

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**WRIT PETITION NO.7365 OF 2004**

1 Dr. [Smt.] M.M.Swami
Sirsikar, 121 Sterling Centre,
Opp: Arora Towers,
11 Moledina Road,
Pune 411 001

2 Dr. K.P.Ghatol,
(Since deceased through L.R.)

2A. Smt. Saral K. Ghatol,
Age : 73 years, Occ : Household,
R/o. Vishal Nagar, Sr.No.26/1,
Wakad Road, Gulmohar Colony,
Pimple Nilakh,
Pune 411 027.

3 Dr. Arun Ramchandra Godase
C/o. Dr. [Smt.] M.M.Swami
Sirsikar, 121 Sterling Centre,
Opp: Arora Towers,
11 Moledina Road,
Pune 411 001.

4 Dr. Mrs. Aayati Bopardikar,
50, Vijaynagar Colony,
Behind S.P.College,
Pune 411 030.

5 Dr. Ajit Bharatsen Somway,
1-C-2 Flat No.8, Siddharth
Nagar, Phase-I,
Near Cosmos Bank, Aundhgaon,
Pune 411 007.

6 Dr. S.Y.Idate,
Plot No.8 "Atharva",
East to Krishna Hospital,
Kranti Nagar,
Sangli 416 416.

7 Dr. Prabhakar Dattatray Deshpande
C6-2-0-3, Sector 6,
Gas Galli, Opp: Wani Building,
CBD Belapur,
Navi Mumbai 400 614

.....Petitioners

: Versus :

1 State of Maharashtra
Through the Secretary,
Public Health Department,
Mantralaya, Mumbai 400 032.

2 The Commissioner,
Employees State Insurance Scheme,
Panchdeep Bhawan,
Lower Parel, Mumbai

.....Respondents

**WITH
WRIT PETITION NO.9990 OF 2004**

1 Dr. Chandrashekhar S. Kapse,
2/33, Raisonni Park,
Market Yard Bus Depot,
Pune 411 037.

2 Dr. Prema Prabhakar Shidore,
Omkar, 759/107/3 Lane No.2,
Prabhat Road,
Pune 411 004.

3 Dr. S.A.Diwanji,
Swami Samarth, S.No.97/3/1,
Plot No.240, Bhusari Colony,
Opp: PMT Depot, Kothrud,
Pune 411 038.

4 Dr. Mrs. Nirmala H. Kolhatkar,
Professor of Pathology,
Dr. D.Y.Patil Medical College,
Pimpri, Pune.

5 Dr. Ajit Vasant Rao Sontakke,
Prof. HOD Biochemistry,
D.Y.Patil Medical College,
Bavada, Kolhapur-416 007.

Versus

State of Maharashtra,
Through Secretary,
Medical Education and Drugs
Department, Mantralaya,
Mumbai 400 032.

Mr. Vishwanath Talkute , Advocate for Petitioner in both
petitions.

Mr. Vishal Thadani, AGP for Respondent-State.

**CORAM : SMT. V.K. TAHILRAMANI, &
SANDEEP K. SHINDE, JJ.**

RESERVED ON: 15th June, 2017

PRONOUNCED ON : 11th July, 2017.

JUDGMENT : [Per :- Shri Sandeep K. Shinde, J.]

1. In both the petitions filed under Article 226 of the Constitution of India, a common issue is raised and, therefore, they are taken up for hearing together and disposed of by this common judgment. The petitioners in the Writ Petition No.7365 of 2004 were Medical Officers working with the Public Health Department of the State; whereas the petitioners in Writ Petition No.9990 of 2004 were medical teachers in the state owned medical colleges. They have challenged vires of the Government Resolution dated 17.8.2002. It is their case that recommendations of 5th pay commission in principle were accepted by the State. Their pay-scales were revised from 1.1.1996; however, recommendation to revise and pay non-practising allowance payable to Doctors who are in service of the State has been accepted and implemented with effect from 1.10.1998. It is their case that non practising allowance is a component of “pensionable pay” in terms of the Maharashtra Civil Services (Pension)

