# Col. (Retd.) B.J. Akkara vs The Govt. Of India & Ors on 10 October, 2006

## Equivalent citations: 2006 AIR SCW 5252, 2007 (1) AIR KAR R 33, 2006 (11) SCC 709, (2007) 1 UPLBEC 227, (2006) 10 SCALE 206, (2006) 4 ESC 464, MANU/SC/4389/2006, (2007) 2 SERVLJ 8, (2006) 8 SCJ 333

## Bench: G. P. Mathur, R. V. Raveendran

CASE NO.:
Transfer Case (civil) 72 of 2004

PETITIONER:
Col. (Retd.) B.J. Akkara

RESPONDENT:
The Govt. of India & Ors.

DATE OF JUDGMENT: 10/10/2006

BENCH:
G. P. Mathur & R. V. Raveendran

JUDGMENT:

J U D G M E N T With T.C. (Civil) Nos. 74/2004, 75-128/2004, 129-140/2004, 141/2004, 2/2005, 14/2005, 15/2005, 16/2005, 17/2005, 18/2005, 28/2005 and 43/2005 RAVEENDRAN, J.

The petitioners in all these petitions, served as Medical, Dental and Veterinary officers in the Army Medical Corps (AMC), Army Dental Corps (ADC) and Veterinary Corps ('RVC') controlled by the Ministry of Defence (for short, 'Ministry'). All of them retired prior to 1.1.1996. These petitions involve a common question relating to calculation of their pension.

2. Defence Ministry Circular dated 31.12.1965 barred private practice (which was a traditionally enjoyed privilege) by AMC officers with effect from 1.1.1966 and conveyed the sanction of the President to the grant of a Non-Practising Allowance ('NPA' for short) to all AMC officers irrespective of the rank, with a stipulation that such NPA shall be treated as Pay for all purposes. Ministry circular dated 2.11.1987 clarified that NPA will be treated as 'pay' for all service matters, and will be taken into account for computing Dearness Allowance and other allowances as well as for calculation of retirement benefits. It also prescribed the rate of NPA for AMC and ADC Officers as Rs. 600/- for basic pay below Rs. 3000/-, Rs. 800/- for basic pay between Rs. 3000/- and Rs. 3700/- and Rs. 900/- for basic pay of Rs. 3700/- and above. The NPA was revised as 25% of basic pay and Rank pay, with effect from 1.1.1996 (subject to the condition that pay plus NPA does not exceed Rs. 29,500/-). G.O. No. 2/S/98, issued by the Ministry, which implemented the Fifth Central Pay Commission recommendations in regard to revision of pay scales, gave the benefit of the revised

NPA to all AMC, ADC and RVC officers who were receiving NPA.

3. The recommendations of Fourth Central Pay Commission in regard to pensionary benefits for Armed Force Officers retiring on or after 1.1.1986 were implemented by Ministry Circular dated 30.10.1987. The said Circular provided that retiring pension of all commissioned officers of the three services, shall be calculated at 50 per cent of the reckonable emoluments, for a qualifying service of 33 years (to be reduced proportionately for lesser qualifying service). It defined 'reckonable emoluments' for purposes of retiring/service pension as average of pay, NPA and rank pay, if any, drawn by the officer during the last 10 months of his service. It defined the term 'pay' as basic pay in the revised pay scales.

4. The recommendations of the Fifth Central Pay Commission were accepted and accorded sanction by the President on 24.11.1997. Consequently, the Ministry issued various circulars implementing the recommendations in regard to pensioners.

Re : Pre 1996 Pensioners The Ministry issued a Circular dated 27.5.1998 (read with earlier circular dated 24.11.1997) rationalizing the pension of pre 1996 pensioners of the Armed Forces, by providing that the consolidated pension of existing pre 1996 pensioners will be calculated with effect from 1.1.1996, by aggregating the following : i) the existing pension; ii) dearness relief up to CPI 1510 (i.e. @148%, 111% and 96% as the case may be, of basic pension as admissible on 1.1.1996 vide DP & PWs OM dated 20.3.19996); iii) Interim relief I; iv) Interim relief II; and v) Fitment weightage @ 40 per cent of the existing pension.

Re : Pensioners retiring on and after 1.1.1996 The Ministry issued a circular dated 3.2.1998, providing that the retiring pension of Armed Force Officer retiring on or after 1.1.1996 shall be calculated at 50% of average of reckonable emoluments during the last 10 months of service, (reckonable emoluments being basic pay including rank pay, stagnation increment and NPA) for a qualifying service of 33 years, to be reduced proportionately for lesser period of qualifying service.

