

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

...
Order reserved on: 07.02.2017

ORIGINAL APPLICATION NO. 060/00914/2014

Chandigarh, this the ^{3rd} day of March, 2017

...
**CORAM: HON'BLE MR. JUSTICE M.S. SULLAR, MEMBER (J) &
HON'BLE MR. UDAY KUMAR VARMA, MEMBER (A)**

...
Dr. Rippudaman Singh Dhillon, IAS son of Sh. Ranjit Singh, Additional Secretary, Finance Department, Haryana Civil Secretariat, Chandigarh, R/o H. NO. 242, Sector 37, Chandigarh.

....APPLICANT

(Argued by: Shri Manoj Bajaj , Advocate)

VERSUS

1. Union of India through the Secretary, Ministry of Personnel, P.G. & Pensions, Department of Personnel and Training, North Block, New Delhi.
2. The Section Officer, Ministry of Personnel, P.G. & Pensions, Department of Personnel and Training, North Block, New Delhi.
3. The Secretary, Government of India, Ministry of Finance, Department of Expenditure, New Delhi.
4. State of Haryana through the Chief Secretary, Haryana Civil Secretariat, Chandigarh.

....RESPONDENTS

(By Advocate: Shri Ram Lal Gupta for respondent no. 1-3
Shri Samarvir Singh, DAG (Haryana) proxy for Sh. Charanjit Bakshi, Addl. AG (Haryana) for State of Haryana.

ORDER

HON'BLE MR. UDAY KUMAR VARMA, MEMBER (A)

The applicant, Dr. Rippudaman Singh Dhillon, was inducted into Indian Administrative Service (IAS) from the stream of Non-State Civil Services Officer (Non-SCS Officer) of Haryana State in 2013. He has preferred this Original Application (OA), under

Section 19 of the Administrative Tribunals Act, 1985, feeling aggrieved against the impugned order dated 25.02.2014 (Annexure A-4), whereby his pay on induction into IAS has been reduced and fixed at Rs. 26,890/- in the pay band of Rs. 15600-39100/- + GP Rs. 6600/-. He claims that prior to his induction into IAS, he was drawing pay of Rs. 34,288/- in the PB of Rs. 15,600-39100+GP of Rs. 7600/-. This pay included an element of Non Practicing Allowance (NPA) that he was drawing as a doctor in the State Government before getting inducted into IAS. The respondents while reducing his pay have sought to justify the same by arguing that NPA (Non-Practicing Allowance) is admissible only to those medical posts for which a medical qualification recognized under the Indian Medical Council Act, 1956 or under the Dentist Act, 1948 has been prescribed as an essential qualification. The applicant has challenged this contention of the respondents and has prayed for quashing of the order dated 02.04.2014 (Annexure A-6) also passed by respondent no. 4. This order, the applicant alleges, denies him the protection of his earlier pay by removing the element of NPA from his earlier pay in the garb of instructions dated 30.08.2008 (Annexure A-5). The applicant prays for issuance of appropriate direction to the Competent Authority to protect his pay which included NPA, while he was working as Medical Officer with State Govt. of Haryana and also grant him consequential benefits.

2. The uncontested facts in this case, in brief, are that the applicant was appointed as Medical Officer in the State Govt. of Haryana in the year 2000. He was inducted into to IAS against the vacancies meant for officers serving in connection with affairs of the

Ke

State vide Government of India (GOI) notification dated 27.02.2013 and joined as such on 28.02.2013.

3. Prior to his appointment to IAS, he was drawing basic pay of Rs. 34,288/- (Pay in PB+NPA @ 25%) in the pay band of Rs. 15600-39100+ NPA @ 25% + Rs. 7600/- Grade Pay and accordingly getting the following emoluments:

a)	Pay in Pay Band	Rs. 34288/-	(which includes Rs 8,378/- as NPA)
b)	Grade Pay	Rs. 7600/-	
c)	DA on basic pay and NPA	Rs. 33,510	

4. The grievance of the applicant is that while fixing his pay in the IAS cadre, his pay has been reduced by Rs. 15080/- (excluding NPA). According to him, while fixing his pay, the NPA which was part and parcel of his basic pay, and which was included and merged while determining his pay in the pay band and grade pay, has not been included. Thus reducing his pay to Rs. 26890/-in pay scale of Rs.15600-39100/- and further he has been granted lesser grade pay of Rs. 6600/- instead of Rs. 7600/-, which he was already drawing. It is stated that pay of an officer on his appointment on a new post, which involved the assumption of duties or responsibilities of greater importance than those attached to his previous permanent post, irrespective of nature of appointment shall not be fixed at a lower stage, rather it has to be fixed one step higher than that of his substantive pay in respect of the old post. However, ignoring the aforesaid settled preposition of law, his pay and grade pay has been reduced to the extent mentioned above. The applicant made representation dated 30.07.2013 followed by reminder dated 20.02.2014, requesting therein for fixation of his pay by granting him

benefit of pay protection, while relying upon Rule 10 (b) of the AIS Pay Fixation Rules, 2007. The provisions of Fixation of initial pay under IAS (Pay) Rules, 2007 is reproduced for reference:-

"4. Fixation of initial pay.