Rules, 1982 ('**Rules**' for short). It is their case, that they have retired after January, 1996 but before 1.10.1998 and, therefore, the State decision inter-alia fixing the date for paying non-practising allowance w.e.f. 1.10.1998, is arbitrary. The petitioners, therefore, contended that the G.R. dated 17.8.2002 granting non-practising allowance to medical practitioners @ 25% of the basic pay subject to the condition that the amount of basic pay and non-practising allowances together would not exceed 29,500/- with effect from 1.10.1998 was discriminatory and in breach of Article 14 of the Constitution of India. It is their case, that since they have retired before 1.10.1998 but after 1.1.1996 they were deprived of non-practising allowance, which otherwise is a component of Pensionable Pay. The Petitioners have been discriminated and singled out by imposing cut-off date 1.10.1998. It is their case that, cut-off date does not certify twin test of reasonable classification and has no nexus with the objects sought to be achieved on the basis of classification.

2 The Petitioners in the Writ Petition No.9990 of 2004 would raise same grounds, but had approached the MAT at the first instance by filing an Original Application No.477 of 2000. The Original Application was dismissed by judgment and order dated 20.8.2002. The Petitioners in the said writ petition, therefore, also seek same relief as sought in Writ Petition No. 7365 of 2004.

3 That in substance, both the petitions, the following reliefs are sought:

(i) It be declared that the Petitioners are entitled to receive revised non-practising allowance from 1.1.1996;

(ii) That Respondents be directed to grant revised non-practising allowance with effect from 1.1.1996 as per the recommendation of 5th pay commission and further direct to pay all arrears of non-practising allowance to the Petitioners.

(iii) In alternative to aforesaid prayers, Respondents be directed to include the revised non-

practising allowance with the basic pay of the Petitioners and grant pension, accordingly, from 1.10.1998 and further be directed to pay the arrears of non-practising allowances from 1.10.1998.

4 The State countered the claim of the Petitioners and submitted thus:

(I) The Government in the Public Health Department vide G.R. Dated 17.8.2002 has sanctioned non-practising allowance for medical officers working in ESI Scheme with effect from 1.10.1998 @ 25% of the basic pay subject to condition that the amount of basic pay and non-practising allowance together would not exceed Rs.29,500/-;

(II) The State has taken a policy decision for sanctioning non-practising allowance with effect from 1.10.1998 with cautious mind taking into consideration financial status of the State;

(III) That in December, 1997, the State has taken

a decision to revise the **pay-scale** of the employees of the State Government and bring them on par with pay fixation formula of the Central Government employees;

(IV) The decision in December, 1997 was made applicable to pay-scales and the State Government had not taken a policy decision regarding grant of HRA, CLA, NPA, etc. to its employees at par with employees at the Central Government from 1.1.1996 i.e., date of implementation of 5th Pay Commission;

(v) That in view of the financial constraints before the Government of Maharashtra, the State Government thought it proper to accept recommendation with certain modifications instead of following them in entirety;

(vi) That after giving anxious consideration to protect interests of the pensioners and to see that they are not totally denied advantages of recommendations of 5th pay commission, the State

Government arrived at following decisions:

“(i) To adopt the Government of India orders with suitable modifications regarding revision of pension of pre-1996/ post-1996 pensioners w.e.f. 1.1.1996.

(ii) The pension of pre-1996 / post- 1996 pensioners so revised will be actually paid to them with effect from 1.7.1999.

(iii) In respect of post-1996 pensioners:-

(a) Gratuity should be calculated on basic pay only (I.e, unlike Central Government, D.A.admissible on the date of retirement/death should not be taken into account for the purpose of calculating gratuity).

(b) Existing upper limit of gratuity (i.e. Rs.2.50 lakh) is to be retained. (i.e. unlike Central Government, it should not be raised to Rs.3.50 lakh).

(c) The existing limit of commutation (i.e. 1/3 or 33.33% of basic pension) is to be retained. (i.e. unlike Central Government, it should not raised to 40% of basic pension).

(d) The proposal to grant fixed medical allowance of Rs.100/- per month should not be considered at present.”

(vii) That as per the recommendation of 5th Pay Commission, the State Government implemented **pay-scales** with certain modifications from 1.1.1996 as re-produced here-in-above; at par with the Central Government.

(viii) That as a policy decision, certain allowances like HRA, CLA, NPA are not made applicable from 1.10.1996 but from certain future date by taking into consideration financial constraints of the State.