5. The Ministry by Circular dated 7.6.1999, conveyed the decision of the President that 'with effect from 1.1.1996, pension of all Armed Forces pensioners irrespective of their date of retirement shall not be less than 50% of the minimum pay in the revised scale of pay introduced with effect from 1.1.1996 of the rank, held by the pensioner.' The circular provided that the revision of pension should be undertaken as follows in case of commissioned officers (both post and pre 1.1.1996 retirees) :

> i) "Pension shall continue to be calculated at 50% of the average emoluments in all cases and shall be subject to a minimum of Rs.1275/- p.m. and a maximum of upto 50% of the highest pay applicable to Armed Forces personnel but the full pension in no case shall be less than 50% of the minimum of the revised scale of pay introduced w.e.f. 1.1.96 for the rank last held by the Commissioned Officer at the time of his/her retirement. However, such pension shall be reduced pro rata, where the pensioner has less than the maximum required service for full pension. [vide clause 2.1 (a)]

> ii) Where the revised and consolidated pension of pre-1.1.96 pensioners are not beneficial to him/her under these orders and is either equal to or less than existing consolidated pension under this Ministry's letters dated 24.11.97, 27.5.98 and 14.7.98, as the case may be, his/her pension will not be revised to the disadvantage of the pensioner [vide clause 4]".

The pension of the petitioners were stepped up, re-fixed and paid accordingly.

6. The implementing departments had some doubts in regard to interpretation of the circular dated 7.6.1999. They therefore, sought clarifications from the Ministry on the following two issues (i) whether NPA admissible as on 1.1.1986 is to be taken into consideration after refixation of pay on notional basis as on 1.1.1986; and (ii) whether NPA is to be added to the minimum of the revised scale while considering stepping up the consolidated pension on 1.1.1996. The Ministry issued the following clarification, vide Circular dated 11.9.2001, in regard to the Circular dated 7.6.1999 :

> "The undersigned is directed to refer to Ministry of Defence letter No.1(1)/99/D(Pension/Services) dated 7th June, 1999, wherein decision of the government that pension of all pensioners irrespective of their date of retirement shall not be less than 50% of the minimum of the revised scale of pay introduced with effect from 1.1.96 of the post last held by the pensioner was communicated .
>
> NPA granted to medical officers does not form part of the scales of pay. It is a separate element, although it is taken into account for the purpose of computation of pension.
>
> This has been examined in consultation with the Deptt. of Pension and Pensioners' Welfare and the Department of Expenditure and it is clarified that NPA is not to be taken into consideration after re-fixation of pay on notional basis on 1.1.1986. It is also not to be added to the minimum of the revised scale of pay as on 1.1.1996 in cases where consolidated pension is to be stepped up to 50%, in terms of Ministry of Defence Letter No.1(1)/99/D (Pension/Services) dated 7th June, 1999."

[Emphasis supplied] The Circular also directed the Controller General of Defence Accounts to recalculate the pension by excluding NPA from Basic Pay and await further instructions regarding recovery of excess payments made with effect from 1.1.1996. In view of it, the pension of the petitioners have been revised by excluding the NPA element, by issuing corrigenda to their PPOs.

7. The writ petitioners are aggrieved by the said clarification contained in the Circular dated 11.9.2001 and the consequential corrigenda to their PPOs reducing their pension. The petitioners therefore filed writ petitions, in different High Courts for the following reliefs :-

> i) For quashing the circular dated 11.9.2001 and/or for a direction to respondents not to give effect to the said circular.

ii) For quashing the consequential corrigenda PPOs, issued to the petitioners by the Controller of Defence Accounts.

iii) For a direction to the respondents, to take into account, NPA at the rate of 25% of the basic pay, including Rank Pay as was being done till the issue of circular dated 11.9.2001, while calculating their pension.

[Note : The actual prayers in each case vary slightly in form. What is given above is the general purport of the prayers in these petitions].

The said writ petitions have been transferred to this Court, in pursuance of applications for transfer filed by the Union of India.

