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Reserved

Court No. - 15

Case :- SERVICE SINGLE No. - 13029 of 2020

Petitioner :- Dr. Avinash Chandra Srivastava & Others
Respondent :- State Of U.P. Thru. Prin. Secy. Finance, Lko & Others
Counsel for Petitioner :- Hari Prasad Gupta,Hari Ram Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 19879 of 2020

Petitioner :- Dr. Jagdish Prasad Singh & Others
Respondent :- State Of U.P. Thru. Prin. Secy. Finance, Lko & Others
Counsel for Petitioner :- Hari Prasad Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 18259 of 2020

Petitioner :- Dr. Laxmi Chauhan & Ors.
Respondent :- State Of U.P. Thru. Prin. Secy. Finance,Lko. & Ors.
Counsel for Petitioner :- Hari Prasad Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 19931 of 2020

Petitioner :- Dr. Ramji Prasad Gupta & Others
Respondent :- State Of U.P. Thru. Chief, Secy. Govt. Of U.P., Lko & Ors.
Counsel for Petitioner :- Saurabh Shankar v
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 13803 of 2020

Petitioner :- Dr. Laxmi Chauhan And Ors.
Respondent :- State Of U.P. Through Prin.Secy. Finance And Ors.
Counsel for Petitioner :- Hari Prasad Gupta,Hari Ram Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 12938 of 2020

Petitioner :- Dr. Ramji Prasad Gupta & Ors.
Respondent :- State Of U.P. Thru. Chief Secy. Civil Sectt. Lko. & Ors.
Counsel for Petitioner :- Saurabh Shankar Srivastav
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 13648 of 2020

Petitioner :- Provincial Medical Services Association Thru President
Respondent :- State Of U.P. Thru Prin. Secretary Finance & Ors.
Counsel for Petitioner :- Hari Prasad Gupta,Hari Ram Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 11704 of 2020

Petitioner :- Dr. Ram Pratap Singh Rathaur & Ors.
Respondent :- State Of Up Thru. Prin. Secy. Finance Lko & Ors.
Counsel for Petitioner :- Hari Prasad Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 12530 of 2020

Petitioner :- Dr. Chandra Bhan Singh & Others
Respondent :- State Of U.P. Thru. Prin. Secy. Finance, Lko & Others
Counsel for Petitioner :- Hari Prasad Gupta,Hari Ram Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 12826 of 2020

Petitioner :- Dr. Kailash Nath Sharma And Ors.
Respondent :- State Of U.P.Throu.Prin.Secy.Finance Lko.And Ors.
Counsel for Petitioner :- Hari Prasad Gupta,Hari Ram Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 22041 of 2020

Petitioner :- Dr. Keshav Singh
Respondent :- State Of U.P. Thru. Addl. Chief Secy. Finance & Others
Counsel for Petitioner :- Hari Prasad Gupta,Hari Ram Gupta
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 13064 of 2020

Petitioner :- Dr.Brijendra Pal Azad Srivastava & Ors.
Respondent :- State Of U.P.Thru.Prin.Secy.Medi.Health & Family Welfare &Or
Counsel for Petitioner :- Manish Misra,Sarvesh Kumar Saxena
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 16147 of 2020

Petitioner :- Dr.(Mrs) Gauri Mullick & Ors.
Respondent :- State Of U.P.Thru Addl.Chief Secy.Medi Health &Family &Ors.
Counsel for Petitioner :- Manish Misra
Counsel for Respondent :- C.S.C.

And

Case :- SERVICE SINGLE No. - 4374 of 2021

Petitioner :- Dr. Brijendra Pal Azad Srivastava & Ors.
Respondent :- State Of U.P.Thru.Addl.Chief Secy./Prin.Secy.Medical & Ors.
Counsel for Petitioner :- Manish Misra,Sarvesh Kumar Saxena
Counsel for Respondent :- C.S.C.

Hon'ble Alok Mathur,J.

1. The petitioners in this batch of writ petitions have raised common grievance, and hence they have been heard together and are being decided by a common judgment. The petitioners are Allopathic doctors who have served under the State Government and have since retired. They are aggrieved by the Government orders dated 14/7/2020 and 04/09/2020 whereby they have been denied the revised rate of Non-Practicing Allowance on the ground that they have retired prior to the cutoff date 24/08/2009, while doctors similarly placed and who have retired after 24/08/2009 has been entitled to the revised rate of Non-Practicing Allowance, and hence, they assert to have been unreasonably discriminated, and have prayed for setting aside of the said Government orders as well as the recovery orders passed in consequence of the impugned orders.

2. The facts in brief are that the petitioners are retired Allopathic Doctors of the Provincial Medical and Health Services of Government of U.P who have superannuated prior to 24/08/2009. The Government of Uttar Pradesh promulgated the U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1983 (hereinafter referred to as, Rules of 1983). By means of the aforesaid Rules of 1983 restriction was placed on Government Doctors and they were banned from obtaining any pecuniary advantage by engaging in private consultancy, and in lieu of the said restriction a Non-Practising Allowance was made available to them, which was to be determined by the State Government.

3. In exercise of its delegated power, the State Government vide order dated 31/08/1989 has not only revised the rate of Non-Practicing Allowance but also provided that it will be treated as part of pay for all service benefits including DA, TA and other allowances and also for pensionary benefits. Subsequently, the rates were revised in 2003 and they were made applicable uniformly on all including the petitioners.

4. The 6th Central Pay Commission recommendations were approved, with regard to Non-Practicing Allowance, by the State of U.P. by Government order dated 24/08/2009, whichrevised the Non-Practicing Allowance to 25% of the basic pay plus grade pay. The benefit of G.O dated 24/08/2009 did not in any manner disentitle the petitioners, but they were not given the benefit of the revised rates.

5. The 7th Pay Commission recommendations were approved by State of U.P on 09/03/2019 and given effect to vide Government order dated 09/08/2019. The benefit of the same was given to the petitioners, and they started receiving the enhanced rate of Non-Practicing Allowance, till passing of the impugned Government orders.

6. The bulwark of the challenge in this bunch of writ petitions is discrimination meted out to the petitioners by the unreasonable classification introduced by the State Government, by the impugned Government orders dated 14/07/2020 and 04/09/2020, both having the effect of disentitling the petitioners who retired prior to 24/08/2009 of the revised rate of Non-Practicing Allowance. In one set of writ petitions the Government orders dated 14/07/2020 and recovery order dated 16/07/2020 have been challenged, while second set of petitions, the challenge is to the Government order dated 04/09/2020 which had amended the earlier Government order dated 09/03/2019. The consequential relief sought in both the writ petitions is writ of mandamus to command the opposite parties to pay the Non-Practicing Allowance as per the existing revised rate of 20% as fixed by the Government order dated 09/08/2019.

7. Sri Hari Prasad Gupta, Sri Hari Ram Gupta and Sri Manish Mishra Advocates have appeared on behalf of the petitioners, and Sri Ramesh Kumar Singh, Senior Advocate Learned Additional Advocate General

assisted by Sri Ashutosh Singh has addressed this court on behalf of the State.

8. It has been submitted by the Counsels appearing on behalf of the petitioners that the U.P Government Doctors Allopathic Restriction on Private Practice Rules, 1983 provides for grant of Non-Practicing Allowance in lieu of their entitlement for private practice at the rates which will be specified by the Government from time to time. It has been submitted that a vested right has been created in favour of the Government doctors for payment of the Non-Practicing Allowance in lieu of the ban on private practice as per the rules of 1983.

9. Subsequent to their retirement, the petitioners have been receiving Non-Practicing Allowance and there is no dispute with regard to their entitlement to receive the same. They claim that the State is acting illegal and arbitrary by not revising the rate of Non-Practicing Allowance with regard to the petitioners by wrongly interpreting the clause "the revised rates would be applicable with immediate effect" in the Government order dated 09/08/2019 to mean that the same would be applicable only to the persons retiring after the said date, and not the person retiring prior to the said date, like the petitioners.

10. The petitioners would submit that the correct interpretation of the said Government order would be that the revised rates of Non-Practicing Allowance would be effective prospectively across the board, and no person either in service retired can claim arrears of Non-Practicing Allowance, on the basis of revised rates from 01/01/2006 to 24/08/2009.

11. The petitioners claim that they are entitled to the revised amount of the Non-Practicing Allowance as prescribed by the Government from time to time and seek to challenge the decision of the State Government in restricting it only to the fixed amount payable at the time of retirement, as being illegal and arbitrary and violative of Article 14 and 16 of the Constitution of India.

12. Sri Manish Mishra Advocate submitted that the impugned Government orders has created two classes of pensioners with the cut of date being 24/08/2009, dividing both these classes of pensioners, and they have both been held to be entitled to receive Non-Practicing Allowance, but at

differential rates, solely on the basis of the date of retirement. It has been submitted that there is no valid justification for creating the two classes, and the date of retirement does not have any rational nexus for determination of the quantum of Non-Practicing Allowance, nor is there any rational basis for such classification and consequently the impugned Government orders are hit by vice of Article 14 of the Constitution of India. It is urged that all the pensioners who form one class, are entitled to the same amount of Non-Practicing Allowance as revised by the Government from time to time, irrespective of date of retirement. To further canvas their submissions, it has been submitted that for a valid classification, there must be some distinguishing feature which separates or distinguishes one class from the other, in which case, the State may validly provide for different amount of Non-Practicing Allowance to such classes. Any such classification, for it to be valid, must necessarily satisfy the twin test, one that it should be based on some intelligible differentia, and secondly, that it should have a reasonable nexus with the object sought to be achieved. It is stated that both these material aspects are lacking in the classes so created, and hence the said impugned Government orders deserve to be set aside being violative of Article 14 of the Constitution. Reliance was placed upon the judgement of the Apex court in the case of D.S. Nakara (1983)1SCC305 to buttress their contention and submitted that their case is squarely covered by the ratio laid by the Apex court therein and as well as subsequent pronouncements of the Apex Court in this regard.

13. It was further submitted that the Non-Practicing Allowance being an integral part of the basic pay of the petitioners was liable to be periodically enhanced and revised as is done with regard to the basic pay and other allowances of all the pensioners irrespective of the date of retirement following the basic principle that, being a welfare State it is the obligation of the State to provide security in old age, and escape from undeserved want which has been duly recognized, and hence, pension is treated not only as a reward for the past services but with a view to help the employee to avoid destitution in old age. The quid pro quo is that when the employee was physically and mentally alert, he rendered unto master the best, expecting

him to look after him in all the fall of life. A retirement system therefore exists only for the purpose of providing benefits.

14. Reliance was also placed on the Judgement of the Supreme Court in the case of **V. Kasturi vs Managing Director, State Bank of India, Bombay(1998) 8 SCC 30** where it was held that the person retiring is eligible for pension at the time of his retirement and if he survives till such time subsequent amendment of relevant pension scheme he would become eligible to enhanced pension and would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force, he would be entitled to the benefit of the amended pension provision from the date of the order. Reliance was also placed on the judgement of the Apex court in the case of **All Manipur Pensioners Association vs State of Manipur (2020) 14 SCC 625** and others where on similar facts Supreme Court held that all the pensioners irrespective of the date of retirement either the 1996 retirees shall be entitled to revision in pension at par with those pensioners who retired post 1999, as they form a single homogeneous class, and the differentiation sought to be made by the State Government was held to be violative of Article 14 of the Constitution.

