the rates under the different slabs, besides granting it uniformly to all medical officers. The administrative Ministry has suggested that NPA should continued and also be counted for purposes of housing accommodation eligibility. In the matter of permitting limited private practice we have been advised by expert opinion that it could be permitted in a limited form provided malpractices could be curbed. We also note that it is only doctors who are required to devote a lifetime to health care and life sustenance under oath as a part of their qualifications. We do not recommend extension of NPA to any other category. We recommended that the slab system of granting NPA to doctors may be dispensed with and NPA be granted at a uniform rate of 25% of basic pay subject to the condition that pay plus NPA does not exceed Rs. 29,500, i.e. less than the maximum proposed for the Cabinet Secretary. It will continue to count forwards all service and pensionary benefits as at present. No other change is called for, as it would disturb relatives with other services. We are also not in favor of permitting private practice in any form at this stage." (Emphasis Supplied)

3. The aforesaid recommendations of 5th CPC were accepted by The Ministry of Personnel, Public Grievances and Pensions, Government of India, vide letter dated 07.04.1998, the relevant portion whereof reads as under:-

> ".....In supersession of this Ministry's letter of even number dated the 20th March, 1998 on the above subject I am directed to say that the President is pleased to decide that Central Health Service officers may be paid Non Practicing Allowance @ 25% of their Basic Pay subject to the condition that Pay plus Non Practicing Allowance does not exceed Rs. 29,500/-.
>
> 2. The Non Practicing Allowance shall count as 'pay' for all service benefits including retirement benefits as hitherto. (Emphasis Supplied)

4. In order to bridge the gap between the pensionary benefits of pre 01.01.1986 retirees and post 01.01.1986 retirees, 5th CPC recommended that:- (i) pay of pre 01.01.1986 retirees be updated by notional fixation as on 01.01.1986 by adopting the same formula as for serving employees; (ii) pensioners, who had been brought on Fourth Central Pay Commission pay-scales upon notional fixation of their pay and those who retired on or after 01.01.1986 be treated alike with regard to consolidation of their pension as on 01.01.1996 by allowing the same fitment weightage as may be allowed to serving employees; and (iii) consolidated pension, irrespective of the date of the retirement, shall not be less than 50% of minimum pay of post, as revised by 5th CPC, held by the pensioner at the time of retirement.

5. On 27.07.1997, Ministry of Personnel, Public Grievances and Pensions, Government of India, issued an office memorandum regarding implementation of aforesaid recommendations of 5th CPC, relevant portion whereof reads as under:-

> "Subject: Implementation of Government's decision on the recommendations of the Fifth Central Pay Commission -- Revision of pension of pre-1996 pensioners/family pensioners. etc.

The undersigned is directed to say that in pursuance of Government's decision on the recommendations of Fifth Central Pay Commission, sanction of the President is hereby accorded to the regulation, with effect from 1.1.1996, pension/family pension of all the pre-1996 pensioners/family pensioners in the manner indicated in the succeeding paragraphs.

2.1 These orders to all pensioners/family pensioners who were drawing pension/family pension on 1.1.1996 under the Central civil Services (Pension) Rules, CCS ((Extraordinary Pension) Rules and the corresponding rules applicable to Railway pensioners and pensioners of All India Services including officers of the Indian Civil Service, retired from service on or after 1.1.1973.

2.2 Separate orders will be issued by Ministry of Defence in regard to Armed Forces pensioners/family pensioners.

.....

3.1 In these orders:

(a) 'Existing pensioner' or 'Existing family pensioners' means a pensioner who drawing/entitled to pension/family pension on 31.12.1995.

(b) 'Existing pension' means the basic pension inclusive of commutated portion, if any, due on 31.12.1995. It covers all classes of pension under the CCS (Pension) Rules, 1972 as also Disability Pension under the CCS (Extraordinary Pension) Rules and he corresponding rules applicable to Railway employees and Members of All India Service.

(c) 'Existing family pension' means the basic family pension drawn on 31.12.1995 under the CCS (Pension) Rules and the corresponding rules applicable to Railway employees and Members of All India Service.

....

4.1 The pension family pension of existing pre-1996 pensioners/family pensioners will be consolidated with effect from 1.1.1996 by adding together:

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(i) The existing pension/family pension.

(ii) Dearness Relief up to CPI 1510 i.e. @ 148%, 11% and 96% of Basic Pension as admissible vide this Department's O.M. No. 42/8/96-P&PW(G) dated 20.3.1996.

(iii) Interim Relief I.

(iv) Interim Relief II.

(v) Fitment weightage @ 40% of the existing pension/ family pension.

The amount so arrived at will be regarded as consolidated pension/family with effect from 1.1.1996. The upper ceiling on pension/family pension laid down in the Department of Pension and Pensioners' Welfare Office Memorandum No. 2/1/87-PIC.11 dated 14.4.1987 has been increased from Rs. 4500/- and Rs. 1250/- to 50% and 30% respectively of the highest pay in the Government (The highest pay in the Government is Rs. 30,000 since 1.1.1996). Since the consolidated pension will be inclusive of commuted portion of pension, if any, the commuted portion will be deducted from the said amount while making monthly disbursement....."

6. On 10.02.1998, Ministry of Personnel, Public Grievances and Pensions, Government of India, issued office memorandum, the relevant portion whereof reads as under:-

Subject: Implementation of Government's decision on the recommendations of the Fifth Central Pay Commission -- Revision of pension of pre-1986 pensioner/family pensioners etc.