8. To understand the grievance of the petitioners, it is necessary to give an illustration :

Lt. General R. K. Upadhyay - (Petitioner No. 2 in W.P. No. 1845/2002 on the file of Delhi High Court corresponding to T.P.(C) No. 833/2002) :

Pension with effect from 1.7.1991 Original pension sanctioned as per PPO No.M/003476/91 (50 per cent of average reckonable emoluments, that is pay plus NPA) [Note : There was no Rank pay as it was admissible only to the Ranks from Captain to Brigadier] Rs.4185 Pension with effect from 1.1.1996 Stage I : Pension as per Ministry's Circulars dated 24.11.1997 and 27.5.1998

i) Existing pension Rs. 4185

ii) Dearness Relief (96% of existing pension) Rs. 4018

iii) Int. Relief I Rs. 50

iv) Int. Relief II Rs. 419 Fitment Weightage (40% of existing pension) Rs. 1674 Rs.10346 Stage II : Pension as per Ministry's circular dated 7.6.1999 (vide corrigendum PPO No. M/MODP/030332/1999) Pay scale of pensioner : Rs.7300-100-7600 Corresponding revised scale of pay : Rs.22400-525 -24500 Minimum pay in the revised pay scale Rs. 22400 Add NPA (25% of Rs.22400) Rs. 5600

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| | |
|---|---|
| Total | Rs. 28000 |

50% of the aggregate (Rs.28000) as pension

Rs.14,000

Stage III : Pension as per Ministry's circular dated 7.6.1999 , as clarified by circular dated 11.9.2001 (vide corrigendum PPO No. M/MODP/16129/ 2001) Pay scale of Pensioner : Rs. 7300-100-7600 Revised scale of pay : Rs.22400-525-24500 50% of minimum in the revised scale of pay (Rs.22400) as pension Rs.11,200 Thus, the pension which had been fixed at Rs.10,346/- per month with effect from 1.1.1996, was increased to Rs.14,000/- per month by reason of stepping up as per Circular dated 7.6.1999 and later reduced to Rs.11,200/-

in view of the clarification dated 11.9.2001.

CONTENTIONS OF PENSIONERS :

9. The petitioners have urged the following contentions :-

9.1) The Defence Service Medical Officers were earlier entitled to private practice. The permission to private practice was withdrawn with effect from 1.1.1966 and in lieu of it, the President sanctioned a non-practising allowance (NPA) with the stipulation that such NPA will be treated as 'Pay' for all purposes. As a consequence, in respect of Medical Officers, NPA was always treated as part of 'pay' for purposes of pension. By Circular dated 7.6.1999, the benefit of stepping up was extended to all armed forces pensioners, including medical officers, with effect from 1.1.1996. The benefit extended was that irrespective of their date of retirement, their pension shall not be less than the 50% of the minimum pay in the revised scale of pay introduced with effect from 1.1.1996 of the rank held by the respective pensioner. The words "minimum pay" should be interpreted as minimum pay in the revised pay-scale plus NPA, in so far as Medical Officers entitled to NPA, as in their cases, the term 'Pay' wherever it occurs, means and includes basic pay plus NPA.

9.2) The Ministry had correctly understood the term "50% of the minimum pay in the revised scale of pay," used in the circular dated 7.6.1999 as "50% of the minimum in the revised pay-scale plus NPA", and on that basis issued modified PPOs., revising the pension. For example, in the case of Lt.

Generals, where the applicable revised pay scale was Rs.22,400-525-24,500, the Ministry took the minimum in the revised scale of pay (Rs.22,400/-) and added 25% thereof (Rs.5,600/-) as NPA and arrived at the pension as Rs.14,000/- being 50% of the aggregate sum of Rs. 28,000/-. The Circular dated 11.9.2001, under the guise of a clarification, directed that NPA be omitted while calculating the 50% of the minimum pay in the revised pay scales, for purposes of stepping up. This amounted to unauthorized modification of the President's decision contained in the Ministry's Circular dated 7.6.1999. It is also opposed to the rule that in the case of Medical Officers, 'Pay' includes NPA, for all purposes. The Ministry had no authority to modify or dilute the President's Policy decision which is given effect by Circular dated 7.6.1999.

9.3) In the case of Medical Officers who retired on or after 1.1.1996, even after the clarificatory circular dated 11.9.2001, NPA is added to the basic pay in the revised pay-scale and 50% of the aggregate is being paid as 'retiring pension'. Adding NPA to the basic pay for arriving at the pension in the case of those who retired on or after 1.1.1996 and omitting to add NPA in the case of pre 1996 retirees amounts to hostile discrimination of pre 1996 retirees, violating Article 14 and the principles relating to pension laid down by this Court in D.S. Nakara vs. Union of India [1983 (1) SCC 305].

9.4) The Delhi High Court had struck down a similar clarificatory Circular dated 19.10.1999 relating to Civilian Medical Officers (corresponding to Defence Ministry Circular dated 11.9.2001 under challenge in these petitions) by judgment dated 18.5.2002. That decision has attained finality and the Union of India has implemented it by reverting back to addition to NPA to minimum pay, for purposes of stepping up the pension in regard to pre 1996 civilian Medical Officers. Union of India has to extend to similar treatment, even in the case of Defence Service Medical Officers, by ignoring the clarification dated 11.9.2001.