15. The State of U.P. having introduced Liberalised Pension Scheme in 1961 by making rules which were considered necessary for augmenting Social Security in old age to Government servants other than those who retired earlier cannot be worse off than those who retired later. This division which classified pensioners into two classes is not based on rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory.

16. It has been urged that by means of Government Order dated 09/08/2019, the recommendations of the 7th Pay Commission were duly approved, but under the garb of clarifying the said Government Order at the behest of the Director Treasuries, the benefit which had accrued to the petitioners with regard to the rate of Non-Practicing Allowance at the rate of 20% of the basic salary, was withdrawn. It was provided therein that the petitioners would only be entitled to the Non-Practicing Allowance which was being paid to them at the time of the retirement. This clarification has

been issued nearly after one year of the approval of the recommendations of the 7th Pay Commission, during which period the Non-Practicing Allowance was being paid to the petitioners at the rate of 20% of the basic salary plus grade pay. It is submitted that once the enhanced rate of the Non-Practicing Allowance was approved and the same was being paid to the petitioners, then a vested right accrued in favour of the petitioners, and the withdrawal of the enhanced rate of Non-Practicing Allowance without any reason or affording any opportunity of hearing is illegal and arbitrary and violative of the principles of natural justice. It was stated that it was a colourable exercise of power by the State Government in issuing the impugned Government order thereby under the garb of clarification the effect of the earlier Government Order dated 09/08/2019 has been reversed, without there being any reasonable basis in the most illegal and arbitrary manner, and in effect a new policy has been introduced under garb of rectification of error, and on this score also it is ultra vires the rules of 1983.

17. Sri Manish Misra, learned counsel for the petitioners further submitted that once the recommendations of an expert committee like the Commission are accepted, which has submitted a exhaustive report after detailed discussions and consultations with various representatives of pensioners and other Government bodies, and the recommendations are duly accepted and implemented, then the same cannot be reversed in such a casual manner without giving any reasons for the same. It was stated that there are certain matters which require a wider consultation and deep insight to bring forth the relevant issues necessary for taking an informed decision, which can be gathered only after appointing a body like a commission or a committee and handing them over the specialized task like fixation of the pay and allowances, and their recommendations are liable to be accepted or rejected or accepted in modified form by the Government, but once their reasoned and informative recommendations, are accepted by the Government, then they cannot be lightly overturned and reversed without there being adequate and sufficient reasons which is totally lacking in the present case.

18. Sri Hari Ram Gupta, Advocate while assailing the Government order dated 14/09/2020 submitted that the same has been passed only to circumvent the interim orders passed by this Court staying the operation of

the earlier Government order dated 14/07/2020 and the consequential order dated 16/07/2020, and therefore it was a colourable exercise of power and is hence ex facie illegal and arbitrary and beyond the competence of the State Government. It was further submitted that the malice of law is clearly evident in the said Government order, which is a vain attempt to reimpose the restriction on payment of the Non-Practicing Allowance to the petitioners as per the recommendations of the 7th Pay Commission, contrary to the interim order of this Court. The said Government order dated 04/09/2020 has only recast the previous Government order dated 14/07/2020 without making any change to the outcome or effect of the previous Government order. It is submitted that the brazenness of the State Government is writ large in issuing the impugned Government order dated 04/09/2020, where they have deliberately ignored the interim orders of this court staying the earlier Government order, and hence it is clearly an overreach of the power and authority and jurisdiction of the State Government in this regard.

19. Sri Ramesh Kumar Singh, Learned Additional Advocate General representing the State in the aforesaid writ petitions while opposing the claim of the petitioners submitted as follows:-

a. With regard to the maintainability of the writ petition it is submitted that some of the petitioners were holding the administrative posts of Director General/Director and therefore they are not entitled to receive Non-Practicing Allowance, as such Non-Practicing Allowance cannot be included for the purpose of calculation of the respective pension amounts, and they would not have any locus to raise the issues as raised by them.
b. The revisions of Non-Practicing Allowance on percentage basis as provided in Government order dated 24/08/2009 has prospective effect and is not applicable on the persons who retired before 24/08/2009 and were getting Non-Practicing Allowance in accordance with the earlier arrangement on slab basis and no changes have been made in their respective amount of Non-Practicing Allowance amount till date.

c. It is the stand of the State Government that is on account of wrong interpretation of the Government order dated 09/08/2019 the persons who retired before 24/08/2009 were paid the respective pension along with the Non-Practicing Allowance on the percentage basis and after issuance of Government order dated 14/07/2020, the error was rectified, and consequential recovery orders were passed.

d. It has also been submitted that the impugned Government orders were passed to correct administrative errors which had crept in, in interpreting the Government order dated 24/08/2009, and a "Conscious policy" decision has been taken by the State Government.

e. The State has also pleaded financial constraint, as a reason for making the "correction" by means of the impugned Government orders.

f. It has been vehemently submitted that the State Government had rectified its error and by means of the impugned order dated 04/09/2020 paragraph 4(ii)(a) of Government order dated 09/08/2019 has been amended/substituted and now it is provided that Government doctors who were receiving Non-Practicing Allowance @ 25% on the date of their retirement would be entitled to Non -practicing allowance @ 20% of the basic pay as on 01/01/2016 while according to amended paragraph 4(ii)(b) such Government doctors who at the time of retirement were getting Non-Practicing Allowance of a fixed amount on slab basis will be entitled to the same amount of Non-Practicing Allowance they were receiving without any change. In this regard it was categorically stated that the Non-Practicing Allowance amount of pensioners who retired before 24/08/2009 has never been revised till date.

g. It is stated that the State Government is fully empowered to issue orders regarding payment of Non-Practicing Allowance to the Government doctors in service and also for those who have retired, in exercise of power under rule 4 of the rules of 1983.

h. The State has relied upon the Division Bench judgement of this court dated 25/01/2018 in writ petition no. 1482 as the of 2015 in support of the submissions that the petitioners are not entitled for revision/enhancement of the amount of Non-Practicing Allowance.

i. Defending the challenge made to the impugned Government orders being violative of Article 14 in as much as they are based on unreasonable classification, it has been argued by the learned Additional Advocate General that there is a creation of two classes of pensioners, but the classification is in fact reasonable based on distinction between persons who have received Non-Practicing Allowance on slab basis and the persons who have received Non-Practicing Allowance on percentage basis. It was further submitted that the said classification is justified as it is protected under the parameters of the Financial constraints, in the interest of general public at large.

20. I have heard the counsel for the petitioners as well is the learned Additional Advocate General on behalf of the State. The following issues fall for consideration of this court:

A. Whether the writ petitions are maintainable on behalf of Allopathic the Government doctors who have retired prior to the 24/08/2009 and were holding the post of Director General/Director on the date of the retirement?

B. Whether the benefit of enhancement/revision in the rates of Non-Practicing Allowance has any bearing on the date of retirement, and more particularly as to whether the same would be payable/admissible only to the serving Government Doctors and not to the retired Government Doctors?

C. Whether the judgement of the Division Bench of this court dated 25/01/2018 can have any application in the case of the petitioners in challenging the impugned Government orders?

D. Whether the classification created by the impugned Government orders on the basis of date of retirement is valid?

E. Whether the retired Government doctors are entitled for revision rate of Non-Practicing Allowance?

Maintainability of writ petition

21. With regard to the maintainability of the writ it has been submitted that according to Rule 4 (b) of the Rules of 1983 provides the list of persons who were excluded from the benefit of Non-Practicing Allowance which

includes persons holding the post of Director/Additional Director, Medical Education and Training and Principle of State Medical Colleges. It is vehemently urged that such petitioners, who are holding the said posts are not entitled to Non-Practicing Allowance, and hence any petition on their behalf, in this regard, would not maintainable.

22. The counsel of the petitioner on the other hand urged that the rules of 1983 were amended, notified/published on 21/06/2005 by The U.P. Government Doctors (Allopathic) Restriction on Private Practice (Second Amendment) Rules 2005 which extended the benefit of Non-Practicing Allowance even to the persons holding administrative post of Director/Additional Director. It is submitted that after the amendment of 2005 the embargo for entitlement of Non-Practicing Allowance imposed by Rule 4(b) of the Rules of 1983 was lifted, and hence even the person holding the said posts became entitled for the benefit of Non-Practicing Allowance, with effect from coming into force of the said amendment. The Learned Additional Advocate General has further submitted that as per the impugned Government orders, the petitioner would be entitled for the benefit of Non-Practicing Allowance which they were receiving on the date of the retirement, and such persons(Director/Additional Director) who are excluded by the operation of Rule 4(b) would not be entitled to benefit of Non-Practicing Allowance even after the amendment of the 2005 as on the date of retirement they were not entitled for receiving Non-Practicing Allowance. In response it has been submitted that even the persons who have held the post of Director/Additional Director are entitled to Non-Practicing Allowance after the amendment of 2005, and therefore they are aggrieved by the impugned Government orders revising the rate of Non-Practicing Allowance to their disadvantage and hence being “aggrieved” their petitions would be maintainable.

23. On the issue of maintainability, this Court is of the view that the present petition at the behest of persons holding Office of Director/Additional Director at the time of the retirement even though initially excluded from the benefit of Non-Practicing Allowance due to operation of the exclusionary clause in the rules of 1983, but subsequently, after amendment of 2005, were granted benefit of Non-Practicing

Allowance, would be maintainable. The embargo imposed by the rules of 1983 was lifted when the said rules were amended in 2005 and they became entitled to receive the Non-Practicing Allowance. From 2005 till passing of the impugned order dated 14/07/2020, there is nothing on record to show that petitioners were disentitled from receiving the benefit of Non-Practicing Allowance. The petitioners being aggrieved by the impugned orders which have disentitled them from the benefit of the Non-Practicing Allowance due to the fortuitous circumstance, that their date of the retirement is prior to 24/08/2009, and not because they were holding the post of Director/Additional Director at the time of the retirement, which grievance can legally and validly be raised by them in the present set of petitions. Even otherwise, the impugned Government orders have been challenged by number of other individual persons and also the Provincial Medical Service Association of which they are members. Accordingly, in light of the above discussion the challenge to the maintainability of the writ petition fails and the petitions are held to be maintainable.

24. Another objection regarding maintainability has been raised by the State stating that when a writ petition has been preferred by the Provincial Medical Services Association, then individual petitions preferred by the members would not be maintainable and deserves to be dismissed. This argument of the respondents is not convincing and does not hold much water. A writ petition is maintainable before the High Court by any person who is aggrieved by the action of the State as being violative of part III of the Constitution. An individual cannot be nonsuited, just because an Association of which he is a member has also preferred a similar writ petition on the same subject matter. An individual has a right to enforce his fundamental rights enshrined in part III of the Constitution, and the rights to sue, to enforce the fundamental rights is not subservient or subject to a class action by the Association of which he is a member. In the present case, the Association and the individual members have raised a common challenge to the impugned Government Orders. The petitioners are discontent by the impugned Government orders as they have been personally deprived of the benefit of the Non-Practicing Allowance and therefore they are the “aggrieved” and can validly ventilate their grievance by means of a writ

petition under Article 226 of the Constitution and also that the benefit or otherwise arising from the outcome of the present writ petitions, shall necessarily be of the individual members, and therefore the writ petitions on behalf of the individual members cannot be dismissed as being not maintainable.

