

SUPREME COURT OF INDIA

State of M.P.

Vs.

Yogendra Shrivastava

C.A.No.3156 of 2007

(R.V.Raveendran and B. Sudershan Reddy JJ.)

07.10.2009

ORDER

R.V.Raveendran, J.

Delay condoned and leave granted in the SLPs.

1. The question involved in these appeals filed by the State of Madhya Pradesh, relates to the quantum of Non- Practicing Allowance ('NPA' for short) payable to certain categories of Medical Officers belonging to the State Insurance service.

2. The *Madhya Pradesh Employees State Insurance Service (Gazetted) Recruitment Rules, 1981* (in short 'the Rules') framed by the State Government came into force in the year 1982. Rule (5) of the Rules provides that classification of the service, the scales of pay attached thereto and the number of posts included in the service shall be in accordance with the provisions contained in Schedule I thereto. The scales of pay and NPA payable to different categories of Medical Officers, other than the Director of the Service, are extracted below from Schedule I to the Rules:

“S Name of the Posts included in the Scale of pay I.N service o.

2. Dy. Director Rs.680-40-800-50-1000-

3. Superintendent, ESI Hospital EB-50-1150 + NPA @

4. Specialist, ESI Hospital 25% of pay

5. Supervisory Insurance Medical Officer

6. Insurance Medical Officer (Class I) Rs.500-30-680-40-800- EB-50-1150 + NPA @ 25% of pay

7. Insurance Medical Officer/Assistant Rs.425-25-500-30-680- Surgeon EB-40-800-50-900 + Rs.100 pm as ESI Special Allowance + NPA @ 25% of pay Non-Practising Allowance is paid to Medical Officers when private practice by medical officers was prohibited and abolished.”

3. Even though the rules specified that the aforesaid categories of Medical Officers were entitled to NPA linked to their pay (that is 25% of the basic pay), the letters of appointment issued to them specified that the NPA payable to them would be a fixed lump sum approximately equal to 25% of the initial (minimum) pay in the pay scale applicable to them, (as contrasted from a variable linked to the quantum of their pay provided under the Rules). As a result, whenever there were increases in their pay on account of annual increments, NPA was not correspondingly increased so as to maintain it at 25% of basic pay, but continued to be paid at the fixed lump sum rate. The state Government was however revising the fixed lump sum NPA, whenever there was revisions in the pay scales, by issuing executive orders. The respondents in these appeals as also several other medical officers brought this anomaly to the notice of the department and requested that the NPA should be paid to them at 25% of the pay in accordance with the rules, as was done in the case of Medical Officers working in the Public Health and Medical Education departments.

4. As their request was not acceded, the respondents approached the Madhya Pradesh Administrative Tribunal seeking a direction for payment of NPA in accordance with the Rules. They contended that whenever there was an increase in their basic pay, either on account of annual increments in the pay scale or on account of revision of pay scales, there should be corresponding automatic increase in the NPA in terms of the Rules which required payment of "NPA @ 25% of the pay". The Tribunal accepted the contention and allowed their applications and directed the appellant to calculate and pay NPA at the rate of 25% of the pay from the respective dates of their joining service. The State Government filed writ petitions challenging the orders of the Tribunal. The High Court dismissed those petitions, upholding the orders of the Tribunal. The said orders of the High Court are under challenge in these appeals by special leave.

5. It should be noted here that as there was no stay, the state government instructed the Director of Employees State Insurance Services, to give effect to the orders of the Tribunal affirmed by the High Court and pay the respondents NPA @ 25% of their salary from the respective dates of their appointment, subject to the final decision of this Court, with a condition that if the matters were decided in favour of the appellants, recovery of the excess payment would be made.

6. The appellant State also amended the Madhya Pradesh Employees State Insurance Service (Gazetted) Rules 1981 (by notification dated 20.3.2003) and substituted the words "NPA at such rate as may be fixed by state government from time to time by orders issued in this behalf" in place of the words "NPA at 25% of pay" wherever they occurred in the Rules, with retrospective effect from 14.10.1982.

7. In this background, on the contentions raised by the parties, the following three questions arise for our consideration:

“(i) Whether the rates of NPA specified in the letters of appointment and the orders of the department, can prevail over the provisions relating to NPA in the Rules ? (ii) Whether the retrospective amendment of the Rules by notification dated 20.5.2003, can deny the benefit which had accrued under the unamended Rules? (iii) Even if the respondents are held to be entitled to higher NPA as contended by them and as found by the Tribunal and the High Court, whether the financial benefit could be extended to them beyond three years prior to filing of the original applications before the Tribunal.

Re : Question (i)”

8. The appellants contend that the Rules do not contain any specific provision for payment of non- practising allowance. They point out that schedule I to the Rules merely refers to "plus NPA @ 25% of the pay" in the column relating to the pay scale, without defining the term `pay'. It is submitted that when the term `pay' is not defined, it can refer to the minimum or initial pay in the pay-scale, or to each stage in the pay-scale commencing from the initial pay and ending with the maximum pay in the pay-scale. It is contended that the State Government had proceeded on the basis that "25% of the pay" referred to the `25% of initial pay' and had fixed the NPA keeping the said figure in view, by means of executive orders. It is submitted that fixing of a lump sum as NPA, approximately equal to 25% of the initial pay in the applicable pay-scale, by executive orders issued by the Government from time to time, was therefore in consonance with the Rules.

