

CWP No. 28518 of 2013 and connected cases (O/M)

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 24.5.2017

CWP No. 28518 of 2013 (O/M)

Dr. Baldev Raj Bhandari and others

..... Petitioner (s)

Versus

State of Punjab and others

..... Respondent (s)

CWP No. 9908 of 2013 (O/M)

Dr. Rajesh Bhanot and others

..... Petitioner (s)

Versus

State of Punjab and others

..... Respondent (s)

CWP No. 14232 of 2013 (O/M)

Suresh Kumar and others

..... Petitioner (s)

Versus

State of Punjab and another

..... Respondent (s)

CWP No. 20865 of 2015 (O/M)

Dr. Himmat Singh Aneja and others

..... Petitioner (s)

Versus

State of Punjab and others

..... Respondent (s)

CORAM : HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Mr. Vijay Sharma, Advocate, for the petitioners
in CWP No. 28518 of 2013.

Ms. Anu Chatrath, Senior Advocate, with,
Ms. Shina Dhuria, Advocate, for the petitioners
in CWP No. 9908 and 14232 of 2013.

Mr. Arjun Sharma, Advocate, for the petitioners
in CWP No. 20865 of 2015.

Mr. Harsimran S. Sethi, Additional Advocate General, Punjab.

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

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KULDIP SINGH J.

By this single judgment, I shall dispose of all the four abovenoted writ petitions, involving the same questions of law and facts. The facts are extracted from CWP No. 28518 of 2013, titled as Dr. Baldev Raj Bhandari and others Versus State of Punjab and others.

The petitioners, in all the cases, were working as doctors in the Health Department of State of Punjab. All of them retired from service before 1.1.2006 and were granted pension. Before 1.1.2006, the pension of the petitioners was calculated on the basis of pay, NPA and other allowances. However, on account of the recommendations of the 5th Pay Commission, the State Government issued Punjab Civil Services (Revised Pay) Rules, 2009, (in short 'Rules of 2009'), with effect from 1.1.2006, vide notification dated 27.5.2009 (Annexure-P-4), whereby the report of the 5th Pay Commission was implemented. Regarding the grant of Non-Practicing Allowance (NPA), the Government issued instructions dated 14.9.2009 (Annexure-P-2), wherein for the NPA, following instructions were issued :-

“2. After considering the recommendation of the Fifth Punjab Pay Commission, the Governor of Punjab is pleased to decide that the non-practicing allowance (NPA) presently admissible to certain categories of posts in the Department of Health and Family Welfare and Department of Medical Education and Research shall continue to be paid at the rate of 25% of Revised Basic Pay in the revised pay structured subject to the condition that Basic Pay plus NPA shall not exceed Rs. 85000/-.

3. The Revised date of NPA would be effective from the date an employee draws pay in the revised pay structure applicable to him in accordance with the provisions of the Punjab Civil Services (Revised Pay) Rules 2009.

4. The non-practicing allowance (NPA) shall continue to be treated as pay for the purpose of grant of Dearness Allowance,

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entitlement of Travelling Allowance/Daily Allowance as well as for calculation of retirement benefits.”

In the abovenoted Clause 4, it was specified that the NPA shall continue to be treated as pay for the purpose of grant of dearness allowance, entitlement of travelling allowance/daily allowance as well as the calculation for the purpose of retiral benefits. For revision of the pension of pre-1.1.2006 retirees, the Government issued instructions dated 17.8.2009 (Annexure-P-5), where in Para-4.2, the NPA was not treated as a part of pay qua pre-1.1.2006 retirees of Health Department. Clause 4.2 of the said letter is reproduced as under :-

“4.2 The fixation of Pension will be subject to the provision that the revised pension, in no case, shall be lower than fifty percent of the minimum of the pay in the pay band plus the grade pay corresponding to the pre-revised pay scale from which the pensioner had retired. This will be reduced pro-rata if the qualifying service of the person falls short of 33 years.”