NON PRACTICING ALLOWANCE

25. It is relevant to look into of the archival chronology of the Non-Practicing Allowance in order to get the clarity about the nature of the allowance and also the policy of the Government with regard to the same. This aspect of the matter has also been dealt in detail in the report of the 7th Pay Commission, where it is stated that earlier the doctors in the Government service were allowed private practice. The Railways which was the biggest employer of medical staff under the Central Government allowed the medical officers except the Chief medical Officer to engage in private practice in so far as it did not interfere with the other official duties. Apart from Railways, doctors employed in other Government agencies were generally debarred from private practice and consequently granted a Non-Practicing Allowance at the rate of 50% subject to a maximum of Rs 400/- between 1957–59. The rate of Non-Practicing Allowance varied from Hospital to Hospital and from State to State. This issue was considered by the Third Pay Commission which recommended payment of Non-Practicing Allowance varying between Rs.150/- to Rs.600/-per month. The 4th Pay Commission decreased the rates as compared to the previous commission, but the 5th Pay Commission recommended grant of 25% of the basic pay plus grade pay the Non-Practicing Allowance and also provided that it shall continue to count towards all service and pensionary benefits without any change.

26. The Pay Commission further considered some specific grounds for grant for treating Doctors in Government service differently and extending Non-Practicing Allowance to them, namely: -

(a) Earlier doctors in Government service were allowed the privilege of private practice or Non-Practicing Allowance in lieu thereof. At that

time, the emoluments of doctors were deliberately kept with the presumption that they will make good the loss by private practice.

(b) The basic medical course is of longer duration (4 ½ +1 year internship). Due to this, doctors enter the Government service at a late stage. Whereas in other services averages of entry of graduate direct recruits is about 23 years. In medical branch it is about 27 years. Due do this they have shorter effect of service.

(c) The entry level posts in the cadre of doctors have to be filled by direct recruitment. Accordingly, promotion prospects for them are lesser viz-a-viz officers in other organised services.

(d) The nature and duties and conditions of work of doctors involved certain uncommon deprivation. They have often to work at odd hours beyond the prescribed working as often they have to attend to urgent cases.

27. The State of Uttar Pradesh accordingly also decided to place restriction on the private practice of Government Doctors and promulgated the "The U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1983".

28. Rules of 1983 imposes restriction on private practice of "Government Doctors". Rule 3 of Rules, 1983 imposes restriction on private practice of Government Doctors and Rule 4 provides payment in lieu of private practice (commonly known as "Non Practicing Pay" or "Allowance").

29. The aforesaid scheme introduced by rules, 1983 was done with an intention to compensate the Government doctors in lieu of ban imposed on the private practice and to recompence them from loss of earnings and further that the Non-Practicing Allowance was treated to be part of pay for all the service benefits including pension.

30. The aforesaid rules were made under Article 309 of the Constitution of India and came into effect on 30th August, 1989. On 31/08/1989 while fixing the rates of Non-Practicing Allowance with effect from 14/08/1988 in clause 2 provided that the Non-Practicing Allowance shall form part of the basic salary of the employee for the purposes of pensionary benefits,

dearness allowance, travel/daily allowance. By means of Government order dated 19/02/1990 & 22/03/1990 it was further clarified that Non-Practicing Allowance shall form part of basic salary as described in financial handbook vol II to IV in rule 9(21)(1). The rates of Non-Practicing Allowance were prescribed by Government order dated 31/08/1989 were subsequently revised and enhanced on 01/02/2003.

31. The rules of 1983 delegated the power of fixing the rate of Non-Practising Allowance from time to time to the State Government, and in exercise of the delegated power it proceeded to revise the rates as and when it was necessary, coterminous with the recommendations of the Central Pay Commission.

32. With the submission of the 6th Central pay Commission report in March 2008, recommending that "*that Doctors should continue to be paid Non-Practicing Allowance at the existing rate of 25% of the aggregate of the band pay and grade pay subject to the condition that the Basic Pay plus Non-Practicing Allowance does not exceed Rs.85,000/-*" the State of U.P. by means of Government order dated 24/08/2009, also approved the recommendation of the Pay Commission and revised the Non-Practicing Allowance to 25% of the basic pay plus grade pay. The said Government order also provided that the revised rates of Non-Practicing Allowance would be applicable with immediate effect.

33. The Government Order dated 24/08/2009 provides that after considering the various representations received from officers of medical service the rates of the Non-Practicing Allowance has been revised to 25% of the Pay Band plus Grade Pay. It was reiterated that the Non-Practicing Allowance for all purposes would be considered as part of salary including pensionary benefits. It was further clarified that the revised rates shall be applicable prospectively.

34. The Government order dated 24/08/2009 is very clear in its terms in as much as it seeks to revise the existing rates of Non-Practicing Allowance. It is further stated therein that the rates prescribed shall be effective prospectively, meaning thereby that the enhanced rates shall be payable only

from the date of the Government order itself, and not from any previous date.

35. In absence of any provision either explicitly or otherwise, the Government order dated 24/08/2009 could not have been construed to restrict the application of the revision of the Non-Practicing Allowance to the petitioners. It is also noted that by the impugned Government Order only the rates were revised, and no new policy/scheme was framed.

36. Nonetheless, the benefit of the aforesaid Government order, as interpreted by the respondents, was never extended to the petitioners, and they continue to receive Non-Practicing Allowance at the old slab system at the fixed rates.

37. The 7th Pay commission recommended revision of Non-Practicing Allowance to 20% of the basic pay for the employees of the Central Government. The State of U.P. duly considered and accepted the recommendations of the 7th Pay Commission and extended the revision of the rates of the Non-Practicing Allowance to the Government doctors of State of Uttar Pradesh with the condition that the basic salary along with the Non-Practising Allowance should not exceed Rs.2,37,500/- .Clause 2 provided that the Non-Practicing Allowance would for all purposes would be part of the basic salary received by the retired employees. Clause 3 of the said Government order further provided that the benefit of Non-Practising Allowance would be admissible only to those doctors were getting the benefit of the same as per the earlier Government order dated 24/08/2009 **or any other Government order issued earlier in this regard**.

38. The Government order dated 09/03/2019 only revised the rate of Non-Practicing Allowance, and in very unequivocal terms extended the benefit of the same to the retired Government doctors. Clause 3 clearly extended the benefit of Non-Practicing Allowance to those employees who were receiving the same as per Government order dated 24/08/2009 or any earlier Government order in this regard.

39. To give effect to the decision of the Government announcing the rate of Non-Practicing Allowance to 20%, another Government order dated 09/08/2019 was passed referring to the earlier Government order dated 09/03/2019 and stated that a decision has been taken by the Government to revise the rate of Non-Practicing Allowance with effect from 09/03/2019, and consequently there would be a need for revision of pension payment orders for the purposes of payment of pension/family pension.

40. According to Clause 4(i) of the said Government order which applied to the doctors who had retired prior to 01/01/2016 and for payment of their pensionary benefits from 01/01/2016 and 08/03/2019. It provided that the amount of Non-Practicing Allowance which was being paid as on 31/12/2015 will be added to the basic salary as computed on coming into force of the recommendations of the 7th Pay Commission as on 01/01/2016 will be paid as pension while clause (ii) provided that from 09/03/2019 20% of the basic salary will be paid as Non-Practicing Allowance which will be added to the revised basic salary as on 01/01/2016.

41. In pursuance of the Government order dated 09/03/2019 as well as 09/08/2019 all the petitioner started receiving the Non-Practicing Allowance at the rate of 20% as part of the pensionary benefits. Consequently, giving effect to the aforesaid Government orders, revised pension payment orders were issued to the petitioners which have been annexed along with the writ petitions including Non-Practicing Allowance 20% of the basic pay. As the petitioners were receiving the Non-Practicing Allowance in terms of earlier Government orders, they were extended the benefit of the same and they started receiving the Non-Practicing Allowance at the revised rates.

42. The petitioners continued to receive Non-Practicing Allowance at the rate of 20% of the basic salary till passing of the impugned order dated 14/07/2020 and the recovery order dated 16/07/2020.

43. The impugned Government order dated 14/07/2020 in its recital states that the Director Pension has sought certain clarification as to the quantum

of Non-Practicing Allowance admissible to Government doctors who have retired prior to 24/08/2009.In response to the said clarification the G.O dated 14/07/2020 provides that the Government doctors who had retired prior to 24/08/2009 will be entitled to Non-Practicing Allowance at the same rate which was being paid to them **immediately prior to their retirement**.

44. The State Government in its attempt to "clarify" the order dated 09/08/2019 has further provided in clause 3 that from 24/08/2009 to 31/12/2015 in accordance with clause 4(i) of the Government order dated 09/08/2019 the same amount of Non-Practicing Allowance which the Government doctors were receiving just prior to his retirement would be added to the revised basic pay, meaning thereby that petitioners would not be entitled to any revision of Non-Practicing Allowance and the retired Doctor would receive the fixed amount of Non-Practicing Allowance which they were receiving at the time of their retirement, while persons retiring after 24/08/2009 according to fresh meaning/interpretation given to clause 4(ii) will be entitled to Non-Practicing Allowance at the rate of 20% of the basic salary.

45. The aforesaid Government order can therefore be summarised as under:-

A. With regard to the petitioners who retired prior to 24/08/2009 will be entitled to receive Non-Practicing Allowance at the rate which they were receiving at the date of retirement, and the revision of the Non-Practicing Allowance from time to time is inadmissible to them subsequent to 24/08/2009.

B. The clarification has been applied retrospectively in as much as relates back to payment of Non-Practicing Allowance with effect from 24/08/2009, and therefore it seeks to clarify the Government order dated 24/08/2009 and makes it inapplicable to the petitioners.

C. It further creates another class of Government doctors who retired post 24/08/2009, and they will be entitled to the revised rate of Non-Practicing Allowance.

46. One of the present sets of writ petitions was filed challenging the Government order dated 04/07/2020 and this Court passed an interim order on 24/08/2020 in writ petition no.12938 of 2020 (SS) staying the operation implementation of the order dated 14/07/2020 and 16/07/2020 as well as the recovery of the amount already paid. The interim order was followed and extended in all the other similar cases.

47. Pursuant to the interim order of the High Court staying the Government order dated 04/07/2020 and 16/07/2020,the State Government proceeded to pass another order dated 04/09/2020 purporting to remove the error which had crept in the earlier Government order dated 09/08/2019 and in effect only recast clause 4(ii) of the said Government Order, now providing that those Government doctors who at the time of their retirement were receiving Non-Practicing Allowance at the rate of 25% ,will be entitled to receive Non-Practicing Allowance at the rate of 20% of their basic pay with effect from 09/03/2019. It was further provided that those Government doctors who at the time of their retirement were receiving a fixed amount as Non-Practicing Allowance, would receive Non-Practicing Allowance at the same rate at which they were receiving at the time of their retirement. It was further clarified that with effect from 09/03/2019 there would be no change or revision in the Non-Practicing Allowance.

48. The Government order dated 04/09/2020 in effect creates a paradigm shift in the scheme of payment of Non-Practicing Allowance to the retired doctors of the Provincial Medical Services. In sum and substance, it provides that the doctors would be entitled to receive that component of Non-Practicing Allowance as part of their pension which they were receiving just prior to the retirement, and in other words it actually freezes the rate of Non-Practicing Allowance payable to petitioners who retired prior to 24/08/2009, while other Government Doctors after 24/08/2009 would be entitled to receive Non-Practicing Allowance at revised rates.