The undersigned is directed to say that in pursuance of Government's decision on the recommendations of Fifth Central Pay Commission announced in this Department's Resolution No. 45/86/97-P&PW(A) dated 30.9.97-P&PW(A)-Part II dated 27.10.1997, the president is now pleased to decide that the pension/family pension of all pre-1986 pensioners/family pensioners who were in receipt of the following types of pension as on 1.1.1996 under Liberalised Pension Rules, 1950, CCS(Pension) Rules,

1972 as amended from time to time or the corresponding rules applicable to Railway pensioners and pensioners of All India Services may be revised w.e.f. 1.1.1996 in the manner indicated in the succeeding paragraphs:

(i) Retiring Pension.

(ii) Superannuation Pension

(iii) Compensation Pension

(iv) Invalid Pension.

2. In accordance with the provisions contained in CCS (Pension) Rules, 1972 and the Government's order issued there under, at present pension of all pre-1986 pensioners is based on the average emoluments drawn by them during last completed 10 months immediately preceding the date of retirement and similarly family pension is based on the last pay drawn by the deceased Government servant/pensioner Government has, inter alias accepted the recommendation of Fifth Central Pay Commission to the effect that the pension of all the pre-1986 retirees may be updated by notional fixation of their pay as on 1.1.1986 by adopting the same formula as for the serving employees and thereafter for the purpose of consolidation of their pension/family pension as on 1.1.1986, they may be treated alike those who have retired on or after 1.1.1986." (Emphasis Supplied)

7. On 30.07.1997, Ministry of Personnel, Public Grievances and Pensions, Government of India issued a memorandum, the relevant portion whereof reads as under:-

"..... The notional pay so arrived as on 01.01.1986 shall be treated as average emoluments for the purpose of calculation of pension and accordingly the pension shall be calculated as on 01.01.1986 as per the pension formula then prescribed."

8. On 17.12.1998, Ministry of Personnel, Public Grievances and Pensions, Government of India issued a memorandum, the relevant portion whereof reads as under:-

"...The President is now pleased to decide that w.e.f. 1.1.1996, pension of all pensioners irrespective of their date of retirement shall not be less than 50% of the minimum pay in the revised scale of pay introduced w.e.f. 1.1.1996 of the post last held by the pensioner. However, the existing provisions in the rules governing qualifying service and minimum pension shall continue to be operative. Similarly w.e.f. 1.1.1996 family pension shall not be less than 30% of the minimum pay in the revised scale introduced w.e.f. 1.1.1996 of the post last held by the pensioner/deceased Government servant. Accordingly, so far as persons governed by CCS (Pension) Rules, 1972 are concerned, orders contained in the following Office Memoranda of this Department as amended from time to time shall be treated as modified as indicated below:

A. O.M. No. 45/86/97-P&PW(A)-Pt.I dated October 27, 1997

2. The first sentence of paragraph 5 of the Office Memorandum relating to "Pension" may be substituted by the following:-

"Pension shall continue to be calculated at 50% of the average emoluments in all cases and shall be subject to a minimum of Rs. 1,275 per month and a maximum of up to 50% of the highest pay applicable in the Central Government, which is Rs. 30,000 per month since 1st January, 1996, but the full pension in no case shall be less than 50% of the minimum of the revised scale of pay introduced with effect from 1st January, 1996 for the post last held by the employee at the time of his retirement. However such pension will be suitably reduced pro-rata, where the pensioner has less than the maximum required service for full pension as per the rule (Rule 49 of CCS (Pension) Rules 1972) applicable to the pensioner as on the date of his/her superannuating/retirement and in no case it will be less than Rs. 1275/- p.m....." (Emphasis Supplied)

9. At this juncture, it may be noted that Rule 33 of Central Civil Service (Pension) Rules defines "emoluments" as under:-

"The expression 'emoluments' means basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rules which a Government servant is receiving immediately before his retirement or on the date of his death and will also include Non practicing Allowance granted to the Medical Office in lieu of private practice." (Emphasis Supplied)

10. Rule 9(21)(a)(i) of Fundamental Rules defines "pay" as under:-

"Pay means the amount drawn monthly by a Government servant as:-

(i) the pay other than special pay or pay granted in view of the personal qualifications which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in a cadre:

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may specially classed as pay by the President."

11. In terms of the aforesaid office memorandums relevant extracts which have been noted in para 3, 5, 6 and 7 above, the pension payable in respect of pre/post 01.01.1986 retirees, with effect from 01.01.1996, was being calculated in the following manner:-

Pre 01.01.1986 retirees

Step 1: Notional fixation of pay as per IV CPC

Step 2: Average Emoluments = Notional Pay (As per resolution dated 30.07.1997, contents whereof have been noted in para 7 above)

Step 3: Existing Pension = 50% of Average Emoluments (As per Central Civil Service (Pension) Rules 1972)

Step 4: Consolidation of Pension:- Existing Pension+ Dearness Relief up to CPI 1510 i.e. @ 148%, 11% and 96% of Basic Pension as admissible vide Department of Pension and

Pensioner Welfare's O.M. No. 42/8/96-P&PW(G) dated 20.3.1996 + Interim Relief I + Interim Relief II + Fitment Weightage @ 40% of existing pension

Step 5: If Consolidated Pension < Sum total of 50 % minimum pay as per revised pay scale prescribed by V CPC and NPA which is 25% of revised basic pay, then consolidated pension was stepped up to said amount.