9.5) At all events, irrespective of the validity of the clarification dated 11.9.2001, even if any amount has been wrongly paid to petitioners, the Respondents cannot recover such excess amount paid in pursuance of the Circular dated 7.6.1999.

QUESTIONS ARISING FOR DECISION :

10. On the contentions urged, the following questions arise for consideration :

(i) Whether the Circular dated 11.9.2001, is only a clarification, or an amendment, to the Circular dated 7.6.1999.

(ii) Whether the Circular dated 7.6.1999 as clarified by Circular dated 11.9.2001, leads to unequal treatment of those who retired prior to 1.1.1996 and those who retired after 1.1.1996 solely with reference to date of retirement.

(iii) Whether the respondents having accepted and implemented the decision of the Delhi High Court (in Dr. K.C. Garg vs. Union of India C.M.P. No. 7322/2001 and connected cases decided on 18.5.2002) on a similar issue, are required to extend a similar treatment to Defence Service Medical Officers also, by cancelling the Circular dated 11.9.2001.

(iv) Even if the Circular dated 11.9.2001 is found to be valid, whether Respondents are not entitled to recover the excess payments made.

Re : Question No. (i) :

> 11. We may first refer to the intent and purport of the Circular dated 7.6.1999. The Circular dated 7.6.1999 neither prescribes the requirements/qualifications for entitlement to pension nor the method of determination of pension. It only effectuates the President's decision that the pension (Which has already been determined in accordance with the applicable rules/orders) irrespective of the date of retirement, shall not be less than 50% of the minimum pay in the revised scales of pay introduced with effect from 1.1.1996. Pension is determined as per relevant rules/orders, by calculating the average of reckonable emoluments (basic pay, Rank Pay and NPA) drawn during the last 10 months of service and then taking 50% thereof as the retiring pension applicable to retirees with 33 years of qualifying service, with proportionate reduction for retirees with lesser period of qualifying service. The basis for calculating the pension in respect of those who retired prior to 1.1.1996, and those retired on or after 1.1.1996 happens to be the same. The retiring pension is 50% of the average reckonable emoluments for retirees with 33 years of qualifying service, with proportionate reduction for those with lesser years of qualifying service.

The President's decision given effect by Circular dated 7.6.1999 only extends to all pre 1996 retirees, who did not have the benefit of fixation of pension with reference to the revised pay scales which came into effect on 1.1.1996, the benefit of the said revised pay scales, albeit in a limited manner. In so doing, it also puts those who retired on or after 1.1.1986 and pre 1986 retirees on par and on a common platform, removing the disparity, if any, in their pensions.

12. When the Fifth Central Pay Commission recommendations were implemented, the pension of those who retired prior to 1.1.1996, was rationalized by directing that their pension shall be the aggregate of (a) existing pension; (b) dearness relief; (c) interim relief I; (d) interim relief II, and (e) fitment weightage of 40% of the existing pension. The 'existing pension' referred to therein was the pension which had been arrived at by calculating 50% of the average pay, NPA and Rank Pay during the last 10 months of service. The Circular dated 7.6.1999 made it clear that pension of retirees shall continue to be calculated at 50% of average of reckonable emoluments for the last 10 months before retirement, but only stipulated that the 'full' pension (that is pension for 33 years service) shall not be less than the 50% of the minimum pay in the revised pay scale introduced with effect from 1.1.1996. The Circular dated 7.6.1999 also made it clear that if the minimum prescribed therein was not beneficial to the pensioner, that is, where it was either equal to or less than the existing consolidated pension, his pension will not be reduced to his disadvantage. In short, the Circular dated 7.6.1999, merely stepped up the pension (for a qualifying service of 33 years) to 50% of the minimum pay in the revised scale of pay introduced with effect from 1.1.1996 of the rank held by such pensioner, where his pension was less. We may here note that whenever the reference is to stepping up pension to 50% of the minimum pay in the revised scale of pay, it applies to those with

33 years of qualifying service and gets proportionately reduced for lesser period of qualifying service.