(ix) That as a matter of policy decision , effect of NPA was granted from 1.10.1998 as implemented in the cases of other allowances, i.e., HRA, CLA, etc.;

5 Besides, State contended that, request of the petitioners to effect NPA from 1.1.1996 instead of 1.10.1998 is, therefore, not tenable in law as effect of NPA is given by the State Government along with other allowances from 1.10.1998 is a policy matter and

considering the financial resources available, as grant of NPA from 1.1.1996 in stead of 1.10.1998 would result in huge additional financial burden of 1.40 Crores per annum on the Government in addition to the amount of Rs.4.50 crores on account of respective arrears.

6 State further urged, that heavy expenditure will be loaded on pensionary payment as NPA is countable in basic pay for computation of pension. That to grant NPA @ 25% of the basic pay would cause financial burden on the State Government and that the subject G.R. was issued in consultation with Finance Department.

7 The State on the aforesaid premise, would contend that the subject resolution whereby the date was fixed for paying NPAs was a policy decision. The decision is based on the availability of financial resources of the State. That the State has every right to fix the date. That recommendations of the 5th pay commission are not binding on the State. The State, therefore, would contend

that what was revised from 1996 was a pay-scale. That this being the policy decision, this Hon'ble Court may not have jurisdiction to interfere with it. It was contended that scope of judicial review of the policy decision in such case is extremely narrow and further since such decisions are taken by taking into consideration the financial constraints/status, the petition deserves no consideration and the petitions may kindly be dismissed.

8. After hearing the Learned Counsel for the petitioner and the Learned AGP for the State, the following issues/points arise for our consideration :-

(i) whether the State justifies its decision to grant non-practising allowance w.e.f. 1st October, 1998?

(ii) Whether, the petitioners (who retired in between 1st January, 1996 to 30th September, 1998) have right to claim non-practising allowance from 1st January, 1996?

(iii) whether the petitioners have a right to claim revision/re-calculation of their “pensionable pay” as on, 1st October, 1998 ?

(iv) Whether State's decision dated 17.8.2002 (i.e. Government Resolution) is arbitrary and violating Article 14 ?

(v) Whether (“financial constraints”) could be a valid ground for introducing a cut-off date while implementing the recommendations of the 5th Pay Commission ?

9. It is not in dispute that, the Maharashtra Civil Services (Pension Rules, 1982) regulates the pension scheme. Rule 60 defines the “Pensionable pay”. It means the average pay earned by a Government Servant during the last ten months service.

. The “Pay” is defined in Rule 36, which includes, special dearness pay, personal pay, special pay and other

emoluments which may be specially classed as pay by Government.

10. It is admitted fact that, all the recommendations of the 5th Pay Commission were not accepted by the State. The State revised the pay scales from 1st January, 1996 but took a conscious decision to pay the non-practising allowance from 1st October, 1998. It is admitted fact that, non-practising allowance is a part of “pay” in terms of Rule 36 of the aforesaid Rules.

11. On the backdrop of aforesaid facts, we will now answer point no.1. The State, in its Affidavit has elaborately stated that, its decision dated 17th August, 2002 is a policy decision. It appears, in view of the financial constraints before the Government, the recommendations of the 5th Pay Commission were accepted with certain modifications and not in entirety. We have perused the Affidavits filed by the State, wherein, they have clearly stated that considering the

financial resources available and the huge burden, the decision was taken to fix the date for paying the non-practising allowance from 1st October, 1998.

. It may be stated that, the importance of considering the financial implications while providing benefits for employees, has been noted in number of judgments including **State of Rajasthan V/s. Amritlal Gandhi, 1997 2 SCC page 342**, wherein the Supreme Court observed thus :-

“the financial impact of making the Regulations retrospective can be the sole consideration while fixing a cut-off date. In our opinion, it cannot be said that this cut-off date was fixed arbitrarily or without any reason. The High Court was clearly in error while allowing the writ petitions and substituting the date of 1st January, 1986 for 1st January, 1990.”

. In another judgment in the case of **T.N. Electricity Board V/s. Veeraswamy, (1999) 3 SCC page 414** it was observed that, financial constraints could be a valid ground for introducing a cut-off date while implementing a pension scheme on a revised basis. In that case, the

pension scheme applied differently to persons who had retired from service before 1st July, 1986 and those who were in employment on the said date. It was held that, they could not be treated alike as them as they did not belong to one class and they formed separate classes.