Post 01.01.1986 and pre 01.01.1996 retirees

Step 1: Average Emoluments = Pay + NPA (As per Rule 33 of CCS (Pension) Rules 1972

Step 2: Existing Pension = 50% of Average Emoluments

Step 3: Consolidation of Pension = Existing Pension+ Dearness Relief up to CPI 1510 i.e. @ 148%, 11% and 96% of Basic Pension as admissible vide this Pension Department's O.M. No. 42/8/96-P&PW(G) dated 20.3.1996 + Interim Relief I + Interim Relief II + Fitment Weightage @ 40% of existing pension

Step 4: If Consolidated Pension < Sum total of 50 % minimum pay as per revised pay scale prescribed by V CPC and NPA which is 25% of revised basic pay, then consolidated pension be stepped up to said amount.

12. The implementing departments had some doubts with regard to interpretation of the office memorandum dated 17.12.1998. They therefore, sought clarifications from Ministry of Personnel, Public Grievances and Pensions on the following two issues:- (i) whether NPA admissible as on 01.01.1986 is to be taken into consideration after re-fixation of pay on notional basis as on 01.01.1986; and (ii) whether NPA is to be added to the minimum of the revised scale while considering stepping up of the consolidated pension on 01.01.1996.

13. The Ministry issued the following clarification, vide office memorandum dated 29.10.1999, in regard to the office memorandum dated 17.12.1998:-

"Subject: Implementation of Government of India decision on the recommendations of Vth CPC – Revision of pension of pre-1996 pensioners.

The undersigned is directed to refer to this Department's O.M. No.45/10/98-P&W(A) dated December 17, 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 the 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 Departments/Ministries as to whether Non-Practising 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 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 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 O.M. No.45/10/98-P&W(A) dated 17.12.98."

14. To understand the effect of office memorandum dated 29.10.1999, it is necessary to give an illustration:

<u>Pension prior to 01.01.1996</u>

Existing Pension Rs.1000/-
(50% of average emoluments, that is pay plus NPA)

<u>Pension with effect from 01.01.1996</u>

<u>Stage I: Pension as per Office Memorandum 27.10.1997</u>

Existing pension	Rs.1,000/-
Dearness allowance	Rs.500/-
Interim relief I	Rs.100/-

Interim relief II	Rs.100/-
Fitment weightage	Rs.400/-
Consolidated pension	Rs.2,100/-

Stage II: Pension as per Office Memorandum dated 17.12.1998

Pay scale of pensioner	Rs.2000-100-2700
Corresponding revised scale of pay	Rs.8000-300-15000
Minimum pay in revised scale of pay	Rs.8,000/-
NPA (25% of minimum pay)	Rs.2,000/-
Add minimum pay plus NPA	Rs.10,000/-
50% of minimum pay plus NPA	Rs.5,000/-

Since consolidated pension less than sum total of 50% of minimum pay plus NPA, consolidated pension stepped up to said amount i.e. Rs.5,000/-

Stage III: Pension as per Office Memorandum dated 29.10.1999

Pay scale of pensioner	Rs.2000-100-2700
Corresponding revised scale of pay	Rs.8000-300-15000
Minimum pay in revised scale of pay	Rs.8000/-
50% of minimum pay plus NPA	Rs.4,000/-

Since consolidated pension less than 50% of minimum pay in revised pay scale, consolidated pension stepped up to said amount i.e. Rs.4,000/-

Thus, the pension which had been fixed at Rs.2,100/- per month with effect from 01.01.1996, was increased to Rs.5,000/- per month by reason of stepping up as per office memorandum dated 17.12.1998 and later reduced to Rs.4,000/- in view of the clarification issued by office memorandum dated 29.10.1999.

15. Since the office memorandum dated 29.10.1999 adversely affected the pensionary benefits of the doctors employed by the Central Government, some doctors who had retired from Central Health Service prior to the year 1996 assailed the validity of the aforesaid office memorandum before the Central Administrative Tribunal (hereinafter referred to as "CAT"), Principal Bench, New Delhi. The validity of the aforesaid memorandum was upheld by CAT, which decision was assailed before this Court by and under Writ Petition(s) Nos.7322, 7826 and 7878 of 2001.

16. Vide judgment and order dated 18.05.2002 in the petition titled *'K.C. Garg & Ors v Union of India & Ors'*, a Division Bench of this Court quashed the aforesaid office memorandum dated 29.10.1999 holding that:- (i) since NPA is treated as a part of pay, NPA is required to be added to the '*minimum pay*' envisaged under the office memorandum dated 17.12.1998; (ii) not adding NPA to the minimum pay would result in a discrimination between pre and post 01.01.1986 retirees which in turn would negate the very object of 5th CPC to bring pre 01.01.1986 retirees at par with post 01.01.1986 retirees; and (iii) by issuance of aforesaid office memorandum, the benefit granted to the retirees was sought to be taken back, but prior thereto the principles of natural justice had not been complied with.

17. With regard to the contention advanced by the Central Government that the addition of NPA to minimum pay would result in grant of double benefit of NPA to retirees, this Court observed as under:-

> "8.1. The learned counsel for the respondents, in our opinion, is also not correct in his contention that by reason of grant of such N.P.A., the retirees would be getting benefit. Having regard to the fact that N.P.A., which they had been getting merged in scale of pay and the pension in terms of the recommendations of 5th CPC was to be paid with prospective effect, the question of their getting double benefit of N.P.A. does not arise."