13. The emoluments of those who retired on or after 1.1.1996, calculated with reference to the basic pay in the revised scale of pay plus NPA will certainly be more than the minimum pay in the revised scale of pay and therefore, in their cases, the question of stepping up will not arise. On the other hand, as the pension of pre-1996 retirees was based on the basic pay under the old pay scale plus NPA, and as the old pay scale was much less than the 1996 revised pay scale, their pension required to be stepped up. The extent to which the existing pension should be stepped up is clearly specified in the Circular as "minimum pay in the revised scale of pay". The words used do not give room for any confusion or doubt. A 'pay scale' has basically three elements. The first is the minimum pay or initial pay in the pay scale. The second is the periodical increment. The third is the maximum pay in the pay scale. An employee starts with the initial pay in the pay scale and gets periodical increases (increments) and reaches the maximum or ceiling in the pay scale. Each stage in the pay scale starting from the initial pay and ending with the ceiling in the pay scale, when applied to an employee is referred to as 'basic pay' of the employee. Whenever the government revises the pay scales, a fitment exercise takes place as per the principle of fitment (formula) provided in the rules governing the revision of pay so that the 'basic pay' in the old scale is converted into a 'basic pay' in the revised pay scale. When the circular dated 7.6.1999 used the words '50% of the minimum pay in the revised scale of pay', it referred to 50% of the initial pay in the revised scale of pay. If the old scale of pay was Rs.7300- 100-7600 and if the revised scale of pay was Rs.22400-525-24500, the minimum pay in the revised scale of pay would be Rs.22400 and 50% of the minimum pay in the revised scale of pay would be Rs. 11200/-.

14. It is no doubt true that the term 'pay', with reference to medical officers, includes the basic pay and NPA. But the term 'basic pay' does not include NPA. In the absence of any special definition, the term 'basic pay of a government servant' refers to the applicable stage of pay in the pay scale to which he is entitled, and does not include NPA even in the case of Medical Officers. What the circular dated 7.6.1999 intended to extend by way of benefit to all pensioners, was a minimum pension, that is, 50% of the minimum pay in the 1996 revised scale of pay. NPA has no part to play in the minimum that is sought to be assured. NPA has relevance only for initial fixation of pension and not for stepping up pension under Circular dated 7.6.1999.

15. As a result, if the pension of a retiree is determined by taking into account NPA as part of 'pay' and the pension so determined is more than 50% of minimum pay in the revised scale of pay, he would continue to get such higher pension. This would happen in the case of all those who retired on or after 1.1.1996. If the pension determined by taking into account NPA as part of pay, is less than 50% of the minimum pay in the revised scale of pay, his pension would be stepped up to 50% of the minimum pay in the revised scale of pay. This would happen in the case of pre 1996 retirees.

16. The petitioners want to read the words "not less than 50% of the minimum pay in the revised scale of pay" in the Circular dated 7.6.1999, as "not less than 50% of the minimum pay in the revised scale of pay plus NPA". When the language used is clear and unambiguous and the intention is also clear, it is not permissible to add words to the Circular dated 7.6.1999 to satisfy what petitioners

consider to be just and reasonable. "Minimum pay in the revised scale of pay" refers only to the initial pay in the revised scale of pay and not anything more. Due to a misinterpretation, NPA was included for the purpose of giving the benefit of stepping up the pension in the case of retired medical officers. The fact that NPA had already been taken into account while calculating the 'existing pension' of the medical officers who retired before 1.1.1996 was lost sight of. The fact that NPA is part of 'pay' and not part of 'basic pay' was also overlooked. Therefore, it became necessary to issue the clarification, which was done by circular dated 11.9.2001, clarifying that it was impermissible to again add NPA to 'the minimum pay in the revised pay scale' for the purpose of stepping up the pension.

17. Another grievance of the petitioners is that prior to circular dated 7.6.1999, the pay and pension of medical officers was always more than the pay and pension of non-medical officers of the same rank, in view of NPA element, and by virtue of the clarificatory circular dated 11.9.2001, the pension of both categories, (Medical Officers and non-Medical Officers), who retired prior to 1996, became equal. The petitioners contend that even after stepping up under Circular dated 7.6.1999, the disparity which earlier existed between Medical Officers and Non-Medical Officers of the same rank, should be maintained. They point out that if the pension of medical officers and non-medical officers of the same rank should be the same, the purpose of giving NPA as part of pay to Medical Officers was defeated and NPA became illusory. We cannot agree. When the purpose of stepping up pension is to ensure that all retirees of the same rank get pension which is not less than the prescribed minimum, it would be unjust for a section to say that merely because they were earlier enjoying a higher pension than others of the same rank, such disparity should be continued, even after stepping up. When the object of stepping up of pension is to bring in parity and avoid disparity, the claim of petitioners that disparity should be continued cannot be accepted.

18. We, therefore, hold that circular dated 11.9.2001, is only a clarification to correct the wrong interpretation of the circular dated 7.6.1999. It neither amends nor modifies the circular dated 7.6.1999.