1 (1) The initial pay of a direct recruit shall be fixed at the minimum of pay band-3 with grade pay of Rs.5400:

Provided that, if a direct recruit holds a lien, or would hold the lien, had his lien not been suspended on permanent post, under the rules applicable to him prior to his appointment to the Indian Administrative Service, his initial pay shall be regulated in following manner, namely:-

(a) he shall, during the period of probation, draw the pay of the permanent post, if it is more than the minimum of the Junior Scale and on confirmation in the Indian Administrative Service;

(b) if he was holding a Group A post before appointment to the Indian Administrative Service, his pay shall be fixed at the same stage as the pay in the Group A post in the Pay-Band-3 plus Grade Pay Rs.5400; and

(c) if he was holding a post lower than a Group A post, his pay in Pay Band-3 shall be fixed as the pay arrived at by increasing his pay in respect of the lower post by one increment equal to 3% of the sum of the pay in the pay band and the grade pay admissible for such lower post, computed and rounded off to the next multiple of 10 and if his pay in the pay band after adding one increment is less than the minimum of the pay band-3, then, his pay in the shall be fixed at the minimum of pay band-3;

(d) he shall however, cease to earn any increments in the Junior Scale, until, having regard to his length of service, he becomes entitled to a higher pay: Provided further that he shall draw the pay admissible under rule 7 if that is more than the pay referred to in the preceding proviso.

1 (2) The pay of a member of the Service in the Junior Scale shall, on promotion to a post in the Senior Time Scale, be fixed in the revised pay structure as follows: "One increment on notional basis equal to 3% of the sum of the pay in the pay band and the existing grade pay shall be computed and rounded off to the next multiple of 10 and added to the existing pay in the pay band for Junior Scale of the Indian Administrative Service, thereafter, two additional increments at the rate of 3% of the sum of the pay in the pay band 3, arrived at after adding one increment on notional basis, and the grade pay of Rs.6600 / - corresponding to the Senior Time Scale, shall be computed and rounded off to the next multiple of 10 and added successively to the existing pay in the pay band 3 to arrive at the pay for Senior Time Scale of Indian Administrative Service in the pay band. The second increment is to be calculated on the sum of the pay in the pay-band and existing grade pay, after addition of the first increment in the pay in pay-band. The grade pay of Rs.6600 corresponding to the Senior Time Scale shall be granted in addition to this pay in the pay band.

(3) The initial pay of a State Civil Service officer, on his appointment to the Service or on appointment in a cadre post in an officiating capacity in accordance with rule 9 of the Indian Administrative Service (Cadre) Rules, 1954, as the case may be, shall be fixed as per the principles laid down in Schedule I. Further pay and incremental benefits shall accrue to him under the other relevant provisions.

(4) The initial pay of an officer appointed by selection to the Service or on appointment to a cadre post in an officiating capacity, in accordance with rule 9 of the Indian Administrative Service (Cadre) Rules, 1954, as the case may be, shall be fixed by the Central Government in consultation with the State Government concerned, in the manner specified in Schedule I. Further pay and incremental benefits shall accrue to him under the other relevant provisions.

1 (5) The pay of a member of the Service in the Senior Time Scale shall, on promotion to the Junior Administrative Grade, be fixed in pay band 3 in the same manner as in the case of promotion from Junior Time Scale to Senior Time Scale by adding two additional increments at the rate of 3% of the sum of the pay in the pay band 3 and the grade pay of Rs.7600, computed and rounded off to the next multiple of 10 and added successively to the existing pay in the pay band 3, plus the grade pay of Rs.7600.

1 (6) The pay of a member of the Service in the Junior Administrative Grade shall, on promotion in the Selection Grade, be fixed in pay and-4 by granting two additional increments, computed on the minimum of the pay band plus grade pay and the grade pay of Rs.8700 shall be granted to the Selection Grade.