49. The impugned order dated 04/09/2020 has also been assailed in the second batch of writ petitions, and this Court by means of an interim order

dated 20/01/2021 stayed the order dated 04/09/2020 and also the recovery of the Non-Practicing Allowance from the petitioners.

50. The controversy which has led to filing of the present bunch of petitions by the petitioners, all of whom are pensioners, having served in State of U.P. in the capacity of Allopathic Government doctors, and are receiving pension, are aggrieved by the action of the State Government, whereby those who retired after 24/08/2009 have been held to be entitled to revised amount of Non-Practicing Allowance on percentage basis, while the petitioners who retired prior to 24/08/2009 have been held to be entitled to Non-Practicing Allowance which they were getting just prior to the retirement that is under the slab system without any increment. They claim hostile discrimination has been meted out to them and have therefore challenged the impugned Government orders on the ground that they create two classes of pensioners, without there being any rational basis for such classification and hence are violative of Article 14 of the Constitution as interpreted by the Supreme Court in the case of D.S. Nakara (1983)1 SCC 305 and others subsequent pronouncements.

Prospective application of Government Orders

51. It has been submitted by the respondents that the impugned Government orders have "prospective application" and would be applicable only to persons who have retired after the date of the impugned Government order, and therefore petitioners have been validly excluded from the benefit of revised rate of Non-Practicing Allowance.

52. It has been stated in the counter affidavit on behalf of the respondents that the Government order dated 24/08/2009 was introduced with prospective/immediate effect and persons who retired before 24/08/2009 were getting Non-Practicing Allowance in accordance with the earlier arrangement of slab basis and no changes have ever been made till date, and on that basis have proceeded to justify the impugned Government orders.

53. The State Government while interpreting the words "prospective/immediate effect", in the Government order dated 24/08/2009 have understood it to mean that the benefit of the said, order would be given to persons retiring after coming into effect of the said Government order, that is 24/08/2009. The petitioners on the other hand have submitted that in cases where there is revision of pay scales or allowances which are introduced from a certain date, the benefit of the revised scale is not limited to those who enter service subsequent to the date fixed for introducing revised scales, but the benefit is extended to all those in service prior to the date. The revision when made is made applicable prospectively, and in the present case, all pensioners whenever they retire would be covered by the revised Scheme. The date of retirement becomes irrelevant. But the revised scheme would be operational from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retire subsequent to that date.

54. There is force in the contention of the petitioners that those who have retired prior to 24/08/2009 would be entitled to Non-Practicing Allowance as per Government order dated 01/02/2003 till 24/08/2009, when the rates were revised. Subsequently they would be entitled to the rate as fixed by the Government order dated 24/08/2009, meaning thereby that they cannot claim any arrears for revision of its prior to 24/08/2009. In the case of **V. Kasturi Vs. Managing Director, State Bank of India, Bombay and Anr (1998) 8 SCC 30 .** Ahmadi, J.,speaking for the Court in the aforesaid decision highlighted the observations in Nakara's case found at page 333 para 46 to the following effect:

> *".... the pension will have to be recomputed in the light of the formula enacted in the liberalised pension scheme and effective from the date the revised scheme comes into force. And beware that it is not a new scheme, it is only a revision of existing scheme. It is not a new retrial benefit. It is an upward revision of an existing benefit. If it was a wholly new concept, a new retrial benefit, one could have appreciated an argument that those who had already retired could not expect it."*

With regard to the extending the revision of the pension scheme it was held:-

> ***23.****However, if an employee at the time of his retirement is not eligible for earning pension and stands outside the class of pensioners, if subsequently by amendment of the relevant pension rules any beneficial umbrella of pension scheme is extended to cover a new class of pensioners and when such a subsequent scheme comes into force, the erstwhile non-pensioner might have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme. If such new scheme is prospective only, old retirees non-pensioners cannot get the benefit of such a scheme even if they survive such new scheme. They will remain outside its sweep. The decisions of this Court covering such second category of cases are:Commander, Head Quarterv.Capt. Biplabendra Chanda[(1997) 1 SCC 208 : 1997 SCC (L&S) 444] andGovt. of T.N.v.K. Jayaraman[(1997) 9 SCC 606 : 1997 SCC (L&S) 1208] and others to which we have made a reference earlier. If the claimant for pension benefits satisfactorily brings his case within the first category of cases, he would be entitled to get the additional benefits of pension computation even if he might have retired prior to the enforcement of such additional beneficial provisions. But if on the other hand, the case of a retired employee falls in the second category, the fact that he retired prior to the relevant date of the coming into operation of the new scheme would disentitle him from getting such a new benefit.*

55. To make it abundantly clear the prospective operation of such Government orders only means that the revised rates are applicable from that particular day onwards, and no arrears can be claimed on the basis of the revised rates prior to the said date. It is also further to clarify that prospective application has no correlation to the eligibility of claiming Non-Practicing Allowance. As discussed above there is no quarrel about their right to receive Non-Practicing Allowance, as the petitioners are regularly being paid pension as revised by the State Government from time to time. The allowances are also revised by the State Government from time to time looking into various factors including the cost index of living. Similarly, the Non-Practicing Allowance has been constantly revised since 1983, and it has always been co-related with the scale of pay an even though prior to 24/08/2009 it was on a slab basis, but still it was roughly a particular

percentage of the basic salary which is clearly discernible on a plain reading of the aforesaid Government orders. The Government order dated 24/08/2009 also revised the rate of Non-Practicing Allowance and made it 25% of the basic salary. Apart from the revision of the rates in the said Government order we could not find any such tectonic shift in the policy with regard to payment of Non-Practicing Allowance which the State claims has led to create a watershed between the persons retiring prior to 24/08/2009 and those retiring subsequently, nor any such provision could be demonstrated by the State. This court is not impressed by the argument of the State that the petitioners will only be entitled to same allowances as well being paid to them at the time of retirement, without any revision of rates. The interpretation adopted by the State is clearly erroneous and arbitrary.

Retrospective application of impugned Government Order

It has been submitted on behalf of petitioners that in exercise of delegated power the Government could not have fix the rates of Non-Practicing Allowance retrospectively, and therefore on this score also the impugned orders are without jurisdiction, illegal and arbitrary. As has already been discussed above the rules of 1983 were made in exercise of powers under Article 309 of the Constitution of India, and the power to fix the rates was delegated to the State Government. The impugned orders have been passed in exercise of the said delegated power under the rules of 1983. The question which arises for our consideration is as to whether in exercise of delegated power, the State Government could prescribe the rates retrospectively? The law in this regard has been considered by the Hon'ble Apex Court in the case of***State of Rajasthan v.Basant Agrotech (India) Ltd.*****, (2013) 15 SCC 1**

> ***21.****There is no dispute over the fact that the legislature can make a law retrospectively or prospectively subject to justifiability and acceptability within the constitutional parameters. A subordinate legislation can be given retrospective effect if a power in this behalf is contained in the principal Act. In this regard we may refer with profit to the decision in* ***Mahabir Veg-***

etable Oils (P) Ltd. v. State of Haryana *(2006) 3 SCC 620, wherein it has been held that: (SCC p. 633, paras 41-42)*

"41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.

42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. (See West v. Gwynne [(1911) 2 Ch 1 : 104 LT 759 (CA)] .)"

22. *In* ***MRF Ltd. v. CST*** *[(2006) 8 SCC 702] the question arose whether under Section 10(3) of the Kerala General Sales Tax Act, 1963 power was conferred on the Government to issue a notification retrospectively. This Court approved the view expressed by the Kerala High Court in* ***M.M. Nagalingam Nadar Sons v. State of Kerala*** *[(1993) 91 STC 61 (Ker)] , wherein it has been stated that in issuing notifications under Section 10, the Government exercises only delegated powers while the legislature has plenary powers to legislate prospectively and retrospectively, a delegated authority like the Government acting under the powers conferred on it by the enactment concerned, can exercise only those powers which are specifically conferred. In the absence of such conferment of power the Government, the delegated authority, has no power to issue a notification with retrospective effect.*

23. *In* ***M.D. University v. Jahan Singh*** *[(2007) 5 SCC 77 : (2007) 2 SCC (L&S) 118] it has been clearly laid down that (SCC p. 83, para 19) in the absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect.*

24. *In Ahmedabad* ***Urban Development Authority v. Sharadkumar Jayanti-kumar Pasawalla*** *[(1992) 3 SCC 285 : AIR 1992 SC 2038] a three-Judge Bench has ruled thus: (SCC p. 292, para 7)*

"7. ... in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it

under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power."

25. *On a perusal of the aforesaid authorities there can be no scintilla of doubt that if the power has been conferred under the main Act by the legislature, the State Government or the delegated authority can issue a notification within the said parameters. In the case at hand, the High Court interpreting Section 16 has opined that such a power has not been conferred on the State Government to issue a notification retrospectively and, therefore, it can only apply with prospective effect.*

26. *Dr Manish Singhvi, learned counsel appearing for the State, has submitted that wherever a statutory power is conferred, there is no limitation with regard to exercise of that power and the same could be exercised from time to time and even if the words "time to time" are absent in the statute, the power conferred under the Act could be exercised all over again and there is no limitation to the number of times the power is exercised and if the power is exercised once, it cannot be stated that the power stands exhausted. It is his submission that the administrative power as well as quasi-legislative power could be exercised any number of times and this principle is embodied under Section 21 of the General Clauses Act. The learned counsel would further contend that even if the words "time to time" would not have been there in Section 16 of the Act, the power could be exercised any number of times. To bolster his submissions, he has commended us to the decisions in* ***A. Thangal Kunju Musaliar v. M. Venkatachalam Potti [A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, AIR 1956 SC 246] , D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala [D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala, (1980) 2 SCC 410] , Bansidhar v. State of Rajasthan [Bansidhar v. State of Rajasthan, (1989) 2 SCC 557] and State of M.P. v. Tikamdas [State of M.P. v. Tikamdas, (1975) 2 SCC 100 : 1975 SCC (Tax) 310]*** *.*

47. *After so stating the learned Judges analysed the scope of Section 21 of the General Clauses Act and opined that Section 21 embodies a rule of construction and the nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification, etc. Thereafter, the Court enumerated the principle thus: (****Shree Sidhbali Steels Ltd. Case [Shree Sidhbali Steels Ltd. v. State of U.P****., (2011) 3 SCC 193] , SCC p. 209, para 38)*

"38. ... there is no manner of doubt that the exercise of power to make subordinate legislation includes the power to rescind the same. This is made clear by Section 21. On that anal-

ogy an administrative decision is revocable while a judicial decision is not revocable except in special circumstances. Exercise of power of a subordinate legislation will be prospective and cannot be retrospective unless the statute authorises such an exercise expressly or by necessary implication."

