IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.6261 OF 2017

VAISHALI BHAGWANTRAO BHAGWAT AND OTHERS
..PETITIONERS

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS ..RESPONDENTS

…

Mr. Milind Patil, Advocates for the Petitioners.
Mrs. A. V. Gondhalekar, A.G.P. for Respondent Nos.1 and 2.

WITH
WRIT PETITION NO.9302 OF 2017

DR. ARUN PUNDLIK MORE AND OTHERS ..PETITIONERS

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS ..RESPONDENTS

…

M/s. Legal United Law Firm and Mr. R. L. Chhabda, Advocates for the Petitioners.
Mrs. A. V. Gondhalekar, A.G.P. for Respondent Nos.1 to 3.

WITH
WRIT PETITION NO.9446 OF 2017

DR. VIJAY MADHUKAR MULAY AND OTHERS ..PETITIONERS

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS ..RESPONDENTS

…

M/s. Legal United Law Firm and Mr. R. L. Chhabda, Advocates for the Petitioners.
Mrs. A. V. Gondhalekar, A.G.P. for Respondent-State.

WITH
WRIT PETITION NO.11911 OF 2018

BHARAT BHAGWANSING CHAVAN AND OTHERS ..PETITIONERS

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS ..RESPONDENTS

…

Mr. Mukund R. Kulkarni, Advocates for the Petitioner.
Mrs. A. V. Gondhalekar, A.G.P. for Respondent Nos.1 to 3.

…

CORAM : S. V. GANGAPURWALA &
A. M. DHAVALE, JJ.

Closed for Orders on : 05.03.2019.

Order Pronounced on : 26.04.2019.

FINAL ORDER **(Per S. V. Gangapurwala, J.) :-**

1. All these writ petitions are based on similar set of facts and involve common issue. To avoid rigmarole they are decided by common judgment. The petitioners contend that Clause 3 of the clarification dated 17.01.2012 issued by the Assistant Secretary, Department of Medical Education and Drugs, of the State of Maharashtra thereby directing to pay non-practicing allowance to the petitioner on the basis old pay by ignoring the 6th revised pay by applying ceiling limit be quashed and set aside and the said clarification be declared as ultra-virus to Rule 15 of the MCSR Pay Rules, 1981 and the terms of the appointment orders. The petitioners also claim declaration that they are entitled for non-practicing allowance proportionate to their revised pay at the rate of 50% of the revised pay as provided under the Government policy enumerated in the Government Resolutions dated 27.03.2008 and 18.08.2010.

2. The petitioners herein had approached Maharashtra Administrative Tribunal with the aforesaid reliefs. The Original Applications are rejected. Aggrieved thereby, the present writ petitions.

3. The learned counsel for the respective petitioners empathetically submit that the allowance is a part of pay and allowance is payable on pay. The application of the ceiling cannot be justified by treating the same as part of the pay to prevent the so called pay from crossing the salary payable to the highest government servant of the land. The said logic destroys the very purpose of payment of non-practicing allowance as compensation for loss of private practice.

4. The learned counsel for petitioners further contends that the reliance placed on the judgment of the Apex Court in a case of **K. C. Bajaj & others V/S Union of India and others** reported in **2013 CJ (SC) 1261** is misplaced. In the said case the non-practicing allowance was treated as part of pay for all benefit and payment of allowance and the application of the ceiling was with an express policy to restrict the same to avoid payment of salary more than payable to the highest civil servant of the land. In the present case the non-practicing allowance is not treated as part of pay. The service condition of petitioners cannot be changed to the detriment of the petitioner. The learned counsel submits that the absence of any