Re : Question No. (ii)

19. The petitioners next contend that in the case of Medical Officers who retired on or after 1.1.1996, even after the Circulars dated 7.6.1999 and 11.9.2001, NPA is added to basic pay for the purpose of calculating the pension, whereas in the case of pre 1996 retirees, NPA is not being added and that amounts to discrimination. This is a misleading contention. In the case of those retiring on or after 1.1.1996, NPA is added to basic pay, to determine their pension, and not for stepping up the pension. In the case of pre 1996 retirees, as NPA was already added while determining their pension, the question of adding it again, for purposes of stepping up the pension, does not arise.

20. The principles relating to pension relevant to the issue are well settled. They are :

> a) In regard to pensioners forming a class, computation of pension cannot be by different formula thereby applying an unequal treatment solely on the ground that some retired earlier and some retired later. If the retiree is eligible for pension at the

time of his retirement and the relevant pension scheme is subsequently amended, he would become eligible to get enhanced pension as per the new formula of computation of pension from the date when the amendment takes effect. In such a situation, the additional benefit under the amendment, made available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred.

b) But all retirees retiring with a particular rank do not form a single class for all purposes. Where the reckonable emoluments as on the date of retirement (for the purpose of computation of pension) are different in respect of two groups of pensioners, who retired with the same rank, the group getting lesser pension cannot contend that their pension should be identical with or equal to the pension received by the group whose reckonable emolument was higher. In other words, pensioners who retire with the same rank need not be given identical pension, where their average reckonable emoluments at the time of their retirement were different, in view of the difference in pay, or in view of different pay scales being in force.

c) When two sets of employees of the same rank retire at different points of time, it is not discrimination if :

(i) when one set retired, there was no pension scheme and when the other set retired, a pension scheme was in force.

(ii) when one set retired, a voluntary retirement scheme was in force and when the other set retired, such a scheme was not in force; or

(iii) when one set retired, a PF scheme was applicable and when the other set retired, a pension scheme was in place.

One set cannot claim the benefit extended to the other set on the ground that they are similarly situated. Though they retired with the same rank, they are not of the 'same class' or 'homogeneous group'. The employer can validly fix a cut-off date for introducing any new pension/retirement scheme or for discontinuance of any existing scheme. What is discriminatory is introduction of a benefit retrospectively (or prospectively) fixing a cut off date arbitrarily thereby dividing a single homogeneous class of pensioners into two groups and subjecting them to different treatment.

[Vide D.S. Nakara v. Union of India [1983 (1) SCC 305], Krishna Kumar v. Union of India [1990 (4) SCC 207], Indian Ex-Services League v. Union of India [1991 (2) SCC 104], V. Kasturi v. Managing Director, State Bank of India [1998 (8) SCC 30] and Union of India v. Dr. Vijayapurapu Subbayamma [2000 (7) SCC 662].

21. As noticed earlier, pension is determined with reference to the applicable rules/orders governing pension. The Ministry's Circular dated 7.6.1999 comes in, only to step up the pension from 1.1.1996, if the pension calculated in accordance with the rules/orders is less than 50% of the minimum pay in

the revised scale of pay introduced with effect from 1.1.1996. There is no need to step up the pension of those who retired on or after 1.1.1996, as their pension will be more than or in no event less than the minimum provided under the circular dated 7.6.1999. The stepping up is required only to those who retired prior to 1.1.1996 as their pension was lower on account of the fact that their reckonable emoluments for purpose of calculation of pension, was based on the old scales of pay. Let us take the case of a Medical Officer of the rank Lt. General, with 33 years of service, who retired in the year 1998 after getting two increments in the revised pay scale. As the applicable pay scale is Rs.22400-525-24500, his basic pay would have been Rs.23,450/- at the time of retirement. 25% thereof namely Rs.5863/- would be the NPA. If the reckonable emolument was Rs.29313/-, pension will be 50% thereof, namely Rs.14656/-. As the pension under the Rules (Rs.14656/-) was more than 50% of the minimum of revised pay scale (Rs.11200/-) assured under the circular dated 7.6.1999, the benefit of stepping up is not required in his case. It is only those whose pension was determined with reference to old scales of pay, and not the revised higher scale of pay, who require the benefit of the stepping up. Therefore, the contention that pre 1996 retirees and post 1.1.1996 retirees are being treated differently, is untenable. They are treated similarly. But the fact that post 1.1.1996 retirees do not require the benefit of stepping up, cannot by any stretch of imagination, give rise to a contention that the benefit given to pre- 1996 retirees by way of stepping up, amounts to discrimination.