The petitioners state that as per the recommendation of the 5th Pay Commission, the pension of the existing pensioner shall continue to be 50% of the basic pay plus NPA. Qua pre-1.1.2006 pensioner, by non-inclusion of NPA in the initial pay, the parity amongst the pre-1.1.2006 PCMs Doctor pensioners and post-1.1.2006 pensioners of other categories is not maintained. All pre-1.1.2006 pensioners constitute one class of pensioners. Therefore, for the purpose of pre-1.1.2006 retirees by not including NPA in the basic pay, a discrimination is caused. The petitioners have referred to further intra departmental communication, in which their case was recommended by the Principal Secretary to Government of Punjab, Health and Family Welfare, vide letter dated 27.9.2010 (Annexure-P-7), to include NPA in the basic pay and issue the revised instructions. However,

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the Finance Department, Punjab, vide letter dated 1.7.2011 (Annexure-P-10), declined such proposal. Subsequently, the Director, Health and Family Welfare, Punjab, addressed another letter dated 16.9.2011 (Annexure-P-11) to the Principal Secretary to Government of Punjab, Department of Health and Family Welfare (Health-1), Chandigarh, making a similar request, but the same again did not find favour with the Finance Department, Punjab, which again rejected the same, vide letter dated 1.12.2011 (Annexure-P-13), stating that the NPA cannot be added to the initial pay. It is evident that the petitioners approached the then Minister of Health and Family Welfare, Punjab, vide representation dated 2.4.2012 (Annexure-P-14) and the matter was again re-examined. The Finance Department, Punjab, vide letter dated 23.5.2013 (Annexure-P-21) again rejected the said proposal to include the NPA in the initial pay for the purpose of calculation of pension. It is to be added here that after 1.1.2006, the pension cannot be less than 50% of the basic pay. In case of post-1.1.2006 retirees, the NPA has been included in the basic pay. That would mean that the pension of post-1.1.2006 retirees cannot be less than the basic pay plus NPA, whereas qua pre-1.1.2006 retirees, it cannot be less than 50% of the pay, in which the NPA is not included, with the result that pre-1.1.2006 retirees will get less pension as compared to post-1.1.2006 retirees. The petitioners have prayed for quashing various orders of the Finance Department, Punjab, i.e. orders dated 1.7.2011, 1.12.2011 and 23.5.2013 (Annexures-P-10, P-13 and P-21 respectively), vide which the Finance Department, Punjab, had declined to include the NPA in the basic pay. The petitioners seek revised pension by including NPA at the rate of 25% in the initial pay (basic pay) with effect from 1.1.2006, as per the Finance Department, Punjab, instructions dated

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17.8.2009 (Annexure-P-5) and the subsequent instructions dated 22.2.2010 (Annexure-P-6).

The State, in the written statement, claimed that the petitioners are pre-1.1.2006 retirees and demanded inclusion of NPA in the basic pay. The petitioners have approached this Court in the year 2013 and 2015 respectively. Therefore, their writ petitions are barred by delay and laches. It was stated that the pension of the petitioners has been revised with effect from 1.1.2006 as per the instructions issued by the State Government. The recommendations of the 5th Pay Commission were made applicable and implemented with effect from 1.1.2006. The petitioners are not entitled to their claim of inclusion of NPA for the purpose of revision/fixation of their pension with effect from 1.1.2006. The revised rate of NPA being included in the initial pay shall be effective from the date of the notification. It was stated that the NPA was neither part of the pre-revised grade pay nor of revised pay band of the scales. The NPA was only included in the basic pay for the purpose of re-fixation of pension as well as the calculation of the retiral benefits, in terms of the Finance Department, Punjab. Therefore, respondents prayed for dismissal of the present writ petitions.

I have heard the learned senior counsel for the petitioners, the learned counsels for the petitioners, the learned State counsel and have also carefully gone through the file.