reference to the non-practicing allowance in the 6th pay revision report is misinterpreted by the Joint Secretary of the Medical Education and Drugs Department to deny the benefit of non-practicing allowance on the revised pay and that non-practicing allowance is payable on the basis of old pay. The clarification issued under Clause 3 of letter dated 17.01.2012 is absolutely irrational. The Government has now under Resolution dated 24.07.2012 agreed to pay the non-practicing allowance proportionate to the 6th pay scale with effect from 1st July 2012. The Government has applied ceiling of Rs.85,000/- on the total salary by considering the non-practicing allowance as a part of pay only for the purpose of ceiling is not sustainable, arbitrary, irrational and does not stand to any reason. The ceiling formula applied in the Government Resolution dated 24th July 2012 is in direct conflict with the Clause 9(A)(b)(iii) of the Government Resolution dated 10th November 2009 issued to extend benefit of the 6th pay revision to the Teachers in the Government Medical / Dental and Ayurvedic Colleges in the State of Maharashtra. The said clause reads that the sum total of the raised basic pay and such other emoluments (on which allowances are payable treating them as a part of pay) shall not exceed Rs.80,000/-. The Government is not treating the non-practicing allowance as part of pay to deny any allowances payable on the same however, is imposing ceiling on the same by treating the same as part of pay contrary to the spirit behind the special benefit of non-practicing allowance. It is further submitted that the said ceiling of Rs.85,000/- is illogical. A senior Medical Teacher who is already suffering ceiling as provided under Clause 9(A)(b)(iii) of Government Resolution dated 10th November 2009 will get non-practicing allowance of Rs.5000/- of Junior Teacher based on their proportionate non-practicing allowance would get equal salary rendering their seniority, useless, for the purposes of monitory benefits. Such a policy is arbitrary and does not have any rational nexus behind the concept of non-practicing allowance. The same is also not inconsonance with Rule 15 of the MCSR Pay Rules, 1981. The learned counsel further submits that recovery of already paid non-practicing allowance is illegal. The same could not have been made.

5. The petitioners relied on the judgment of the Apex Court in a case of **State of M.P. Vs. Yogendra Shrivastava** reported in **2010 (12) SCC 538** to contend that the Apex Court held that the non-practicing allowance at the rate of 25% as provided under Rules framed under proviso to Article 309 would prevail and 25% of the basic pay from time to time would be paid as non-practicing allowance. The learned counsel also relies on the judgment of the learned Single Judge of the Gujarat High Court

in **Gujarat State Judicial Department (Class III) Employees Federation and Ors Vs. State of Gujarat and Ors** reported in **2011 CJ (Guj) 494.**

6. The learned A.G.P. submits that the Government Resolution dated 10.11.2009 implemented revised pay scales to the teachers in the Government Medical, Dental and Ayurved Colleges in the State. The said Government Resolution was issued in concurrence of Finance Department of the State. The Government Resolution did not speak about revision of non-practicing allowance. However, it was noticed that in some Government Medical Colleges the benefit of the non-practicing allowance was granted as per the revised pay scales with effect from 01.01.2006. Therefore, it was made clear under Government clarification dated 17.01.2012 that the proposal of granting non-practicing allowance as per the revised pay scale is still under consideration and non-practicing allowance is payable as per the old pay scales until issuance of final order in this regard. Based on the said clarification dated 17.01.2012 the Deans of Medical Colleges issued orders to recover excess payments made to the Medical Teachers. The Government Resolution dated 24.07.2012 granted non-practicing allowance to the Medical Teachers as per the revised pay scales with effect from 01.07.2012. The said Government Resolution was issued with concurrence of the Finance Department of the State. Therefore, the question of payment of non-

practicing allowance as per the revised pay scale with effect from 01.01.2006 does not arise. The Tribunal rightly relied on the judgment of the Apex Court in a case of **K. C. Bajaj & others V/S Union of India and others** (supra). The Government of Maharashtra is well within its powers to apply the grant of non-practicing allowance subject to limit of Rs.85,000/- with effect from 01.07.2012. The non-practicing allowance is special allowance granted to the Medical Teachers for not engaging themselves in private practice while in Government service and has no connection with provisions of MCSR Pay Rules. The order of recovery is legal and proper.

7. Upon considering the submissions of the counsels for the parties and the judgment of the Tribunal, the spectrum of the grievance of the petitioners appears to be as under:

(1) The non-practicing allowance at the rate of 50% and/or 35% should be paid on the revised pay scale as from date the revised pay scales have been given effect too that is 01.01.2006.

(2) The ceiling prescribed is illegal.

8. The petitioners under Government Resolution dated 24.07.2012 have been awarded non-practicing allowance at the rate of 50% for those who are serving in tribal areas and at the rate of 35% in non-tribal areas with effect from 01.07.2012. The non-practicing allowance by its

very nature is an allowance. The petitioners are not in a position to place reliance on any rules to fortify their contention that the non-practicing allowance is to be paid on the basis of the pay scale or the revised pay scale. The payment of non-practicing allowance is governed by the Government Resolutions issued from time to time. The petitioner's reliance on rule 15 of the MCSR Pay Rules does not in any way assist the cause of the petitioners.