22. The contention that NPA is taken into account in the case of post 1.1.1996 retirees but not pre 1996 retirees is untenable. NPA is taken as part of 'pay' in the case of both pre and post 1.1.1996 retirees. NPA is not taken into account in the case of any retiree for applying the stepping up benefit under circular dated 7.6.1999. It is a different matter that post 1.1.1996 retirees do not require the benefit under the circular dated 7.6.1999. As already noticed, while calculating pension of the pre 1996 retirees, NPA had already been taken into account as part of 'pay', and that pension which was determined after taking into account NPA, is found to be less than the minimum guaranteed under the circular dated 7.6.1999, their pension is being increased to the minimum provided in the circular dated 7.6.1999. NPA cannot again be added to the minimum to step up the pension. If that is done, it will amount to taking NPA into account twice for purposes of pension, which is impermissible. The contention of discrimination between pre 1.1.1996 retirees and post 1.1.1996 retirees is, therefore, imaginary.

Re : Question No. (iii)

23. It was alleged that in the case of civilian medical officers, the nodal Ministry had issued circulars dated 17.12.1998 and 29.10.1999 (corresponding to the Defence Ministry's Circulars dated 7.6.1999 and 11.9.2001); that some civilian Medical Officer Retirees had challenged the said circular dated 29.10.1999 directing that NPA shall not be added to minimum pay in the revised scale, before the Delhi High Court; that the High Court had allowed the said writ petitions (CWP No.7322/2001 and connected cases K. G. Garg vs. Union of India) by order dated 18.5.2002; and that the said order was not challenged by the Union of India, but on the other hand, was implemented by adding NPA to basic pay while stepping up the pension in the case of civilian Medical Doctors who had retired prior to 1.1.1996. It is contended that the Respondents having accepted and implemented the decision of the Delhi High Court in the case of civilian medical officers, cannot discriminate against the Defence service medical officers placed in identical position and therefore the benefit given to

the civilian medical officers in pursuance of the decision of the Delhi High Court should also be extended to them. The petitioners rely on the broad principles underlying estoppel by Judgment, legitimate expectation, and fairness in action in support of their contention.

24. Respondents have filed an affidavit dated 1.8.2006 admitting that in pursuance of the decision of the Delhi High Court, the circular dated 29.10.999 had been withdrawn but clarified that it was withdrawn only in regard to the civilian medical officers who were petitioners in the said writ petititions and not in regard to all civilian medical officers. It is contended that the fact that a decision of the High Court had been accepted or implemented in the case of some persons, will not come in the way of the Union of India resisting similar petitions filed by others, in public interest.

25. A similar contention was considered by this Court in State of Maharashtra vs. Digambar [1995 (4) SCC 683]. This Court held :

> "Sometimes, as it was stated on behalf of the State, the State Government may not choose to file appeals against certain judgments of the High Court rendered in Writ petitions when they are considered as stray cases and not worthwhile invoking the discretionary jurisdiction of this Court under Article 136 of the Constitution, for seeking redressal therefor. At other times, it is also possible for the State, not to file appeals before this Court in some matters on account of improper advice or negligence or improper conduct of officers concerned. It is further possible, that even where S.L.Ps are filed by the State against judgments of High Court, such S.L.Ps may not be entertained by this Court in exercise of its discretionary jurisdiction under Article 136 of the Constitution either because they are considered as individual cases or because they are considered as cases not involving stakes which may adversely affect the interest of the State. Therefore, the circumstance of the non-filing of the appeals by the State in some similar matters or the rejection of some S.L.Ps in limine by this Court in some other similar matters by itself, in our view, cannot be held as a bar against the State in filing an S.L.P. or S.L.Ps in other similar matters where it is considered on behalf of the State that non-filing of such S.L.P. or S.L.Ps and pursuing them is likely to seriously jeopardize the interest of the State or public interest."

The said observations apply to this case. A particular judgment of the High Court may not be challenged by the State where the financial repercussions are negligible or where the appeal is barred by limitation. It may also not be challenged due to negligence or oversight of the dealing officers or on account of wrong legal advice, or on account of the non-comprehension of the seriousness or magnitude of the issue involved. However, when similar matters subsequently crop up and the magnitude of the financial implications is realized, the State is not prevented or barred from challenging the subsequent decisions or resisting subsequent writ petitions, even though judgment in a case involving similar issue was allowed to reach finality in the case of others. Of course, the position would be viewed differently, if petitioners plead and prove that the State had adopted a 'pick and choose' method only to exclude petitioners on account of malafides or ulterior motives. Be that as it may. On the facts and circumstances, neither the principle of res judicata nor the principle of estoppel is attracted. The Administrative Law principles of legitimate expectation or

fairness in action are also not attracted. Therefore, the fact that in some cases the validity of the circular dated 29.10.1999 (corresponding to the Defence Ministry circular dated 11.9.2001) has been upheld and that decision has attained finality will not come in the way of State defending or enforcing its circular dated 11.9.2001.