The factual position is not disputed. The doctors working in the Health Department, Punjab, were allowed non practicing allowance at the rate of 25% of the basic pay before 1.1.2006. However, when the report of the 5th Pay Commission was implemented with effect from 1.1.2006, the basic pay was defined in Clause 3 (i) of the notification dated 27.5.2009

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(Annexure-P-4) is reproduced as under :-

“3 (i) “basic pay” in the revised pay structure means the pay drawn in the specified pay band plus the applicable grade pay, but does not include any other type of pay like special pay etc.,”

It is clear from the definition that the basic pay would mean pay band plus applicable grade pay, but will not include any other type of pay like special pay etc.

The letter of the Government of Punjab, Department of Finance dated 14.9.2009 (Annexure-P-2) shows that the NPA shall continue to be treated as pay for the purpose of grant of dearness allowance, entitlement of travelling allowance/daily allowance as well as for calculation of retiral benefits. However, there is marked distinction between the words 'pay' and 'basic pay'. The basic pay has been defined above in the notification dated 27.5.2009 (Annexure-P-4).

The learned counsel for the petitioners has argued that the 5th Pay Commission in its recommendations in Clause 7.6 recommended that the pension should continue to be 50% of basic pay (plus NPA). The relevant recommendation is reproduced as under :-

“7.6 The Commission recommends that pension should continue to be 50% of Basic Pay (plus NPA). It should also continue to be calculated on the basis of last pay drawn or 10 months average whichever is beneficial to the employee.”

Therefore, it has been asserted that respondents were not justified in excluding the NPA from the basic pay by issuing instructions dated 17.8.2009 (Annexure-P-5), where in Clause 4.2, the revised pension was ordered to be not less than 50% of the minimum pay in the pay band plus the grade pay corresponding to the pre-revised pay scale, from which the pensioner had retired.

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In another communication dated 22.2.2010 (Annexure-P-6), in case of revision of pension of pre-1.1.2006 retirees, Annexure-A was enclosed wherein the pay band, grade pay and the initial pay were mentioned. The said annexure effectively excluded the NPA from the pay band plus the grade pay.

The learned counsel for the petitioners has further argued that the matter was taken up by the Director, Health and Family Welfare, Punjab and the reasons were given, but these were wrongly rejected by the Finance Department, Punjab, on various occasions. It has been further argued that the petitioners obtained the information under the Right to Information Act, 2005, (Annexure-P-26) and it comes out that the Finance Department, Punjab, passed the order on the basis of office memo of the Union of India. It is further stated that the office memo of the Finance Department, Union of India, was itself withdrawn on account of the judgment rendered by the Apex Court in K.C. Bajaj and others Versus Union of India and others (Civil Appeal Nos. 10647-10648 of 2013 arising out of SLP (C) Nos. 3367-68 of 2011 with connected matters), decided on 27.11.2013 (Annexure-P-22), wherein the Apex Court held that the pension is to be calculated by adding the element of NPA.

On the other hand, the learned counsel for the State has vehemently argued that there is a marked distinction between the words 'pay' and 'basic pay'. While for the purpose of pay, the NPA was included to calculate dearness allowance, travelling allowance/daily allowance and other retiral benefits. However, for the purpose of pension, after 1.1.2006, the NPA has been included in the basic pay for calculating the pension, which cannot be less than 50% of the basic pay plus NPA. However, for

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pre-1.1.2006 retirees, their pension cannot be less than 50% of the pay, which means that the NPA is not to be included in their pay, while calculating the pension to be not less than 50% of the pay. It is stated that pre-1.1.2006 retirees make a distinct class and the Government can always decide to extend the benefit from a particular date. Therefore, the Government was justified in not including NPA in the basic pay of the petitioners for calculating the pension. While referring to Para-4.2 of the instructions dated 17.8.2009 (Annexure-P-5), which is in dispute, it is stated that the wording of same para is very clear. Therefore, the NPA is not to be included in the basic pay, which is pay band plus the grade pay. The learned State counsel has also referred to Annexure-A, wherein the calculation of pension has been mentioned, giving pay band plus the grade pay and 50% thereof. Therefore, it makes clear that the NPA is not a part of the basic pay qua pre-1.1.2006 retirees.