18. Aggrieved by the aforesaid decision passed by this Court, the Central Government sought permission for leave to appeal by filing Petitions for Special Leave to Appeal under Article 136 of Constitution of India before Supreme Court but the challenge was dropped on account of an opinion being rendered by the then Attorney General of India that the decision in *K.C.Garg's* case (supra) was on sound legal principles and hence the matter should be taken no further.

19. In the meantime, one Dr.G.D.Hoonka, who had retired from Central Railway, Jabalpur assailed the validity of the circular dated 15.01.1999 issued by Railway Board, Government of India, which circular was similar to the office memorandum dated 29.10.1999 issued by Ministry of Personnel, Public Grievances and Pensions. The challenge was by and under an Original Application filed before the Jabalpur Bench of CAT. The CAT quashed the circular in question, which decision was challenged before the Madhya Pradesh High Court. Holding that since NPA is treated as part of pay, it is required to be added to 'minimum pay' envisaged under the circular dated 15.01.1999, vide judgment dated 07.12.2004

titled *'G.D.Hoonka vs. Union of India'* a Division Bench of Madhya Pradesh High Court affirmed the decision of the CAT.

20. Aggrieved by the aforesaid decision of the High Court, Union of India preferred a Petition for Special Leave to Appeal under Article 136 of Constitution of India before Supreme Court which was dismissed.

21. Pursuant to the decision of this Court in *K.C. Garg*'s case (supra), some doctors who had retired from Central Health Services prior to the year 1996 approached the concerned authorities seeking re-fixation of their pension in terms of the decision of this Court in *K.C.Garg*'s case (supra), which request was not accepted. Aggrieved by the said action of the authorities, the petitioners herein, who are the doctors or legal heirs of the doctors employed under Central Government and had retired prior to the year 1996, filed application(s) under Section 19 of Administrative Tribunals Act, 1985 before CAT, Principal Bench, New Delhi seeking quashing of the office memorandum dated 29.10.1999 and re-fixation of their pension in terms of decision of this Court in *K.C.Garg*'s case (supra).

22. Before aforesaid application(s) could be decided by the CAT, a significant development took place.

23. Vide circular dated 31.12.1965, Ministry of Defence barred private practice by the doctors employed in armed forces with effect from 01.01.1966 and conveyed sanction of President to the grant of NPA to the said doctors irrespective of their rank, with a stipulation that NPA shall be treated as pay for all purposes. Vide circular dated 02.11.1987, Ministry of Defence clarified that NPA will be treated as "pay" for all service matters, and will be taken into account for computing

dearness allowance and other allowances as well as for retirement benefits. The said circular also prescribed different rates of NPA payable to the doctors based upon their basic pay.

24. Pursuant to the recommendations of 5th CPC, NPA was revised as 25% of basic pay and rank pay, with effect from 01.01.1996. It be noted here that pursuant to the recommendations of the 4th CPC, Ministry of Defence issued circular dated 30.09.1987 which provided that retiring pension of all commissioned officers shall be calculated at 50% of the reckonable emoluments, for a qualifying service of 33 years (to be reduced proportionately for lesser qualifying service). The said circular defined "reckonable emoluments" for purposes of retiring/service pension as average of pay, NPA and rank pay, if any, drawn by the officer during the last ten months of his service.

25. On 27.05.1998 Ministry of Defence issued a circular, rationalising the pension of pre 1996 pensioners of the armed forces, by providing that with effect from 01.01.1996, the consolidated pension of existing pre 1996 pensioners will be calculated by aggregating the following:- (i) the existing pension; (ii) dearness relief up to CPI 1510 (i.e. @148%, 111% and 96% as the case may be, of basic pension as admissible on 1-1-1996 vide DP & PWs OM dated 20-3-1996); (*iii*) interim relief I; (*iv*) interim relief II; and (*v*) fitment weightage @ 40 per cent of the existing pension.

26. Vide circular dated 07.06.1999, Ministry of Defence conveyed the decision of the President that *"with effect from 1-1-1996, pension of all 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 pensioner." (It is most significant to note that the circular dated 07.06.1999 and office memorandum dated 17.12.1998 issued by Ministries of Defence and Personnel, Public Grievance and Pension respectively are identically worded.

27. Since implementing departments had some doubts regarding the interpretation of the circular dated 07.06.1999, vide circular dated 11.09.2001, Ministry of Defence issued a clarification to the effect that *"NPA is not to be added to the minimum of the revised pay scale ason 1-1-1996 in cases where consolidated pension is to be stepped up to 50%".*

28. Aggrieved by the aforesaid clarification contained in the circular dated 11.09.2001 the doctors who had retired as Medical, Dental and Veterinary officers in the Army Medical Corps, Army Dental Corps and Veterinary Corps controlled by Ministry of Defence prior to the year 1996 filed writ petitions before various High Courts. The aforesaid writ petitions were transferred to the Supreme Court.

29. Before the Supreme Court contentions as under were advanced:-

A. Since NPA is treated as a part of pay, the expression "minimum pay in the revised scale of pay" occurring in the circular dated 07.06.1996 be read as "minimum pay plus NPA in the revised scale of pay".

B. The circular dated 11.09.2001 results in discrimination between pre and post 01.01.1996 retirees for NPA is being added to the basic pay of post 01.01.1996 retirees even after the issuance of the circular dated 11.09.2001 and that 50% of the aggregate is being paid as "retiring pension" to the said retirees.