48. *Analysing further the learned Judges in* ***Sidhbali Steels case [Shree Sidhbali Steels Ltd. v. State of U.P****., (2011) 3 SCC 193] opined that by virtue of Sections 14 and 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, such power can be exercised from time to time and carries with it the power to withdraw, modify, amend or cancel the notifications earlier issued, to be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. It would be too narrow a view to accept that chargeability once fixed cannot be altered. Since the charging provision in the Electricity (Supply) Act, 1948 is subject to the State Government's power to issue notification under Section 49 of the Act granting rebate, the State Government, in view of Section 21 of the General Clauses Act, could always withdraw, rescind, add to or modify an exemption notification. No industry could claim as of right that the Government should exercise its power under Section 49 and offer rebate and it is for the Government to decide whether the conditions were such that rebate should be granted or not. The aforesaid authority clearly lays down that the power conferred can be exercised in the context of the words "from time to time" as used in the Act or in aid of the General Clauses Act.*

49. *At this juncture, we may fruitfully refer to the meaning given to the words "from time to time" in certain dictionaries and the description made in certain other texts. In Words and Phrases, Vol. 17-A, 1974, "from time to time" has been enumerated in various contexts. We may think it appropriate to reproduce certain contexts which are useful in the present case:*

"The phrase 'from time to time' means as occasion may arise, at intervals, now and then occasionally. Florey v. Meeker [240 P 2d 1177 : 194 Or 257 (1952)] , P 2d at p. 1190.

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In constitutional amendment, authorizing legislature to alter salaries of named county officers 'from time to time', the quoted phrase does not mean from 'term to term'. Almon v. Morgan County [16 So 2d 511 : 245 Ala 241 (1944)] , So 2d at p. 514.

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The phrase 'from time to time', as used in the Constitution, authorizing the legislature to increase the number of Judges of

the Supreme Court from time to time, means occasionally; that is, as the occasion requires, and therefore the words cannot be held to mean that the legislature may not decrease the number of Judges after an increase thereof. State v. McBride [70 P 25 : 29 Wash 335 (1902)] , P at p. 27.

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The Century Dictionary defines the phrase 'from time to time' to mean 'occasionally'; and the Universal Dictionary defines 'from time to time' to mean, 'at intervals; now and then'. The phrase is used in such meaning in Acts 1898, c. 123, para 95, which directs the police commissioners of Baltimore, at the request of the park commissioners, to detail from time to time members of regular police force for preservation of order in the parks. Upshur v. Mayor & City Council of Baltimore [51 A 953 : 94 Md 743 (1902)] , A at p. 955.

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The County Board of Supervisors had no authority to alter an election precinct in September, under statute providing that Board may, from time to time, change the boundaries of precincts and providing that changes might be made at regular or special meeting in July, since the two provisions were in pari materia and should be construed together in the light of all the provisions of the statute, the words 'from time to time' meaning 'at times to recur', and not 'at any time'. Laws 1885, p. 193, para 29, Laws 1871-72, p. 380, para 30, S.H.A. ch. 46, paras 29, 30. County Board of Union County v. Short [77 Ill App 448 (1898)] ."

50. *In The Law Lexicon, The Encyclopedic Law Dictionary (2nd Edn., 1997, p. 764) the words have been conferred the following meaning:*

"From time to time.— ... 'as occasion may arise'....

The words 'from time to time' mean that an adjournment may be made as and when the occasion requires and they will not mean adjournment from one fixed day to another fixed day. ...

'The words "from time to time" are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction.' The meaning of the words 'from time to time' is that after once acting the donee of the power may act again; and either independently of, or by adding to, or taking from, or reversing altogether, his previous act."

> ***51.*** *In Black's Law Dictionary (5th Edn., p. 601), it has been defined as follows:*
> *"From time to time.—Occasionally, at intervals, now and then."*
> ***52.*** *In Stroud's Judicial Dictionary (5th Edn., Vol. 2, p. 1071), it has been stated as follows:*
> *"From time to time.— ... 'as occasion may arise' (as per William, J., Bryan v. Arthur [(1839) 11 Ad & E 108 : 113 ER 354] Ad & E at p. 117)."*
> ***53.*** *Thus, the conspectus of authorities and the meaning bestowed in the common parlance admit no room of doubt that the words "from time to time" have a futuristic tenor and they do not have the etymological potentiality to operate from a previous date. The use of the said words in Section 16 of the Act cannot be said to have conferred the jurisdiction on the State Government or delegate to issue a notification in respect of the rate with retrospective effect. Such an interpretation does not flow from the statute which is the source of power. Therefore, the notification as far as it covers the period prior to the date of publication of the notification in the Official Gazette is really a transgression of the statutory postulate. Thus analysed, we find that the view expressed by the High Court on this score is absolutely flawless and we concur with the same. We may reiterate for the sake of clarity that we have not adverted to the defensibility of the analysis from other spectrums which are founded on the principles set forth in Kesoram case [**State of W.B. v. Kesoram Industries Ltd**., (2004) 10 SCC 201] as the matter has been referred to a larger Bench and the lis in these appeals fundamentally pertains to the retrospective applicability of the notification issued by the State Government as regards the rate of cess on the major mineral i.e. rock phosphate.*

56. Undoubtedly the Government was exercising its delegated power under Rule 4 of the rules of 1983, which provided that the State Government could fix the rates of Non-Practicing Allowance from time to time. The impugned Government order dated 04/09/2020 having fixed the rates of Non-Practicing Allowance with regard to the petitioners retrospectively, with effect from 24/08/2009, which is impermissible as per the law laid down by the Apex court in the aforesaid cases discussed herein. The impugned Government order purportedly clarifying the earlier G.O dated 09/08/2019 provided that the petitioners would only be entitled to Non-Practicing Allowance which they were receiving at the time of their retirement. In the meanwhile, the petitioners have received enhanced amount of Non-

Practicing Allowance, which is also sought to be recovered by the impugned order. The impugned Government order has the effect of refixing the rates with effect from 24/08/2009, therefore is clearly without jurisdiction and arbitrary. Consequently, the Government order dated 04/09/2020 is clearly without authority illegal and arbitrary.

57. We also take notice of clause 3 of the Government order dated 14/07/2020 which states that from 24/08/2009 to 31/12/2015 the persons having retired prior to 24/08/2009 will be entitled to the same amount of Non-Practicing Allowance which they were receiving at the time of retirement. This clause clearly indicates that there was no Government order, or any decision of the Government prior to 14/07/2020 not to revise the rate of Non-Practicing Allowance with regard to the Government doctors who retired prior to 24/08/2009. This retrospective dis-entitlement of Non-Practicing Allowance is clearly without jurisdiction, illegal, arbitrary and clearly violates all canons of reasonableness. Just because the Government is vested the power to decide upon the "rate" of Non-Practicing Allowance, and the action of the Government to fix rates, though plenary, has to be exercised within the prescribed sphere, in accordance with law, rules and regulations in this regard and not in ignorance of the same. The rules of 1983 entitle the Government to fix the rate of Non-Practicing Allowance from time to time, but there is no statutory provision enabling the Government to give retrospectivity effect to such determination. The rules of 1983 do not contain any provision enabling the State Government while exercising its power under rule 4 to fix the rates, to make them applicable retrospectively. This fixation of rate with regard to the petitioners has retrospective application, and therefore, beyond the mandate of the State Government under Rule 4 of the Rules of 1983, and contrary to the law laid down by the Apex Court in the case of ***State of Rajasthan v. Basant Agrotech (India) Ltd.*****, (2013) 15 SCC 1**. Therefore, without there being any enabling provision in this regard in the rules of 1983, the impugned order specially clause 3 of Government order dated 04/09/2020 is without jurisdiction, illegal and arbitrary.

Colourable exercise of Power

58. The impugned order dated 14/07/2019 has been challenged in one set of the bunch of petitions before us, and an interim order was passed on 24/08/2020 where the operation and implementation of the said Government order along with the consequential recovery order dated 16/07/2020 was stayed. Similar interim orders were followed in other writ petitions forming part of this bunch where the Government order dated 14/07/1990 and the consequential recovery orders were stayed, and the State Government was asked to file its response.

59. The State Government proceeded to pass yet another Government order dated 04/09/2020 stating that there was some error in the earlier Government order dated 09/08/2019 and provided that in clause 4(ii)(a) therein shall be read to the effect that those retired Government doctors who at the time of retirement were receiving Non-Practising Allowance at the rate of 25% would be entitled to the revised rate of 20% with effect from 09/03/2019 while as per clause 4(ii)(b) which is with regard to the petitioners who were getting a fixed amount of Non-Practicing Allowance at the time of the retirement, now provides that from 09/03/2019 they will be entitled to the same amount which they were receiving at the time of the retirement, and it further clarifies that such person's will not be entitled to any revision of the rates of the Non-Practicing Allowance.

60. It has been vehemently urged by the petitioners, that when the entire controversy regarding entitlement of payment of Non-Practicing Allowance was sub judice before this Court, and the interim order dated 24/08/2020 had, been passed staying the Government order dated 14/07/2020, then passing of Government order dated 04/09/2020 on the same subject matter was clearly in conflict and contrary to the interim order of this Court and impermissible and even amounts to contempt of the orders of this Court.

61. A second bunch of writ petitions have been filed assailing the validity of the Government order dated 04/09/2020, and this Court being prima facie satisfied about the illegality, has stayed the operation of the said, order.

62. The issue to be determined by this Court is as to whether the State Government can pass a Government order to put into effect an earlier Government order which has been stayed by judicial order. This issue has been discussed in detail in various judgements of the Apex court, the leading being ***Madan Mohan Pathak v. Union of India (1978) 2 SCC 50*** it was observed by Bhagwati J., speaking also for Iyer and Desai., JJ

> *The attempt made to supersede the settlements, in so far as they related to the payment of bonus, by enacting the Life Insurance Corporation (Modification of Settlement) Act 1976 failed, firstly because the Act was held to violate the provisions of Article 31(2) of the Constitution and secondly because the Act could not have retrospective effect so as to absolve the Life Insurance Corporation from obeying the writ of mandamus issued by the Calcutta High Court, which had become final and binding on the parties.*

63. If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed. In **Goa Foundation v. State of Goa (2016) 6 SCC 602,** the Supreme Court held:

> *"24…The power to invalidate a legislative or executive act lies with the Court. A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers. However, the legislature would be competent to pass an amending or a validating act, if deemed fit, with retrospective effect removing the basis of the decision of the Court. Even in such a situation the courts may not approve a retrospective deprivation of accrued rights arising from a judgment by means of a subsequent legislation (1978) 2 SCC 50 : 1978 SCC (L&S) 103]). However, where the Court's judgment is purely declaratory, the courts will lean in support of the legislative power to remove the basis of a court judgment even retrospectively, paving the way for a restoration of the status quo ante. Though the consequence may appear to be an exercise to overcome the judicial pronouncement it is so only at first blush; a closer scrutiny would confer legitimacy on such an exercise as the same is a normal adjunct of the legislative power. The whole exercise is one of viewing the different spheres of jurisdiction exercised by the two bodies i.e.*

the judiciary and the legislature. The balancing act, delicate as it is, to the constitutional scheme is guided by the well-defined values which have found succinct manifestation in the views of this Court in Bakhtawar Trust v. M.D. Narayan, (2003) 5 SCC 298."

64. In the aforesaid judgements the law has been clearly spelled out by the Apex Court. The judicial pronouncements by court of competent jurisdiction cannot be set to naught by the action of the legislature or executive as it would amount to an encroachment on the judicial power. It is noticed that the rules of 1983 had delegated to the Government the power to prescribe the rates of Non-Practicing Allowance from time to time. In exercise of the delegated power vide Government order dated 19/03/2019 the recommendation of the 7th Pay Commission were approved and were given effect by Government order dated 19/08/2019. The first impugned Government order dated 14/07/2020 in its recital stated that the same was being issued for re-fixing the Non-Practicing Allowance with regard to persons having retired prior to 24/08/2009.