9. If the pay and allowance is not part of basic pay then it would be no gain saying that the non-practicing allowance shall be paid with retrospective effect as of the date the revised pay scale is made applicable. The allowances generally are to be paid prospectively.

10. The non-practicing allowance is a special allowance allowed to the medical teachers for not engaging themselves in private practice while in Government service.

11. The pay as per 6^{th} pay commission was made effective from 01.01.2006 vide Government Resolution dated 10.11.2009 to the teachers in the Government Medical, Dental and Ayurved Colleges in the State. Though the revised pay scales to the teachers were implemented as per the Government Resolution dated 10.11.2009, the said Government Resolution was silent with regard to the payment of

non-practicing allowance. The clarification was issued under letter dated 17.01.2012 that the proposal of granting non-practicing allowance as per the revised pay scale is still under consideration and non-practicing allowance is payable as per the old pay scale until issuance of final orders in that regard. Subsequently, on 24.07.2012, the Government Resolution is issued granting non-practicing allowance to the medical teachers as per the revised pay scales with effect from 01.07.2012.

12. The Government Resolution dated 19.10.1989 clarifies that the non-practicing allowance is counted for the purpose of pensionable pay. The Government Resolution dated 24.07.2012 revised the rate of non-practicing allowance to 35% (except some Medical Colleges in rural areas where the rate is 50%) subject to condition that pay plus grade pay plus non-practicing allowance would not exceed Rs.85,000/-. Such limit is prescribed to ensure that this is less than the basic pay of Cabinet Secretary which is fixed on Rs.90,000/- per month. The Government Resolution dated 24.07.2012 issued for payment of non-practicing allowance from 01.07.2012 qua the revised salary as per the 6th pay commission is consistent with the policy of the Government of paying non-practicing allowance under 5th pay commission as per the Government Resolution dated 18.03.2000 wherein the non-practicing

allowance was increased to 25% of the basic pay subject to pay plus non-practicing allowance not exceeding Rs.29,500/-. The Government Resolution dated 24.07.2012 continued the earlier policy of the Government. The similar office memorandum dated 07.04.1998 issued by the Government of India has been upheld by the Apex Court in a case of **K. C. Bajaj & others V/S Union of India and others** (supra). It is not the case of change of service conditions to the detriment of petitioners, as canvassed by the learned counsel for petitioners. The policy is consistent. Even, the same practice was invoked while paying non-practicing allowance under the 5th pay commission. The ceiling applied in no way is in conflict with Clause 9(A)(b)(iii) of the Government Resolution dated 10.11.2009. Pursuant to the decision of the State Government to implement the revised pay scales of all teachers and equivalent cadre with effect from 01.01.2006 as per the Central Government (UGC) scheme, the revised scale of pay and the revised rates of Dearness Allowance were made effective from 01.01.2006 and the non compounded advance increment / special allowances as applicable would take effect from 01.09.2008. The said Government Resolution did not make any provision with regard to the payment of non-practicing allowance on the revised pay as per the 6th pay commission. The same was provided under the Government Resolution dated 24.07.2012.

13. The petitioners had contended that the senior professors would be at loss. Their computed allowance alongwith the non-practicing allowance would be the same as that of junior professor. The said disparity would remain because the salary of the Associate Professors and the Professors ought not to cross the increased ceiling limit of salary of the highest civil servant of the State.

14. The Tribunal has not committed any error in negativing the contention of the petitioner.

15. Some of the petitioners have been paid non-practicing allowance at the revised rate with effect from 01.09.2008 and some from 01.01.2006. It appears that Government Resolution dated 10.11.2009 was interpreted by the authorities to the effect that the non-practicing allowance would be paid from 01.09.2008. It appears that the authorities interpreted Clause 10(i) of Government Resolution dated 10.11.2009 in a manner that non-practicing allowance also would be included in the special allowance and shall take effect from 01.09.2008. The said interpretation was erroneous. However, some of them have been given the benefit of non-practicing allowance from the earlier date than prescribed under the Government Resolution dated 24.07.2012.

16. We do not find that petitioners in any way had misrepresented the authorities. It is probably

on interpretation (though erroneous) of the Government Resolution dated 10.11.2009 the benefit was accorded to some of the petitioners of payment of non-practicing allowance as per the revised pay scale. In view of that, we direct that if the recovery has not been made by the respondents from petitioners regarding the excess amount of non-practicing allowance paid, the same shall not be made as the same would be inequitable.

17. The writ petitions accordingly disposed of. No costs.

(A. M. DHAVALE)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

Devendra/February-19