After close scrutiny of the documents placed on file by both the parties and their rival submissions, it comes out that from the recommendations of the 5th Pay Commission that the Pay Commission in Para-4 of the recommendations dated 14.9.2009 (Annexure-P-2) recommended that the NPA shall continue to be part of the basic pay. The word 'continue' is very important. It refers that something was existing earlier and it should continue to be part of basic pay. Now, it appears that when the Government issued the notification dated 27.5.2009 (Annexure-P-4), implementing the revised pay scales with effect from 1.1.2006 on account of recommendations of the 5th Pay Commission, the peculiar case of the Doctors was overlooked. Infact, in the said notification, there is no mention about the NPA at all. Admittedly, the Government after 1.1.2006,

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for the purpose of pension, has defined basic pay as 'basic pay' plus the NPA.

Now, the question would arise whether the said definition is to apply prospectively or is to apply to the existing pensioners, who may have retired before 1.1.2006 ?

I am of the view that earlier the pension was calculated on the basis of pay plus NPA and other allowances. For the purpose of calculation of other allowances, the NPA was included in the pay. Before 1.1.2006, there was no stipulation that the pension cannot be less than 50% of the basic pay. This concept was introduced for the first time on 1.1.2006. The recommendations of the 5th Pay Commission shows that the Pay Commission desired that the NPA should continue to be treated as part of the basic pay. Once the Government itself decided to accept the recommendations of the pay commission and defined that the term 'basic pay' will include the NPA and accordingly the pay scales of the pre-1.1.2006 retirees are revised with effect from 1.1.2006, then at least from 1.1.2006 different definitions cannot be applied to pre-1.1.2006 and post-1.1.2006 retirees, so as to exclude the NPA from the basic pay for pre-1.1.2006 retirees and include the NPA for post-1.1.2006 retirees. Once the definition of basic pay includes the NPA with effect from 1.1.2006 and the scales of pre-1.1.2006 retirees are revised, that would effectively mean that the new definition effective with effect from 1.1.2006 shall also apply to the existing pensioners, whose pay is revised with effect from 1.1.2006. Therefore, it would mean that the said definition will also apply to the pre-1.1.2006 retirees also.

The learned counsel for the petitioners has relied upon the

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judgment of the Apex Court in K.C. Bajaj's case (supra), wherein a memo of the Union Government was in question. The Apex Court, while considering the recommendations, observed as under :-

“10.4 It is not a case where cut-off date has been fixed. The Central Government is entitled for the purpose of determination of pension pursuant to the policy decision to fix a cut-off date. It is also true that such a cut-off date cannot be held to be arbitrary and irrational, as it was not picked out of a hat. However, in the instant case, we are not concerned with any cut-off date, but we are concerned with the question as to whether despite recommendations of the 5th CPC, a discrimination can be made. The very fact that the Central Government accepts that the emoluments would mean basic pay + N.P.A. in view of its definition as existing in the Rule 9(21) (a)(i) of the Fundamental Rules, there cannot be any reason whatsoever as to why N.P.A. shall be considered to be a part of pay for post-01-01-1986 retirees and not for pre-01-01-1986 retirees.”

The Apex Court concluded as under :-

“32. This Court treated circular dated 11.9.2001 as clarificatory in nature and held that it neither amends nor modifies circular dated 7.6.1999. The most striking difference between O.M. dated 7.4.1998 issued by Department of Pension and Pensioners' Welfare, Ministry of Personnel (Public Grievances and Pension) and circular dated 7.6.1999 issued by the Defence Ministry is that the decision of the President conveyed vide O.M. dated 7.4.1998 was that NPA shall count as pay for all service benefits including retirement benefits but no such decision was contained in circular dated 7.6.1999. Therefore, the clarification issued by the Ministry of Defence vide circular dated 11.9.2001 cannot be equated with O.M. Dated 29.10.1999 which had the effect of modifying the decision of the President but was issued without his approval.