“Alternatively, it was contended that incidental matters relating to number of posts, pay scales and NPA referred to the Schedule to the Rules, were subject to periodical revision/changes and it was common practice to make such revisions/changes, by executive orders instead of adopting the process of amending the rules every time, and that such executive orders were binding on the employees and were never challenged.”

9. The Rules made under Article 309 of the Constitution clearly provided that the concerned employees (medical officers) were entitled to NPA @ 25% of pay, in addition to the pay in the pay scale. In fact, it formed part of the pay scale. Consequently, whatever was the basic pay, 25% thereof had to be paid as NPA. Whenever the benefit of increments in the pay-scale, or revision in pay scale were extended, NPA also got correspondingly increased so that NPA always remained as one fourth of the basic pay. This is the interpretation that has been put forth by the Tribunal and upheld by the High Court and we find no reason to interfere with the same.

10. The contention that the executive orders issued from time to time or the appointment letters issued in accordance with such executive orders will prevail over the Rules cannot be accepted. When there is conflict between the Statutory Rules and executive orders, the

statutory Rules will prevail (See : *K. Dayananda Lal vs. State of Kerala*¹, *T. N. Housing Board vs. N. Balasubramaniun*², *State of Karnataka vs. K.G.S.D. Canteen Employees Welfare Association*³ and *Punjab National Bank vs. Astamija Dash*⁴). Executive orders cannot be made or given effect in violation of what is mandated by the Rules. If appointment letters provides for payment of NPA which is not in consonance with Rules, they can be corrected or set right by Tribunals/courts.

Re : Question No.(ii)

11. The Rules were retrospectively amended on 20.5.2003 substituting the words "NPA at such rates as may be fixed by the state government from time to time by order issued in this behalf" in place of "NPA @ 25% of pay" in the Rules. It was contended that as the Rules were amended in the year 2003 with retrospective effect from 14.10.1982, it should be deemed that the NPA payable was as notified by the government from time to time and not '25% of the pay'.

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 I 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*⁵; *K. C. Arora vs. State of Haryana*⁶; and *T.R. Kapoor vs. State of Haryana*⁷ -]. 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. Re : Question No.(iii)”

13. The Tribunal directed payment of the difference in NPA to respondents from their respective dates of appointment. The respondents were appointed from 1982 onwards. The respondents had approached the Tribunal long after their appointment, that is, in 1998 or thereafter.

14. The appellants contended that the claims were therefore barred by limitation. It was pointed out that the respondents were paid NPA at a fixed rate as stipulated in the appointment orders and NPA was increased only when it was revised by Government orders from time to time; that respondents accepted such NPA without protest; and that therefore, they cannot, after periods varying from 5 to 15 years, challenge the fixation of NPA or contend that they are entitled to NPA at a higher rate, that is 25% of their pay. We cannot agree. Where the issue relates to payment or fixation of salary or any allowance, the challenge is not barred by limitation or the doctrine of laches, as the denial of benefit occurs every month when the salary is paid, thereby giving rise to a fresh cause of action, based on continuing wrong. Though the lesser payment may be a consequence of the error that was

committed at the time of appointment, the claim for a higher allowance in accordance with the Rules (prospectively from the date 1 of application) cannot be rejected merely because it arises from a wrong fixation made several years prior to the claim for correct payment. But in respect of grant of consequential relief of recovery of arrears for the past period, the principle relating to recurring and successive wrongs would apply. Therefore the consequential relief of payment of arrears will have to be restricted to a period of three years prior to the date of the original application. [See: *M.R. Gupta vs. Union of India*⁸, and *Union of India vs. Tarsem Singh*⁹] Conclusion:

15. The appeals are allowed in part as follows:

“(i) We uphold the decision of the Tribunal, affirmed by the High Court that respondents are entitled to 25% of their pay, as NPA.

(ii) The respondents will be entitled to NPA @ `25% of pay' only upto 20.5.2003. Thereafter, the amended Rules will apply.

(iii) In so far as arrears, the respondents are entitled to recover the difference in NPA only in regard to the salary which accrued due during the three0 years prior to the date of filing of the original applications by the respondents before the Tribunal and not from the date of their appointments.

(iv) As a consequence, if the appellants, in pursuance of the orders of the Tribunal/High Court, had paid the difference in NPA, for any period beyond three years before the date of the respective original applications, they will be at liberty to recover the same from the respective respondents in 24 monthly instalments.”

¹1996 (9) SCC 728

²2004 (6) SCC 85

³2006 (1) SCC 567

⁴2008 (14) SCC 370

⁵1972 (4) SCC 765

⁶1984 (3) SCC 281

⁷1986 Supp. SCC 584

⁸1995 (5) SCC 628

⁹2008 (8) SCC 648