65. In clause 2 of the said Government order it was specifically provided that with regard to the Government doctors who had retired prior to 24/08/2009, will be entitled to receive the same amount of Non-Practicing Allowance which they were receiving just prior to their retirement.

66. On the challenge being made to the said Government order in the instant writ petition an interim order was passed on 24/08/2020 whereby the order dated 14/07/2020 along with the consequential recovery order dated 16/07/2020 was stayed with the direction not to recover the amount already paid to the petitioners as Non-Practicing Allowance.

67. The second impugned Government order dated 04/09/2020 was passed without making any reference to the interim order of this court and purporting to have been made in exercise of rule 4 of the rules of 1983 and to remove the error which had crept in the earlier Government order dated 09/08/2019. It provided that those Government doctors who just prior to their retirement were receiving a fixed amount as Non-Practicing

Allowance will continue to receive Non-Practicing Allowance at the same rate which they were receiving at the time of the retirement.

68. Comparing both the impugned Government orders it is noticed that they provide for the same entitlement regarding the petitioners who retired prior to 24/08/2009 and both the impugned Government orders are to the effect that the petitioners would be receiving the same amount of Non-Practicing Allowance which they were receiving at the time of the retirement, without any benefit of revision.

69. In the aforesaid circumstances there cannot be any doubt whatsoever that the Government order dated 04/09/2020 is nothing but a repetition of the earlier Government order dated 14/08/2020. The respondents could not point out any difference in both the Government orders, with regard to its application to the petitioners and also with regard to their entitlement of Non-Practicing Allowance. Such an exercise of power as has been done by the State in the present case, cannot be said to be a legitimate in exercise of powers vested in clause 4 of the rules of 1983, and is arbitrary and consequently violative of Article 14 of the Constitution of India.

70. The law in this regard has been considered by the Hon'ble Apex Court in the case of ***State of Madhya Pradesh & Ors. V. Yogendra Shrivastava (2010) 12 SCC 538.***

> *12. It is no doubt true that Rules under Article 309 can be made so as to operate with retrospective effect. But it is well settled that rights and benefits which have already been earned or acquired under the existing rules cannot be taken away by amending the rules with retrospective effect. [See : N.C. Singhal vs. Director General, Armed Forces Medical Services – 1972 (4) SCC 765; K. C. Arora vs. State of Haryana – 1984 (3) SCC 281; and T.R. Kapoor vs. State of Haryana – 1986 Supp. SCC 584]. Therefore, it has to be held that while the amendment, even if it is to be considered as otherwise valid, cannot affect the rights and benefits which had accrued to the employees under the unamended rules. The right to NPA @ 25% of the*

pay, having accrued to the respondents under the unamended Rules, it follows that respondents–employees will be entitled to Non-Practising Allowance @ 25% of their pay upto 20.5.2003.

71. The respondents have relied upon the judgement of the Apex court in the case of **Haryana Financial Corporation and Another vs Jagdamba Oil Mills and Another (2002) 3 SCC 496,** specially paragraph nos. 10 and 11, where the limits of judicial review have been delineated, and has been observed that the Court's while scrutinizing an administrative decision should not substitute its discretion by the discretion of the administrative authority as if it were sitting in appeal. There is no quarrel with the proposition laid out by the Apex court in this regard, but the same has no application to the facts of the present case. The challenge in the present set of petitions are two Government orders passed in exercise of delegated powers under the Rules of 1983, where the State Government has prescribed the rates of Non-Practicing Allowance, which was a purely administrative exercise, and also this Court is not called upon to give its opinion about the quantum of Non-Practicing Allowance but only to the manner of exercise of power whereby a certain class of pensioners has been deprived of an allowance retrospectively and hence the said judgement is of no assistance in the present case.

72. Considering the rival submissions it is seen that the G.O dated 04/09/2020 has the effect of depriving the petitioners of their entitlement to the revised rate of Non-Practicing Allowance. The Government order dated 04/09/2020 is clearly a device or a mechanism used by the respondents to circumvent the interim order of this Court dated 24/08/2020 by which the Government orders dated 14/07/2020 and 16/07/2020 were stayed. In case the State was aggrieved by the interim order dated 24/08/2020, it was always open for them to move an application for vacation of the stay, or to move a special appeal, or approach the Supreme Court. The Government does not have any power to override a judicial order by executive fiat. The demarcation of power has clearly been delineated in the Constitution where the power to declare a legislative or executive act to be unconstitutional is vested only with the judiciary. Once there is a judicial opinion, even if it is in

form of an interim order, the Executive cannot be allowed to be override the said order, and in case the same is done it would amount to transgression of their power, and such an action is liable to be set aside as being without jurisdiction and authority. The impugned order dated 04/09/2020 is clearly illegal and arbitrary as it has been passed in the teeth of the interim orders of this Court dated 24/08/2020.

Reasonable Classification

73. This Court is called upon to test the validity of the two Government orders dated 14/07/2020 and 04/09/2020 apart from the consequential orders for recovery of the amount of Non-Practicing Allowance paid as per Government order dated 19/08/2019 and a further direction about their entitlement for payment of Non-Practicing Allowance at the rates which has been revised from time to time.

74. The discrimination meted to the petitioners whereby they have been entitled to receive Non-Practicing Allowance on fixed slab basis, while others who have retired post 24/08/2009 are entitled to the revision of the same, is under challenge on the ground that there is no discernible criteria which can distinguish or differentiate between Government doctors who have retired prior to 24/08/2009 and those who have retired post 24/08/2009, as well as the same being illegal and arbitrary, apart from other grounds including not being afforded an opportunity of hearing and also the manner in which such a decision was taken.

75. The watershed which has been created in the present case is the date 24/08/2009, which is the date of issuance of the Government order implementing the recommendations of the 6th Pay commission, whereby the Non-Practicing Allowance admissible in case of the Government doctors was enhanced of 25% basic salary plus Grade Pay. It further provided that the Non-Practicing Allowance shall form part of the salary even for the purposes of retirement benefits, and the revised rates would be applicable with immediate effect.

76. Prior to issuance of the aforesaid Government order dated 24/08/2009 the Non-Practicing Allowance was being paid at fixed rates under a slab system, and accordingly the same was made admissible to all persons including the petitioners, while post 24/08/2009 implementing the recommendations of the 6th Pay Commission, a fixed percentage of the basic salary as the Non-Practicing Allowance was provided rather than quantifying the same by a fixed amount as had been done earlier.

77. The Learned Additional Advocate General has submitted on behalf of State Government that there are in fact two classes of pensioners, one who are receiving Non-Practicing Allowance at the fixed rates retired prior to 24/08/2009 while others have retired 24/08/2009 and consequently the difference between the two classes is real and apparent and hence both different classes have been treated differently by means of the impugned Government orders.

78. Considering the above submission, this court has to consider whether the classification so made by the impugned Government order is based on some intelligible differentiate justifying the creation of the classes and the raison d'être the which can distinguish the persons included in one class from another. The only consideration for classification which comes forth, as per the State, is the date of retirement. Persons retiring prior to 24/08/2009 have been clubbed into one class, and they would be entitled to Non-Practicing Allowance at the rate they were receiving at the time of the retirement and will not be entitled to any enhancements or revision, while the persons retiring after 24/08/2009 would form the other class, and they would be entitled to the Non-Practicing Allowance at the enhanced rate of 20%. In order to considered this aspect it would be fruitful to advert to extracts of judgement in the case of **DS Nakara *v. Union of India*, (1983) 1 SCC 305 : 1983 SCC (L&S) 145 at page 328**

> ***38.*** *What then is the purpose in prescribing the specified date vertically dividing the pensioners between those who retired prior to the specified date and those who retire subsequent to that date? That poses the further question, why was the pension*

scheme liberalised? What necessitated liberalisation of the pension scheme?

40. *Therefore, let us proceed to examine whether there was any rationale behind the eligibility qualification. The learned Attorney-General contended that the scheme is one whole and that the date is an integral part of the scheme and the Government would have never enforced the scheme devoid of the date and the date is not severable from the scheme as a whole. Contended the learned Attorney-General that the Court does not take upon itself the function of legislation for persons, things or situations omitted by the legislature. It was said that when the legislature has expressly defined the class with clarity and precision to which the legislation applies, it would be outside the judicial function to enlarge the class and to do so is not to interpret but to legislate which is the forbidden field. Alternatively it was also contended that where a larger class comprising two smaller classes is covered by a legislation of which one part is constitutional, the court examines whether the legislation must be invalidated as a whole or only in respect of the unconstitutional part. It was also said that severance always cuts down the scope of legislation but can never enlarge it and in the present case the scheme as it stands would not cover pensioners such as the petitioners and if by severance an attempt is made to include them in the scheme it is not cutting down the class or the scope but enlarge the ambit of the scheme which is impermissible even under the doctrine of severability. In this context it was lastly submitted that there is not a single case in India or elsewhere where the court has included some category within the scope of provisions of a law to maintain its constitutionality.*

42. *If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of*

revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. 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. If the liberalisation was considered necessary for augmenting social security in old age to Government servants then those who, retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be subject to ceiling of Rs 8100 p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs 12,000 p.a. and average emolument will be computed on the basis of last 10 months' average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the Liberalised Pension Scheme but it is counter-productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as

the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours' difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Article 14.

79. Further, considering the aspect of reasonable classification, the one other condition for testing the law on the touchstone of Article 14 is the intelligible differentia which distinguishes persons included in the class with the persons excluded from the same.

80. Undoubtedly the Government has a right to treat different classes differently, and to that extent classification is permissible, but the classes so made should be characterised by certain distinction, and the distinction in the two classes should be based on differential attributes which would have just and rational having nexus to the objects sought to be achieved. The law in this regard was enunciated by the apex court in the case of Special Courts Bill (1979)1SCC380, and has been reiterated in the case of **Manish Kumar Vs Union of India (2021) 5 SCC 1:-**

"In the decision of this Court in In Re The Special Courts Bill, 1978, a bench of seven learned judges of this Court laid down certain propositions. We need only allude to those propositions which are apposite for deciding the fate of these cases before us:

"(1) The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

(2) The State, in the exercise of its Governmental power, has of necessity to make laws operating differently on different

groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely,

(1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and

(2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges This fixation of rate with regard to the petitioners has retrospective application, and therefore, beyond the mandate of the State Government under Rule 4 of the Rules of 1983, and contrary to the law laid down by the Apex Court in the case of ***State of Rajasthan v. Basant Agrotech (India) Ltd., (2013) 15 SCC 1****. Therefore, without there being any enabling provision in this regard in the rules of 1983, the impugned order specially clause 3 of Government order dated 04/09/2020 is without jurisdiction, illegal and arbitrary.or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.*

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(11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

(12) Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

(13) A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for

relief and for defence with like protection and without discrimination."