12. In the **State Bank of Punjab and Others V/S. Amar Nath Goyal and Others, (2005) 6 Supreme Court Cases page 754** it was held that *D.S. Nakara* should not be interpreted to mean that the emoluments of persons who retired after a notified date holding the same status, must be treated to be the same.

13. In the case before us, the cut-off date has been fixed as 1st October, 1998 on a very valid ground, of financial constraints. We therefore, reject the contention that fixing of the cut-off date was arbitrary, irrational or had no rational basis or that it offends Article 14. Accordingly, we answer the issue/point no.1 in the affirmative. We also hold, petitioners do not have right to

claim NPA from 1.1.1996. Point no.2 is answered accordingly.

14. The Learned Counsel appearing for the petitioner has relied on the judgment of the Supreme Court in the case of **D.S. Nakara and Ors. V/s. Union of India, (1983) 1 SCC 305** and judgment in the case of **Association of College and University, Superannuated Teachers V/s. Union of India and Others, in Civil Appeal No. 908 of 2013**. So far as the case of *Nakara* is concerned, we are of the opinion that the facts in the case in hand, are all together different than the facts in *Nakara's* case. In the case in hand, the State had revised the pay scales from 1st January, 1996 but postponed the decision of paying allowances including the NPA to the employees on the roll as on 1st October, 1998. Admittedly, in the case in hand, there was decision to revise the pension scheme w.e.f. 1.10.1998.

15. On the other hand, in the case of *Nakara* (supra) on 25th May, 1979 the Government of India, the Ministry of Finance issued Office Memorandum, whereby the formula for computing of pension was liberalised but made it applicable to Government Servants who were in service on March 31, 1979 and retire from service, on or after that date. This liberalised pension formula was applicable to employees governed by 1972 rules retiring on/or after the specified date. In other words, the liberalised pension formula was made applicable prospectively in *Nakara's* case to those who retired on/or after 31st March, 1979 in case of government service covered by 1972 Rules.

. On the backdrop of the aforesaid facts in *Nakara's* case, it was held by the Supreme Court “if the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date.

16. Yet another case, on which reliance was placed is the judgment in the case of ***Association of College and University Superannuated Teachers*** (supra), wherein the Government decided to raise the ceiling of the retirement gratuity and death gratuity from Rs.3.5 lacs to Rs.5 lacs w.e.f. 1st January, 2006 in terms of the G.R. dated 5th May, 2009. After 3 ½ months, another G.R. dated 21st August, 2009 was issued and criteria of retirement gratuity was further raised from Rs.5,00,000/- to Rs.7,00,000/- but the same was made effective from 1st September, 2009. On the backdrop of these facts, it was held that retiring/retired teachers of Colleges and Universities were already holding gratuity and they were granted the benefit of higher gratuity in terms of the Government Resolution dated 5th May, 2009. Thus, there is no justification, legal or otherwise to deny them benefit of higher gratuity w.e.f. 1st January, 2006.

17. In the case in hand, in view of the policy decision, the recommendations of a Pay Commission qua

non-practising allowance has been implemented w.e.f. 1.10.1998. The State's decision to pay the non-practising allowance w.e.f. 1.10.1998 cannot be faulted with because it was based on sound grounds. The petitioners herein had retired before 1.10.1998. No rights were accrued in their favour to claim the NPA w.e.f. 1.1.1996. The State has not revised the pension scheme on 1.10.1998 by recomputing formula of pensionable pay. In view of this, merely because pay scales were revised from 1.01.1996 and because the petitioners had retired before 1.10.1998, that itself will not give rise to any rights to enable the petitioners to claim revision in their "pensionable pay" as on 1.10.1998, a date on which the NPA was revised. The facts in the judgments cited by the petitioners were all together different and therefore the ratio laid down in those cases cannot be made applicable to the facts of this case.

18. That for the aforesaid reasons, both the

petitions fail and are dismissed with no order as to costs.

Rule is discharged.

(SANDEEP K. SHINDE, J)

(SMT. V.K. TAHILRAMANI, J)