Re : Question No. (iv)

25. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 7.6.1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled [Vide Sahib Ram vs. State of Haryana [1995 Suppl.1 SCC 18], Shyam Babu Verma vs. Union of India [1994 (2) SCC 521], Union of India vs. M. Bhaskar [1996 (4) SCC 416], and V. Gangaram vs. Regional Joint Director [AIR 1997 SC 2776] :

> a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.
>
> b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

26. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to in-service employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that Respondents shall not recover any excess payments made towards pension in pursuance of circular dated 7.6.1999 till the issue of the clarificatory circular dated 11.9.2001. In so far as any excess payment made after the circular dated 11.9.2001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong

calculations earlier made.

27. A faint attempt was made by the learned Addl. Solicitor General appearing for Respondent to contend that all such wrong payments could be recovered and at best the pensioners may be entitled to time or instalments to avoid hardship. No doubt in Union of India vs Sujatha Vedachalam [2000 (9) SCC 187], this Court did not bar the recovery of excess pay, but directed recovery in easy instalments. The said decision does not lay down a principle that relief from recovery should not be granted in regard to emoluments wrongly paid in excess, or that only relief in such cases is grant of instalments. A direction to recover the excess payment in instalments or a direction not to recover excess payment, is made as a consequential direction, after the main issue relating to the validity of the order refixing or reducing the pay/allowance/pension is decided. In some cases, the petitioners may merely seek quashing of the order refixing the pay and may not seek any consequential relief. In some cases, the petitioners may make a supplementary prayer seeking instalments in regard to refund of the excess payment if the validity of the order refixing the pay is upheld. In some other cases, the petitioners may pray that such excess payments should not be recovered. The grant of consequential relief would, therefore, depend upon the consequential prayer made. If the consequential prayer was not for waiving the excess payment but only for instalments, the court would obviously consider only the prayer for instalments. If any decision which upholds the refixation of pay/pension does not contain any consequential direction not to recover the excess payment already made or contains a consequential direction to recover the excess payment in instalments, it is not thereby laying down any proposition of law but is merely issuing consequential direction in exercise of judicial discretion, depending upon the prayer for consequential relief or absence of prayer for consequential relief as the case may be, and the facts and circumstances of the case. Many a time, the prayer for instalments or waiver of recovery of excess, is made not in the pleadings but during arguments or when the order is dictated upholding the order revising or re-fixating the pay/pension. Therefore, the decision in Sujatha Vedachalam (supra) will not come in the way of relief being granted to the pensioners in regard to the recovery of excess payments.

28. The learned Additional Solicitor General next submitted that in so far as refund of the excess pension relating to the period 11.9.2001 to date, the petitioners who have obtained interim orders of stay, should be made liable to pay interest, as the petitioners had the benefit of such excess payment. Reliance is placed on the decisions of this Court in Style (Dress Land) vs. Union Territory, Chandigarh [ 1999 (7) SCC 89], Ouseph Mathai vs. M. Abdul Khadir [2002 (1) SCC 319], Rajasthan Housing Board vs. Krishna Kumari [2005 (13) SCC 151]. It is no doubt true that the petitioners, who have obtained orders of interim stay, have been receiving excess pension even after the clarification contained in the Circular dated 11.9.2001 and that they are bound to refund the excess received after 11.9.2001. But there was some amount of confusion on account of the earlier interpretation of the Circular dated 7.6.1999 by the Department itself. Further, the petitioners are all pensioners, who have prosecuted these petitions bonafide. In the circumstances, on the facts and circumstances, we do not propose to award of interest on the amounts to be refunded.

Conclusion :

29. The Circulars dated 7.6.1999 and 11.9.2001 relate not only to pension but also family pension, the only difference being the percentage, that is, 30% is mentioned in respect of family pension instead of 50% in respect of pension. What we have discussed and held in respect of pension will apply to family pension also.

30. In view of the above, the challenge to the validity of the circular dated 11.9.2001 is rejected. These petitions (Transferred Cases) are dismissed. The Respondents, however, shall not recover the excess, if any, paid to the petitioners between 7.6.1999 and 11.9.2001. Respondents may recover the excess if any paid after 11.9.2001 in appropriate monthly instalments approximately equal to the monthly excess payment. Parties to bear respective costs.