2 (7) The pay of a member of the Service in the Selection Grade, on promotion to the Super Time Scale, shall be fixed by adding one increment equal to 3% of the sum of the pay in the pay band - 4 and the existing grade pay, computed and rounded off to the next multiple of 10, to the existing pay in the pay band - 4 and the grade pay corresponding to the Super Time Scale, shall be granted in addition to this pay in the pay band.;

2 (7A) The pay of a member of the Service in the Super Time Scale, on promotion to the HAG scale shall be fixed in the following manner:- After adding one increment equal to 3% of the sum of the pay in the pay band - 4 and the existing grade pay, computed and rounded off to the next multiple of 10, to the existing sum of pay in the pay band - 4 and the grade pay of the Super Time Scale, a sum of Rs.2000 shall be added to arrive at the new Basic Pay in HAG scale which will be subject to a minimum of Rs.67000. The Basic Pay in HAG scale shall not exceed Rs.79000, the maximum of scale.

1 (8) On promotion from one grade to another in the Service, a member of the Service shall have an option to get his pay fixed in the Pay Band of the higher post either from the date of his promotion or from the 1st day of July of the year, the date on which he subsequently earns an increment in the lower scale in the manner provided in the relevant sub-rule above; in the latter case, on the date of promotion, pay in the pay band shall be fixed as the same in the lower post but the grade pay shall be that attached to the higher post, with further re-fixation to be done in the manner provided in relevant sub-rules with effect from the 1st day of July, the date of accrual of the next increment in the lower scale.

4 (8A) On promotion to the HAG scale of Rs. 67000-79000, if a member of the Service opts to have his pay fixed from the 1st day of July of the year, the date on which he subsequently earns an increment in the lower scale in the manner provided in sub-rule(1) 4 of rule 5, then on the date of promotion his pay shall be fixed by adding an amount of Rs. 2000 to his basic pay, subject to a minimum of Rs. 67000 and further re-fixation of pay on the date of next increment in the lower scale, falling on the 1st day of July, shall be done by taking into account his basic pay prior to the date of promotion and adding thereto two increments, one on account of annual increment and the second on account of promotion.

SCHEDULE -I

Principles of pay fixation in cases falling under sub-rules (3) and (4) of rule 4 In this Schedule, the term –

(i) 'actual pay' means the pay to which a member of the State Civil Service/Non-State Civil Service, as the case may be, is entitled by virtue of his substantive position in the cadre of that Service or by virtue of his having continuously worked in a temporary or officiating capacity in a higher post for a period of three years or more after following the prescribed procedure, provided the State Government have not revised the scales of pay applicable to the State Civil Service or Non-State Civil Service, as the case may be, after the 1st day of January, 2006. If the pay scales have been revised subsequent to the 1st day of January, 2006, the dearness allowance, dearness pay, interim or additional relief sanctioned by the State Government after the 1st day of January, 2006 and merged in the revised pay scales, shall be excluded.

(ii) 'assumed pay' means the pay which a member of the State Civil Service or Non-State Civil Service, as the case may be, would have drawn in a scale of his Service in which he was confirmed or in which had continuously worked in a temporary or officiating capacity for a period of three years or more after following the prescribed procedure, provided the State Government have not revised scales of pay applicable to the State Civil Service or Non-State Civil Service, as the case may be, after the first day of January, 2006. If the pay scales have been revised subsequent to the 1st day of January, 2006, the dearness allowance, dearness pay, interim or additional relief sanctioned by the State Government after the 1st day of January, 2006 and merged in the revised pay scales, shall be excluded."

The applicant has further stated in his O.A. that the Government of India, Ministry of Personnel vide notification dated 19.09.2008 promulgated Indian Administrative Service (Pay) Second Amendment Rules, 2008 so as to amend the India Administrative Service (Pay) Rules, 2007 which were given effect from 01.01.2006. In Schedule I of the 2007 Rules, referred to above, the following amendments were made:-

10. In Schedule I of the said rules,
 - (a) for the word and figures "1st day of January, 1996", wherever they occur the words and figures "1 day of January, 2006" shall respectively be substituted;
 - (b) for paragraph (1), the following paragraphs shall be substituted, namely:-

"(1) Notwithstanding anything contained in the first proviso to sub-rule (1) of rule 3, and the Notes there under, the initial pay of a promoted officer or an officer appointed by selection, as the case may be, shall be fixed at the pay drawn by an officer in the Pay Band 3 or Pay Band-4 in the State Service in addition to one of

Ve

35

the grade pays admissible for the three components Senior Scale as per the eligibility of the officer in the following manner:

Pay in Pay Band	Grade Pay
Officer with Pay up to Rs. 29490 in Pay Band-3	Rs. 6600/-
Officers with pay between Rs. 29491 to Rs. 30690 in Pay Band-3	Rs. 7600/-
Officers with pay Rs. 30691 or above in Pay Band-3/Pay-Band-4	Rs. 8700/-

In case the pay of officer in State Service has not been revised to the new pay structure with effect from the 1st January, 2006, the same shall be revised in terms of provisions contained in Rule 3A.”