C. In view of the facts that the decisions in *K.C. Garg* and *G.D. Hoonka*'s cases (supra) passed by this Court and Madhya

Pradesh High Court respectively attained finality and that the government implemented the decision of this Court in *K.C. Garg*'s case (supra), it is not open to the government to take a contrary stand in the present matter(s).

30. Vide decision reported as *Col.B.J.Akkara (Retd) v Union of India* (2006) 11 SCC 709 Supreme Court upheld the validity of the clarification pertaining to addition of NPA contained in the circular dated 11.09.2001 issued by the Ministry of Defence.

31. With regard to the intent and purport of the circular dated 07.06.1999 issued by the Ministry of Defence, the Supreme Court observed as under:-

> "11. We may first refer to the intent and purport of the circular dated 7-6-1999. The circular dated 7-6-1999 neither prescribes the requirements/qualifications for entitlement to pension nor the method of determination of pension. It only effectuates the President's decision that the pension (which has already been determined in accordance with the applicable rules/orders) irrespective of the date of retirement, shall not be less than 50% of the minimum pay in the revised scales of pay introduced with effect from 1-1-1996. Pension is determined as per relevant rules/orders, by calculating the average of reckonable emoluments (basic pay, rank pay and NPA) drawn during the last 10 months of service and then taking 50% thereof as the retiring pension applicable to retirees with 33 years of qualifying service, with proportionate reduction for retirees with lesser period of qualifying service. The basis for calculating the pension in respect of those who retired prior to 1-1-1996, and those who retired on or after 1-1-1996 happens to be the same. The retiring pension is 50% of the average reckonable emoluments for retirees with 33 years of qualifying service, with proportionate reduction for those with lesser years of qualifying service. The President's decision given effect by the circular dated 7-6-1999 only extends to all pre-1996 retirees, who did not have the benefit of fixation of pension with reference to the revised pay scales which came into effect on 1-1-1996, the benefit of the said revised pay scales, albeit in a limited manner. In so doing, it also puts those who retired on or after 1-1-1986 and pre-1986 retirees on

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a par and on a common platform, removing the disparity, if any, in their pensions.

12. .....In short, the circular dated 7-6-1999, merely stepped up the pension (for a qualifying service of 33 years) to 50% of the minimum pay in the revised scale of pay introduced with effect from 1-1-1996 of the rank held by such pensioner, where his pension was less....."

32. With regard to addition of NPA to the "minimum pay" envisaged under the circular dated 07.06.1999 as contended by the retired doctors, the Court observed as under:-

"13. The emoluments of those who retired on or after 1-1-1996, calculated with reference to the basic pay in the revised scale of pay plus NPA will certainly be more than the minimum pay in the revised scale of pay and therefore, in their cases, the question of stepping up will not arise. On the other hand, as the pension of pre-1996 retirees was based on the basic pay under the old pay scale plus NPA, and as the old pay scale was much less than the 1996 revised pay scale, their pension required to be stepped up. The extent to which the existing pension should be stepped up is clearly specified in the circular as "minimum pay in the revised scale of pay". The words used do not give room for any confusion or doubt. A "pay scale" has basically three elements. The first is the minimum pay or initial pay in the pay scale. The second is the periodical increment. The third is the maximum pay in the pay scale. An employee starts with the initial pay in the pay scale and gets periodical increases (increments) and reaches the maximum or ceiling in the pay scale. Each stage in the pay scale starting from the initial pay and ending with the ceiling in the pay scale, when applied to an employee is referred to as "basic pay" of the employee. Whenever the Government revises the pay scales, a fitment exercise takes place as per the principle of fitment (formula) provided in the rules governing the revision of pay so that the "basic pay" in the old scale is converted into a "basic pay" in the revised pay scale. When the circular dated 7-6-1999 used the words "50% of the minimum pay in the revised scale of pay", it referred to 50% of the initial pay in the revised scale of pay. If the old scale of pay was Rs 7300-100-7600 and if the

revised scale of pay was Rs 22,400-525-24,500, the minimum pay in the revised scale of pay would be Rs 22,400 and 50% of the minimum pay in the revised scale of pay would be Rs 11,200.

.....

16. The petitioners want to read the words "not less than 50% of the minimum pay in the revised scale of pay" in the circular dated 7-6-1999, as "not less than 50% of the minimum pay in the revised scale of pay plus NPA". When the language used is clear and unambiguous and the intention is also clear, it is not permissible to add words to the circular dated 7-6-1999 to satisfy what the petitioners consider to be just and reasonable. "Minimum pay in the revised scale of pay" refers only to the initial pay in the revised scale of pay and not anything more. Due to a misinterpretation, NPA was included for the purpose of giving the benefit of stepping up the pension in the case of retired medical officers. The fact that NPA had already been taken into account while calculating the "existing pension" of the medical officers who retired before 1-1-1996 was lost sight of. The fact that NPA is part of "pay" and not part of "basic pay" was also overlooked. Therefore, it became necessary to issue the clarification, which was done by the circular dated 11-9-2001, clarifying that it was impermissible to again add NPA to "the minimum pay in the revised pay scale" for the purpose of stepping up the pension." (Emphasis Supplied)

33. With regard to NPA being part of pay of the retired doctors, the Court observed as under:-

"14. It is no doubt true that the term "pay", with reference to medical officers, includes the basic pay and NPA. But the term "basic pay" does not include NPA. In the absence of any special definition, the term "basic pay of a government servant" refers to the applicable stage of pay in the pay scale to which he is entitled, and does not include NPA even in the case of medical officers. What the circular dated 7-6-1999 intended to extend by way of benefit to all pensioners, was a minimum pension, that is, 50% of the minimum pay in the 1996 revised scale of pay. NPA has no part to play in the minimum that is sought to be assured. NPA has relevance only for initial fixation of pension and not for stepping up pension under the circular dated 7-6-1999."