80a. The Supreme Court in the case of ***All Manipur Pensioners Assn. v. State of Manipur*, (2020) 14 SCC 625** in similar circumstances held as under:-

> **7.9.** *In view of the above, we are satisfied that none of the judgments, relied upon by the learned Senior Advocate for the respondent State, has any bearing to the controversy in hand. The Division Bench of the High Court has clearly erred in not appreciating and/or considering the distinguishable facts in Hari Ram Gupta v. State of U.P., (1998) 6 SCC 328; T.N. Electricity Board v. R. Veerasamy, (1999) 3 SCC 414 ; Amar Nath Goyal [State of Punjab v. Amar Nath Goyal, (2005) 6 SCC 754 : 2005 SCC (L&S) 910] ; P.N. Menon [Union of India v. P.N. Menon, (1994) 4 SCC 68 : 1994 SCC (L&S) 860] and Amrit Lal Gandhi [State of Rajasthan v. Amrit Lal Gandhi, (1997) 2 SCC 342 : 1997 SCC (L&S) 512] .*
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> ***8.*** *Even otherwise on merits also, we are of the firm opinion that there is no valid justification to create two classes viz. one who retired pre-1996 and another who retired post-1996, for the purpose of grant of revised pension. In our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the pensioners form one class who are entitled to pension as per the pension rules. Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid classification. However, a valid classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Therefore, whenever a cut-off date (as in the present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification or valid discrimination therefore must necessarily be satisfied.*

8.1. *In the present case, the classification in question has no reasonable nexus to the objective sought to be achieved while revising the pension. As observed hereinabove, the object and purpose for revising the pension is due to the increase in the cost of living. All the pensioners form a single class and therefore such a classification for the purpose of grant of revised pension is unreasonable, arbitrary, discriminatory and violative of Article 14 of the Constitution of India. The State cannot arbitrarily pick and choose from amongst similarly situated persons, a cut-off date for extension of benefits especially pensionary benefits. There has to be a classification founded on some rational principle when similarly situated class is differentiated for grant of any benefit.*

8.2. *As observed herein above, and even it is not in dispute that as such a decision has been taken by the State Government to revise the pension keeping in mind the increase in the cost of living. Increase in the cost of living would affect all the pensioners irrespective of whether they have retired pre-1996 or post-1996. As observed hereinabove, all the pensioners belong to one class. Therefore, by such a classification/cut-off date the equals are treated as unequals and therefore such a classification which has no nexus with the object and purpose of revision of pension is unreasonable, discriminatory and arbitrary and therefore the said classification was rightly set aside by the learned Single Judge of the High Court. At this stage, it is required to be observed that whenever a new benefit is granted and/or new scheme is introduced, it might be possible for the State to provide a cut-off date taking into consideration its financial resources. But the same shall not be applicable with respect to one and single class of persons, the benefit to be given to the one class of persons, who are already otherwise getting the benefits and the question is with respect to revision.*

9. *In view of the above and for the reasons stated above, we are of the opinion that the controversy/issue in the present appeal is squarely covered by the decision of this Court in D.S. Nakara [D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145] . The decision of this Court in D.S. Nakara [D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145] shall be applicable with full force to the facts of the case on hand. The Division Bench of the High Court has clearly erred in not following the decision of this Court in D.S. Nakara [D.S. Nakara v. Union of India, (1983) 1 SCC 305 : 1983 SCC (L&S) 145] and has clearly erred in reversing the judgment and order of the learned Single Judge. The impugned judgment and order [State of Manipur v. All Manipur Pensioners' Assn., 2016 SCC OnLine Mani 22] passed by*

the Division Bench is not sustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. The judgment and order [All Manipur Pensioners' Assn. v. State of Manipur, 2005 SCC OnLine Gau 118 : (2005) 3 Gau LR 384] passed by the learned Single Judge is hereby restored and it is held that all the pensioners, irrespective of their date of retirement viz. pre-1996 retirees shall be entitled to revision in pension on a par with those pensioners who retired post-1996. The arrears be paid to the respective pensioners within a period of three months from today.

81. Considering the legal principles as enshrined in the renditions of the Apex court we find that the Non-Practicing Allowance was conceived and brought into effect by the U.P Doctors (Allopathic) Restriction on Private Practice Rules, 1983, where rule 3 provided for restriction on private practice, and consequently by rule 4 which stated that in lieu of private practice, Government doctor would be entitled to an amount by way of non-practicing pay or allowance or both, as the Government may specify from time to time. Giving effect to the rule 4 of 1983, Government order was issued on 31/08/1989 providing in clause 2 that Non-Practicing Allowance would form part of salary for the purposes of post-retirement benefits apart from other benefits stated therein. This aspect, character and nature of the Non-Practicing Allowance was reiterated in the Government order dated 01/02/2003 where rates of the Non-Practicing Allowance were revised. The Non-Practicing Allowance therefore was admissible to the Government doctors who were in service as a measure of compensation for restriction placed on their private practice, and also the same was to continue after retirement and would form part of the pensionary benefits.

82. It is also clear from the rules read along with the Government order issued from time to time, that it was never envisaged that serving and retired Government doctors will be treated differently for the purpose of payment of the Non-Practicing Allowance. Equally discernible is the fact, that no discrimination was ever conceived or explicitly made in any rule or Government order with regard to disbursement of the Non-Practicing Allowance which may have correlation any with date of retirement or on any other basis whatsoever. All the pensioners(Allopathic Government doctors

including petitioners herein) form one class and are entitled to the same rate of Non-Practicing Allowance as fixed by the Government from time to time. The Government order dated 24/08/2009 does not distinguish between pre and post retirees nor does it create any class in its application for revision of the Non-Practicing Allowance, and therefore the State post facto could not have discovered and created two classes where none existed. After delving into the Government order dated 24/08/2009 we could not discover any intelligible differentia or any point of distinction between the Government doctors who retired prior to 24/08/2009 and those having retired after the said date. The classification sought to be made by the impugned Government orders is bereft of any reason or valid consideration and therefore arbitrary. Government orders which have been issued from time to time in exercise of rule 4 of the rules of 1983, have only approved the revision of the rate of Non-Practicing Allowance in sync with the recommendations of the Central Pay Commission where also no distinction has been made between serving doctors and retired doctors in its application to Non-Practicing Allowance, indicating that there never was any such distinction real or apparent as has been sought to be made as per the impugned orders.

83. The Government orders in our considered opinion having failed the test of reasonable classification and the classification sought to be made on the basis of cut-off date being 24/08/2009 is bereft of reason and also that there is no intelligible differentia between the two classes so created the impugned orders are clearly violative of Article 14 of the Constitution of India.

Government Order to correct the error in earlier Government Order.

84. Examining the recital and content of Government order dated 04/09/2020, whereby, the same has purportedly been issued to "correct the error", also does not inspire confidence but seems to be a vain attempt to introduce a new policy by disguising it as an correction of error. The order dated 04/09/2020 has only recast clauses 4(ii)(a) and (b) as existing in the earlier Government order dated 09/03/2019. Clause 4(ii)(b) is applicable in

case of petitioners whereby person retiring after 24/08/2009 are entitled to the Non-Practicing Allowance at the time which they were receiving immediately prior to the retirement, meaning thereby that they will not be entitled to any increment.

85. In order to test the reason for passing the impugned Government order, we have to examine the recital that the same has been passed to correct the error occurring in the earlier Government order dated 09/03/2019. The Government order dated 09/03/2019 was passed to implement the recommendations of the 7th Central pay Commission, and consequently revise the rates of Non-Practicing Allowance to 20% of the basic salary. The revised rates of Non-Practicing Allowance were extended as provided in clause 3 therein, to all those persons who were receiving Non-Practicing Allowance as per the earlier Government order dated 24/08/2009 or **any other earlier Government order issued from time to time**. The petitioners being fully covered under clause 3 of the said Government order, their pension payment orders were duly revised and modified. It is contended that even otherwise they were receiving Non-Practicing Allowance as per the earlier Government orders dated 31/08/1989 which was subsequently revised by another Government order dated 01/02/2003, and hence the revision was rightfully made even applicable to them.

86. We have also gone through the recommendations of the 7th Central Pay Commission, and we have not been able to find any such classification, nor the same could be pointed by the Counsel for the respondents, from which it could be demonstrated that the 7th Pay commission itself contained any restrictions with regarding to its application in relation to the retired Government doctors. The State Government having approved the recommendations of the 7th Pay Commission in its application to Allopathic Government doctors, and the decision having been implemented and a notification to this effect having been issued, a heavy onus lies on the State Government to show that a decision was taken earlier was erroneous. No such fact has been pleaded or argued pointing out any error and therefore this Court is of the considered opinion, that firstly there was no error,

apparent or otherwise in the Government order dated 09/03/2019 and secondly, there was no occasion to correct the said Government order, which did not contain any deficiency or error and therefore on this score also the order dated 04/09/2020 itself is illegal and arbitrary.

Whether Non-Practicing Allowance is payable to retired Government doctors.

87. It has also been submitted by the State Government that the petitioners who have retired from service are not entitled to the Non-Practicing Allowance as they are not covered by the rules of 1983 and therefore, they cannot claim any rights of the Non-Practicing Allowance. Considering the pleadings as well as submissions of both the parties in this regard, undoubtedly, the petitioners in fact are receiving a fixed amount as Non-Practicing Allowance as a part of their pension. The argument of the State Government seems to be a self-defeating argument in as much as they have themselves admitted that Non-Practicing Allowance is being paid to the petitioners at a fixed rate which they were getting at the time of the retirement. In fact the Government orders dated 31/08/1989 and 01/02/2003 have explicitly extended the benefit of Non-Practicing Allowance to the retired Government doctors which would form part of the pension, and therefore the contention of the respondents that the petitioners are not entitled to Non-Practicing Allowance because they have retired, is clearly wanting in rationality and reasonableness, and even otherwise is clearly contrary to the Government orders dated 31/08/1989 and 01/02/2003, and is therefore rejected. There is no Government order in existence which has the effect of revoking the aforesaid Government orders dated 31/08/1989 and 01/02/2003 and consequently the arguments of the State opposing the payment of Non-Practicing Allowance on this score to the retired Government doctors fails.

Withdrawal of Non-Practising Allowance without opportunity of hearing

88. The Government order dated 24/08/2009 while enhancing the rate of Non-Practicing Allowance to 25% was ipso facto applicable to serving

Government doctors, as well as to the retired Government doctors in as much as the earlier Government orders dated 31/08/1989 and 01/02/2003 had explicitly extended the benefit of Non-Practicing Allowance to the retired Government doctors.

89. The revision on the rate of Non-Practicing Allowance 25% of the basic salary became a vested right of the pensioners and thus was duly protected as property under Article 300A of the Constitution of India, and they could not be deprived of same without following the procedure established by law. As noticed above, there was no error in the impugned Government orders. Further, when a vested right sought to be taken away, then it is mandatory to provide an opportunity of hearing to the person concerned, in absence of which the action of the State is liable to be set aside as being violative of Principles of natural justice. The petitioners were never afforded any opportunity of hearing before passing of the impugned Government orders, and hence on this ground also the impugned Government order dated 04/09/2020 are arbitrary and violative of Article 14 of the Constitution of India.

90. With the introduction of the Liberalised Pension Schemes which has been adopted by the State of U.P. since 1961 it has always been the objective of the Government that the pension paid to the retired Government servants is a social security in old age who has rendered ceaseless service in their heyday, and the quantum of the pension should be such so as to ensure a decent minimum standards of life, medical aid, freedom from want, freedom from fear and enjoyable leisure, and humility of dependents in old age and it should give them economic security. With these objectives in mind and also taking into account the spirit of the Constitution that we have a socialist state, the Government order the impugned Government orders have been scrutinized.

91. There is no Government order in existence which has the effect of revoking the Government orders dated 31/08/1989 and 01/02/2003 and consequently the arguments of the State opposing the payment of Non-Practising Allowance on this score fails.