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Unfortunately, the Tribunal and the Division Bench of the High Court overlooked this vital distinction between O.M. Dated 7.4.1998 issued by the Ministry of Personnel (Public Grievances and Pension), Department of Pension and Pensions' Welfare and Circular dated 7.6.1999 issued by the Ministry of Defence and mechanically applied the ratio of Col. B. J. Akkara's case for deciding the cases of the doctors, who served in Central Health Services, the Railways and other departments of the Government. Therefore, the impugned order is legally unsustainable.

33. In the result, the appeals are allowed, the impugned order of the High Court as also the one passed by the Tribunal are set aside and the applications filed by the appellants before the Tribunal are allowed in terms of the prayer made. The respondents shall re-calculate the pension payable to the appellants by adding the element of NPA. This exercise shall be undertaken and completed by the concerned authorities within a period of three months from today."

I am of the view that in the present case also, the 5th Pay Commission has recommended that the pension shall continue to be 50% of the basic pay plus NPA and it should continue to be included on the basis of last pay drawn or 10 months average, whichever is beneficial to the employee. Therefore, I do not find any force in the contention of the learned State counsel that the 5th Pay Commission never recommended the inclusion of the NPA in the basic pay for pre-1.1.2006 retirees. I am of the view that the Government did not examine the matter in the correct perspective and took the mechanical view of the matter. It is again reiterated that once definition of basic pay is accepted to include the NPA from 1.1.2006, then all the retirees, whose pay is revised with effect from 1.1.2006, are entitled to the benefit of said definition from 1.1.2006.

It comes out that one of the doctors Dr. Himmat Singh Aneja

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and others in CWP No. 20865 of 2015, had earlier approached this Court by way of filing CWP No. 9258 of 2014, titled as Dr. Himmat Singh Aneja and others Versus State of Punjab and others, which was dismissed at preliminary hearing on 11.7.2014. The question would arise for consideration as to when this Court has come to the conclusion that all the pre-1.1.2006 retiree doctors of Health Department, Punjab, are entitled to inclusion of NPA in their basic pay with effect from 1.1.2006, whether the same can be declined to Dr. Himmat Singh Aneja and others on account of dismissal of their previous writ petition? I find the reply in negative. Once a benefit is granted to a particular class, the same has to be extended to the entire class and mere fact that qua Dr. Himmat Singh Aneja and others, their writ petition was dismissed at preliminary hearing, is no ground to decline the same relief to them even though they had withdrawn the LPA and thereafter unsuccessfully filed representation before the Government.

As a result of the foregoing discussion, the present writ petitions are allowed. The impugned orders dated 1.7.2011, 1.12.2011 and 23.5.2013 (Annexures-P-10, P-13 and P-21 respectively) are hereby quashed. Respondents are directed to include the NPA in the basic pay of pre-1.1.2006 retirees also and accordingly calculate their pension with effect from 1.1.2006. Since the petitioners have approached this Court in the years 2013 and 2015 and the notification was issued on 27.5.2009, therefore, the petitioners shall be entitled to arrears from 1.1.2006, but no interest thereon shall be payable till 38 months before the date of filing the present writ petitions. Respondents shall carry out the exercise of re-fixation of the pension of the petitioners-doctors, who are pre-1.1.2006 retirees and complete the same within three months from the date of receipt of certified

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copy of this judgment and thereafter release the revised pension with arrears and interest for 38 months before the date of filing of the present writ petitions, as indicated above till the date of payment. It is further ordered that the same benefit shall also be extended to the other similarly situated employees, who may not have approached this Court.

(KULDIP SINGH)
JUDGE

24.5.2017
sjks

Whether speaking / reasoned : Yes

Whether Reportable : Yes

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Sanjiv Kumar Sharma
2017.05.24 15:07
I attest to the accuracy and
authenticity of this document
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