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34. With regard to the contention that the clarification contained in the circular dated 11.09.2001 results in discrimination between pre and post 01.01.1996 retirees, the Court observed as under:-

> "19. The petitioners next contend that in the case of medical officers who retired on or after 1-1-1996, even after the circulars dated 7-6-1999 and 11-9-2001, NPA is added to basic pay for the purpose of calculating the pension, whereas in the case of pre-1996 retirees, NPA is not being added and that amounts to discrimination. This is a misleading contention. In the case of those retiring on or after 1-1-1996, NPA is added to basic pay, to determine their pension, and not for stepping up the pension. In the case of pre-1996 retirees, as NPA was already added while determining their pension, the question of adding it again, for purposes of stepping up the pension, does not arise.
>
> .....
>
> As noticed earlier, pension is determined with reference to the applicable rules/orders governing pension. The Ministry's circular dated 7-6-1999 comes in, only to step up the pension from 1-1-1996, if the pension calculated in accordance with the rules/orders is less than 50% of the minimum pay in the revised scale of pay introduced with effect from 1-1-1996. There is no need to step up the pension of those who retired on or after 1-1-1996, as their pension will be more than or in no event less than the minimum provided under the circular dated 7-6-1999. The stepping up is required only to those who retired prior to 1-1-1996 as their pension was lower on account of the fact that their reckonable emoluments for the purpose of calculation of pension, was based on the old scales of pay. Let us take the case of a medical officer of the rank of Lt. General, with 33 years of service, who retired in the year 1998 after getting two increments in the revised pay scale. As the applicable pay scale is Rs 22,400-525-24,500, his basic pay would have been Rs 23,450 at the time of retirement. 25% thereof, namely, Rs 5863 would be the NPA. If the reckonable emolument was Rs 29,313, pension will be 50% thereof, namely, Rs 14,656. As the

pension under the Rules (Rs 14,656) was more than 50% of the minimum of revised pay scale (Rs 11,200) assured under the circular dated 7-6-1999, the benefit of stepping up is not required in his case. It is only those whose pension was determined with reference to old scales of pay, and not the revised higher scale of pay, who require the benefit of the stepping up. Therefore, the contention that pre-1996 retirees and post-1-1-1996 retirees are being treated differently, is untenable. They are treated similarly. But the fact that post-1-1-1996 retirees do not require the benefit of stepping up, cannot by any stretch of imagination, give rise to a contention that the benefit given to pre-1996 retirees by way of stepping up, amounts to discrimination.

....

22. The contention that NPA is taken into account in the case of post-1-1-1996 retirees but not pre-1996 retirees is untenable. NPA is taken as part of "pay" in the case of both pre- and post-1-1-1996 retirees. NPA is not taken into account in the case of any retiree for applying the stepping up benefit under the circular dated 7-6-1999. It is a different matter that post-1-1-1996 retirees do not require the benefit under the circular dated 7-6-1999. As already noticed, while calculating pension of the pre-1996 retirees, NPA had already been taken into account as part of "pay", and that pension which was determined after taking into account NPA, is found to be less than the minimum guaranteed under the circular dated 7-6-1999, their pension is being increased to the minimum provided in the circular dated 7-6-1999. NPA cannot again be added to the minimum to step up the pension. If that is done, it will amount to taking NPA into account twice for purposes of pension, which is impermissible. The contention of discrimination between pre-1-1-1996 retirees and post-1-1-1996 retirees is, therefore, imaginary."

35. With respect to the contention pertaining to finality attained by decision of this Court in *K.C. Garg*'s (supra) and the implementation of the said decision by the government, the Court observed as under:-

"26. The said observations apply to this case. A particular judgment of the High Court may not be challenged by the State where the financial

repercussions are negligible or where the appeal is barred by limitation. It may also not be challenged due to negligence or oversight of the dealing officers or on account of wrong legal advice, or on account of the non-comprehension of the seriousness or magnitude of the issue involved. However, when similar matters subsequently crop up and the magnitude of the financial implications is realised, the State is not prevented or barred from challenging the subsequent decisions or resisting subsequent writ petitions, even though judgment in a case involving similar issue was allowed to reach finality in the case of others. Of course, the position would be viewed differently, if petitioners plead and prove that the State had adopted a "pick-and-choose" method only to exclude petitioners on account of mala fides or ulterior motives. Be that as it may. On the facts and circumstances, neither the principle of *res judicata* nor the principle of estoppel is attracted. The administrative law principles of legitimate expectation or fairness in action are also not attracted. Therefore, the fact that in some cases the validity of the circular dated 29-10-1999 (corresponding to the Defence Ministry circular dated 11-9-2001) has been upheld and that decision has attained finality will not come in the way of the State defending or enforcing its circular dated 11-9-2001."