92. Another issue which also arises is as to whether any such allowance like Non-Practicing Allowance is liable to remains stagnant over a period of time in its application to petitioners while it is revised from time to time with regard to others similarly situated.

93. As we have already considered above, the Government order dated 24/08/2009 did not distinguish or create any classes of pensioners for the purposes of payment of Non-Practicing Allowance to Government doctors in as much as it merely revised the rates of Non-Practicing Allowance across the board in pursuance to the recommendations of the 6th Pay commission. A careful perusal also reveals that the Government order dated 24/08/2009 was clearly applicable to the petitioners who retired prior to 24/08/2009. There is no reason or justification forthcoming from the State for its nonapplication to the petitioners. It is in fact the executing agency of Government that is, the Department of Pensions, of the State Government which did not extend the benefit of the said Government order to the petitioners and failed to issue revised pension payment orders giving benefit of 25% of the basic pay as Non-Practicing Allowance. The Counter affidavit which has been filed by the pension department is also silent on this aspect. To cover this lapse seems to be the reason for passing of the impugned Government order dated 04/09/2020, so as to justify their action after a lapse of 10 years. Instead of rectifying the mistake the respondent's have compounded the miseries of the retired Government doctors and in other words it amounts to taking advantage of their own wrongs. The basic salaries and all the allowances are constantly being revised upwards by the Government from time to time keeping in view the rising costs which is usually determined by a cost index. Similarly, the Non Practicing Allowance is also being revised from time to time as detailed above, and therefore the petitioners are also entitled for the revised amount of Non Practicing allowance. Their exclusion from revision of the same is therefore arbitrary and illegal.

Financial Constraint

94. It has been submitted by the learned Additional Advocate General that another reason given by the State Government for not revising the rate of

Non-Practicing Allowance to persons who retired prior to 24/08/2009 is financial constraint of the State Government. In support of the contention it has been stated that the impugned Government orders, having been scrutinized by the Finance department and therefore the applicant's cannot claim any enhancement in their Non-Practicing Allowance. Counsel of the petitioner on the other hand have submitted that no material has been placed by the State to indicate or substantiate the stand of financial constraint, in absence of which is such an argument cannot be accepted.

95. Considering the rival submissions it is noticed that the State has a right to take a plea of financial constraints whenever the issue pertaining to release or grant of money is under consideration, but in order to sustain such an objection, the State is duty bound to lay before the court certain material from which it can be gathered that the prayer if allowed would entail a heavy financial burden. On the other hand it is equally correct that the courts can issue a direction to the State to comply with its statutory duties even if the entail a financial burden. The law in this regard is well settled. In **Paschim Banga Khet Mazdoor Samity Vs. State of West Bengal**, **1996 (4) SCC 36** it has been held:-

> *"Para 16- It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. The said observations would apply with equal, if*

not greater, force in the matter of discharge of constitutional obligation of the State has to be kept in view."

3.6 Relying upon the decision of this Court in the case of ***Swaraj Abhiyan v. Union of India****, (2016) 7 SCC 498 (paras 120 to 123), it is submitted that as held by this Court, a plea of financial inability cannot be an excuse for disregarding statutory duties. Reliance is also placed on the decisions of this Court in the cases of* ***Municipal Council, Ratlam v. Vardichan,*** *(1980) 4 SCC 162; and Khatri (2) v. State of Bihar, (1981) 1 SCC 627 and it is submitted that as observed the State may have its financial constraint and its priorities in expenditure, the law does not permit any government to deprive its citizens of constitutional rights on a plea of poverty. It is submitted therefore that the plea taken by the Central Government that the prayer of the petitioner for the payment of ex gratia compensation for loss of life due to Covid-19 pandemic to the aggrieved families is beyond the fiscal affordability may not be accepted. It is submitted that the fiscal affordability/financial constraint cannot be a ground not to fulfil statutory obligation under the DMA 2005 and the constitutional obligation as provided under Article 21 of the Constitution of India.*

96. In the instant case there is no denial of the fact that the Non-Practicing Allowance is admissible to the petitioners and is being paid, it is only the applicability of revised rates which is under question. The claim of the petitioner is based on statutory rules and Government orders where they have been entitled for the same, and in this regard wherever there is budgetary allocation of resources, then it is presumed that the provision has been made for the same, and plea of financial constraint would not be acceptable. The State government being and are duty bound to pay the

statutory dues of the employees cannot avoid its liability citing financial constraint.

97. It is also noticed that whenever a fresh liability is sought to be created on the State then the contours and parameters of examination are different, and usually ,the stand of the State may be accepted as such except when a claim is made on ground of discrimination. Where one class of persons is already receiving the benefit, and the same is sought to be extended to the other class, then the ground of financial constraint cannot inhibit a claim on ground of equal treatment, as the Constitutional Courts are under a mandate to give effect to the equality clause as mandated by Article of the Constitution of India.

98. The respondents have relied upon the Judgment in the case of **State of Punjab vs Amar Nath Goel (2005) 6 SCC 754** in support of their contentions. The said judgment is distinguishable on facts inasmuch as in paragraph no. 28 of the judgment the Apex court came to conclusion that the benefits as claim there in, were not admissible to the petitioners at the time of their retirement. In the present case the Government in 2020 has held the petitioners not to be entitled for revised rate non practicing allowance retrospectively with effect from 2009. The said amount was admittedly paid and duly received by them. We fail to understand as to why this stand of financial constraint was not taken into consideration, if in case it existed, at the time of approving the recommendations of 7th Pay Commission. The rates were duly revised and the enhanced amount was also paid, and no such difficulty was stated. Even in the impugned orders, only ground for revisiting the earlier Government order is “rectification of error”. There is no mention of any financial constraint in the impugned order, and therefore, it is only an afterthought, and on this score fairness on part of the State is clearly lacking. In case there was any financial constraint, then there was no occasion for the State to disburse the revised amount of Non Practicing allowance, which was paid for nearly one year. At this stage, and facts of the present case, the plea of financial constraint his not available to the respondents.

99. Even otherwise, in the present case apart from the averment made in the counter affidavit, there is no material to substantiate the plea raised by the State with regard to financial constraints, and in absence of such material only on the basis of bald assertion this issue cannot be decided in favour of the State, and hence consequently rejected.

Precedentary value of Judgment in case of Dr. Sabhajeet Singh

100. Learned Additional Advocate General while opposing the writ petitions has submitted that the issues canvassed by the petitioners were subject matter of writ petitions nos. 1482 of 2015(SB) and 1239 of 2012(SB) wherein a number of doctors had approached this court seeking benefit of the Government order dated 24/08/2009 and by means of the judgement dated 25/01/2018 the writ petitions were dismissed, and therefore it is contended that the present petition is also liable to be dismissed on the same analogy.

101. The aforesaid writ petitions had been filed seeking a writ of mandamus and following prayer were sought as stated in paragraph 13 of the judgement:-

(i) Issue a writ order or direction in the nature of mandamus commanding the opposite parties to revise the pension of the petitioners counting the element of Non-Practicing Allowance at the rate of 25% of basic pay as the Non-Practicing Allowance is the part and parcel of the basic pay.

(1A) Issue a writ order or direction in the nature of certiorari quashing the clause-III of the Government order dated 24/08/2009 (contained in annexure no. 6 to the writ petition) directing the opposite parties to count the element of Non-Practicing Allowance at least from 01/01/2016, i.e., the date from which the recommendation of the 6th Pay Commission has been accepted by the State of U.P.

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

102. Further, in paragraph 12 of the said judgement it has been stated that “all these petitioners were already retired before the issue of G.O dated 24/08/2009, claiming computation of retiral benefits by taking into

consideration, Non-Practicing Allowance 25% of basic pay with effect from 01/01/2006 made representations to this effect and then filed the present writ petitions.

103. From the aforesaid, it is clear that the court was considering the relief as to whether Non-Practicing Allowance at the rate of 25% of the basic pay with effect from 01/01/2006 is admissible to the petitioners or not. The petitioners herein have sought quashing of the Government orders dated 14/07/2020 and 04/09/2020 whereby they been deprived of the benefit of the revision of Non-Practicing Allowance which was granted to them by means of Government order dated 09/03/2019. The aforesaid case is clearly distinguishable from the instant case on facts in issue in the instant writ petition.

104. Secondly, in paragraph 20 of the judgement the Division Bench came to conclusion that "….. Therefore, argument of creation of two classes is thoroughly misconceived and is no basis whatsoever .**There does not exist any such classification**" while in the present case the petitioners have based their claim on the basis that the impugned Government orders which has explicitly created two classes of pensioners with 24/08/2009 being the cut-off date, and the State Government in the counter affidavit filed in the case of Dr Laxmi Chauhan and others writ petition no. 18259 (SS) of 2020 themselves have admitted in paragraph 35 of the affidavit stating "the decision taken by the State Government and the issuance of the impugned Government order, in no manner could be said to be discriminatory, in fact, the same is based on **reasonable classification** and is not in violation of any principles of law." The issues and facts on the basis of which adjudication of claim of the petitioners has been made in the instant petition are completely different from the facts as existing at the time when the earlier petition was adjudicated, and therefore the said judgment would not be a precedent in the present case.

105. In the present bench of writ petitions apart from challenging the legality and validity of the impugned Government order dated 14/07/2020

and 04/09/2020 the writ of mandamus is being sought directing the respondents to pay Non-Practicing Allowance to the petitioners in pursuance of the Government order dated 09/08/2019, and therefore in terms of the prayer made before this court in the present set of writ petitions the scope of the enquiry is limited to the adjudication of rights of the petitioners with regard to their entitlement to receive Non-Practicing Allowance as per Government order dated 09/08/2019, and therefore the Division bench judgement of this court in the case of Dr Sabhajeet Singh and Others is not directly related to the facts in issue in the present set of petitions, and as considered above is clearly distinguishable and not applicable in the present case.

106. It has also been canvassed on behalf of the petitioners that the impugned recovery orders are illegal and arbitrary inasmuch as the Non-Practicing Allowance was duly fixed by the Government and paid to them to which they were entitled. This entire exercise was done by the State Government without any involvement of the petitioners, and they were duly entitled for the same. Even otherwise the said recovery will cause immense hardship and the petitioners claim protection of the judgement of the Hon'ble Supreme Court in the case of ***State of Punjab v. Rafiq Masih*****, (2015) 4 SCC 334**

> ***18.*** *It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*
>
> *(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).*
>
> *(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.*
>
> *(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
>
> *(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

107. In facts of the present case where we have already held that the petitioners are entitled to the revised amount of Non-Practicing Allowance as per Government order 09/03/2019, then as natural corollary, the consequential recovery orders dated 16/07/2020 are held to be illegal and arbitrary.

108. In light of the discussion made above, all the writ petitions are **allowed** and the impugned orders dated 14/07/2020, 16/07/2020 and 04/09/2020 are quashed, and the petitioners are held to be entitled to Non-Practicing Allowance as revised by the Government order dated 19/08/2019. The amount of Non-Practicing Allowance recovered in pursuance to the impugned Government orders is directed to be refunded along with arrears within a period of three months from today, failing which interest at the rate of 8% per annum will be paid for delay in payment beyond the period of three months. No other point was urged. The questions A to E are answered accordingly.

109. I may put on record an appreciation for my law clerk Mr. Himanshu Mishra, who has ably assisted me in case law research.

(Alok Mathur, J.)

Order Date :- 02.09.2021
Ravi/