36. Before completing narration of facts, it be noted here that the legal position which emerges from a reading of aforesaid decision of Supreme Court in *Akkara's* case (supra) can be summarized as under:-

I. Stepping up of pension to *'50% of minimum pay in the revised scales of pay'* was prescribed in the circular dated 07.06.1999 with an object to remove the disparity between the amount of pension payable pre and post 01.01.1996 retirees inasmuch pension of pre-01.01.1996 retirees was calculated with reference to old scales of pay whereas pension of post-01.01.1996 retirees was calculated with reference to scales of pay revised in terms of the recommendations of 5th CPC.

II. The words *'minimum pay in the revised scales of pay'* occurring in the circular dated 07.06.1999 was interpreted by Supreme Court as a single expression and were held to mean *'initial pay in the revised scales of pay'*. As opposed to this, this Court in K.C. Garg's case (supra) interpreted the word *'pay'* occurring in the expression *'minimum pay in the revised scales of pay'* in the office memorandum dated 17.12.1998 to mean *'pay plus NPA'* and thus interpreted the words *'minimum pay in the revised scales of pay'* occurring in the circular dated 17.12.1998 to mean *'minimum pay plus NPA in the revised scales of pay'*. The logical corollary which results from the decision of Supreme Court in Akkara's case (supra) is that the office memorandum dated 17.12.1998 has not been correctly interpreted by this Court in K.C. Garg's case (supra).

III. While calculating the amount of pension, NPA is taken into consideration for both pre and post 01.01.1996 retirees inasmuch as formula for calculation of pension for both the retirees is same i.e. 50% of average emoluments and that average emoluments is the aggregate of basic pay plus NPA. In that view of the matter, if NPA is added to *'minimum pay'* envisaged under the circular dated 07.06.1999 the same would result in grant of double benefit of NPA to the retirees.

IV. In case of post 01.01.1996 retirees, NPA is added to their basic pay for the purposes of calculating the amount of pension payable to them inasmuch as formula for calculation of pension 50% of average emoluments and average emoluments is the aggregate of basic pay plus NPA and is not added to *'minimum pay'* envisaged under the circular dated 07.06.1999.

37. In the meantime, the validity of the office memorandum dated 29.10.1999 was challenged before Calcutta Bench of

CAT. Holding that since NPA is treated as a part of pay, it is required to be added to *'minimum pay'* envisaged under the circular dated 17.12.1998, the CAT quashed the office memorandum dated 29.10.1999. (The decision of CAT is titled as *'Shib Pada Ghosh Vs. Union of India'*). On the issue of applicability of *Akkara*'s case (supra), the CAT was of the view that the said case has no application to the case adjudicated by it for the reasons: - (i) *Akkara*'s case (supra) pertains to the doctors working in the army whereas the case adjudicated by it pertains to the civilian doctors and (ii) *Akkara*'s case (supra) was rendered by Supreme Court in a particular factual matrix.

38. After noting decision in *K.C. Garg*, *Akkara* and *Shib Pada Ghosh*'s cases (supra) passed by this Court, Supreme Court and Calcutta Bench of CAT respectively, vide judgment and order dated 12.09.2008, the Full Bench of CAT upheld the validity of the clarification pertaining to addition of NPA contained in the office memorandum dated 29.10.1999.

39. In a nutshell, it has been held that the decision of t6he Supreme Court in *Akkara*'s case (supra) is applicable to the present matter(s) on all fours and that the decision of Calcutta Bench of CAT in *Shib Pada Ghosh*'s case (supra) of not applying the dictum of law laid down in *Akkara*'s case (supra) while adjudicating upon the validity of the office memorandum dated 29.10.1999 is incorrect.

40. Aggrieved by the impugned judgment and order dated 29.10.2009 passed by CAT, the above captioned petition(s) have been filed before this Court.

41. From the above conspectus of facts, it is clear that success/failure of the present petition(s) is hinged upon the applicability of the decision of Supreme Court in *Akkara*'s case

(supra) to the present case. If indeed *Akkara*'s case (supra) is applicable to the present case, we need not delve any further and should proceed to decide the present matter in terms of ratio laid down by Supreme Court in *Akkara*'s case (supra).

42. Conscious of the aforesaid fact, the main thrust of the submissions advanced by Mr.Prashant Bhushan, learned counsel for the petitioners, was that there is a material distinction between the facts of *Akkara*'s case (supra) and the present case and therefore, dictum of law laid down by *Akkara*'s case (supra) is not applicable to the present case. The distinction pointed out by the learned counsel was that in *Akkara*'s case (supra) Supreme Court has proceeded on the premise that NPA forms part of *'basic pay'* of the doctors involved in the said case whereas NPA does not form part of *'basic pay'* of the doctors involved in the instant case. To bring home the point that NPA does not form part of *'basic pay'* of the doctors involved in the instant case, learned counsel placed reliance on the definition of *'pay'* in Rule 9(21)(a)(i) of Fundamental Rules and Rule 7(D) of Central Civil Service (Revised Pay) Rules 1997. To further buttress the said point, counsel placed reliance tabulated statement of calculation of amount of pension revised by one of the petitioner namely Dr.K.C.Bajaj pursuant to the implementation of recommendations of 5th CPC by the government issued by Pay and Accounts Officer, Railway Board, Government of India.

43. In addition to the above, learned counsel argued that:- (i) CAT failed to note the dictum of law laid down by Supreme Court in the decision reported as *S.P.S Vains v Union of India* (2008) 12 SCALE 360, which decision is squarely applicable to the present case; (ii) the clarification contained in the circular dated 29.10.1999 results in discrimination between pre and

post 01.01.1996 and is thus violative of dictum of law laid down by Supreme Court in the decision reported as Nakara and (iii) in view of the facts that the decisions in *K.C. Garg* and *Hoonka*'s cases (supra) have attained finality and that government has also implemented the said decisions, it is not open to the government to take a contrary stand in the present matters.

44. The distinction pointed out by the learned counsel for the petitioners between *Akkara's* case (supra) and the present case is illusory. It is incorrect to say that in *Akkara's* case (supra) Supreme Court proceeded on the premise that NPA forms part of *'basic pay'* of the doctors involved in the said case. On the contrary, Supreme Court has based its decision on the premise that NPA forms part of the *'pay'* of the doctors involved in the said case and that the same is not part of the *'basic pay'* of the said doctors. The same would be evident from the following observations of the court which are being noted herein under for a ready reference:-

> "14. It is no doubt true that the term "pay", with reference to medical officers, includes the basic pay and NPA. But the term "basic pay" does not include NPA. In the absence of any special definition, the term "basic pay of a government servant" refers to the applicable stage of pay in the pay scale to which he is entitled, and does not include NPA even in the case of medical officers.....
>
> 16 .....The fact that NPA is part of "pay" and not part of "basic pay" was also overlooked....."

45. We have summarized in para 36 above as to how the decision in *Akkara's* case (supra) can be summarized under 4 heads with reference to the applicability of the circular dated 7.6.1999 with reference to the concept of *'minimum pay'* and the concept of *'pay'* and how the said decision as read by us brings out the erroneous premise on which the decision in

K.C.Garg's case (supra) proceeded. Thus, we need to write no further to reject the contentions urged by learned counsel for the petitioners as noted herein above for the same stand repelled if the decision in *Akkara's* case (supra) is read as summarized by us in para 36 (I) to (IV).

46. Insofar as the decision of the Supreme Court in *S.P.S. Vains*'s case (supra) is concerned, the facts therein were that pursuant to the implementation of the recommendations of 5th CPC by the Ministry of Defence, the pension of Brigadier which is the feeder post to the promotional post of Major General became more than the pension payable to Major General. To remove the said anomaly, Ministry of Defence issued a circular providing therein that Major General, who retired prior to 01.01.1996 be given same pension as payable to Brigader. However, as regards Major General who retired after 01.01.1996 it was directed that they be given pension according to clause 12(c) of Special Army Instructions 2/S/1998. By virtue of aforesaid Special Instruction, the initial pay of an officer promoted to the rank of Major General would be fixed at the stage next above the pay notionally arrived at by increasing his pay, including rank pay of Brigadier, by one increment in the revised scale at the relevant stage. Due to the aforesaid, Major Generals who retired prior to 01.01.1996 were getting same pension as payable to Brigadier whereas their counterparts who retired after 01.01.1996 were getting much higher pension for they got benefit of revision of pay scales after 01.01.1006. After noticing the aforesaid factual position, the Supreme Court held that date of retirement cannot form valid criterion for classification of pensioners into different classes and directed that pay of all pensioners in the rank of Major General and its equivalent rank in the other two wings of the Defence Services be notionally fixed at the rate

given to similar officers of the same rank after the revision of pay scales with effect from 01.01.1996, and, thereafter, to compute their pensionary benefits on such basis. From the said facts, it is crystal clear that the factual matrix in *Vains*'s case (supra) is entirely different from the present case and thus *Vains*'s case (supra) has no application in the present case. The principle of law in *Vain's* case (supra) would cover a situation akin to the situation confronting the Court in said case.

47. As regards the contentions urged pertaining to discrimination between pre and post 01.01.1996 in the amount of pension payable to them due to issuance of office memorandum dated 29.10.1999 and finality attained by decisions in *K.C. Garg* and *G.D. Hoonka*'s cases passed by this Court and Madhya Pradesh High Court respectively, suffice would it be to state that said contentions have been noted and repelled by the Supreme Court in *Akkara*'s case (supra). (See contents of the paras 34 and 35 noted above)

48. The office memorandums dated 17.12.1998 and 29.10.1999 issued by Ministry of Personnel, Public Grievances and Pensions and the circulars dated 07.06.1999 and 11.09.2001 issued by Ministry of Defence are identically worded. The formula for calculation of pension in respect of the doctors involved in both the cases is the same i.e. 50% of average emoluments. Likewise, the formula for calculation of *'average emoluments'* in respect of the doctors involved in both the cases is the same i.e. aggregate of pay plus NPA. We find no distinction whatsoever in *Akkara*'s case (supra) and the present case.

49. Having regard to the aforesaid facts, no fault can be found with the decision of the CAT that the ratio laid down by

Supreme Court in *Akkara's* case (supra) is applicable to the present case on all fours. Applying the ratio laid down by Supreme Court in *Akkara's* case (supra), we hold that expression *'minimum pay in the revised scales of pay'* occurring in the office memorandum dated 17.12.1998 is to be interpreted to mean *'initial pay in the revised scales of pay'*; and NPA is not required to be added to *'minimum pay'* envisaged under the office memorandum dated 17.12.1998 and that the office memorandum dated 29.10.1999 is only a clarification to the office memorandum dated 17.12.1998.

50. In view of the above discussion, we find no merit in the present petition(s). The impugned judgment dated 29.10.2009 passed by CAT, Principal Bench, New Delhi is upheld.

51. The petitions are accordingly dismissed.

52. However, there shall be no orders as to costs.

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 16, 2010
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