5. It is stated that while fixing the pay of the applicant on appointment to IAS the NPA has been treated as allowance, whereas same is a component of his pay merged in the basic pay and he was drawing this allowance with basic pay and drawing DA on his basic pay in the Pay Band + NPA by treating both the components as his basic pay. Hence the NPA was not an additional pay of the applicant, but is the actual pay in terms of Rule 4.4., Schedule- I of the aforesaid Rules. His claim was recommended by the State of Haryana to UOI (Respondent no. 1 & 2) who passed the impugned order dated 25.2.2014, whereby his claim has been rejected on the ground that since medical qualification is not prescribed for selection to IAS, no NPA is allowed in the pay fixation of the applicant. It is further stated that the respondents have `wrongly relied upon para 4 of Dept. of Expenditure O.M. dated 30.8.2008 (Annexure A-5). Respondent No. 2 placed reliance on memo. dated 30.8.2008 while rejecting his claim which is totally wrong as the said letter related to the subject of revision of rates of Non-practicing allowance attached to medical posts. The memo dated 30.8.2008 deals with posts

Ver

belonging to the Central Health Service (CHS). The applicant argues that he is not seeking grant of NPA in IAS, he is, in fact, seeking protection of his pay because his NPA, which he had already been drawing while working as Medical Officer and which was being treated as his pay for all intents and purposes was required to be protected in terms of the 2007 Memo.

(Annexure A-5) reads as under:

“ OFFICE MEMORANDUM
Subject: Revision of rates of Non -Practising, Allowance attached
to medical posts other than posts included in the Central
Health Services (CHS)

The Sixth Central Pay Commission has recommended that Doctors should continue to be paid Non-Practising 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 +NPA does not exceed Rs.85000/-. Consequent upon acceptance of recommendations of the Sixth Central Pay Commission by the Government, the President is pleased to decide that, in modification of this Ministry's O.M. No.7(25)/E.III(A)/97 dated 15.4.1998, the Non-Practising Allowance may continue to be paid at the existing rate of 25% of Basic Pay subject to the condition that the Basic Pay + NPA does not exceed Rs.85000/-.

2. The term "basic pay" in the revised pay structure means the pay drawn in the prescribed pay band plus the applicable grade pay but does not include any other type of pay like special pay, etc. In the case of Government servants in the pay scales of HAG+ and above, basic pay means the pay in the prescribed scale.
3. The revised rate of NPA would be effective from the date an employee draws pay in the revised scale applicable to him in accordance with the provisions of the Central Services (Revised Pay) Rules, 2008.
4. The NPA should be restricted to those Medical Posts for which a Medical qualification recognized under the Indian Medical Council Act, 1956 or under the Dentists Act, 1948 has been prescribed as an essential qualification.
5. The Non-Practising Allowance will be treated as pay for the purpose of computing Dearness Allowance, entitlement of Travelling Allowance and other allowances as well as for calculation of retirement benefits.
6. These orders will not be applicable in respect of medical posts under the Ministries of Railways, Defence and Department of Atomic Energy for which separate orders will issue.
7. Hindi version will follow."

6. The applicant further stated that order dated 25.2.2014 (Annexure A-4), which has been passed by placing reliance upon a wrong letter not applicable and relevant in the context of applicant is

38

patently illegal, arbitrary, unconstitutional, cryptic and passed without application of mind and same is violative of various judicial pronouncements of different High Courts as well as from the Hon'ble Supreme Court. The applicant rests his case by invoking judicial pronouncement namely **K.C. Bajaj and Ors. Vs. Union of India & Ors 2014 (4) SLR 449**. He has argued that the Apex court has already held that for the purposes of pension the NPA should be taken into account. He has further contended by invoking the Tribunal's judgment in **Pritam Singh IAS Director Consolidation Punjab Vs. Union of India and Ors. 1990 (4) SLR** that any special pay being drawn by a Deputy Collector needs to be protected on his elevation to IAS. By referring to another judgment dated 21.10.2016 of the Gujrati High Court in Special Civil Application No. 9615 of 2006 **Mahesh Kumar P Kapadia Vs. State of Gujarat** he has tried to establish that while calculating the raise in Dearness Allowance(DA) in the case of doctors drawing NPA, NPA needs to be treated as part of basic pay. Citing these rulings the applicant argues that if NPA is treated as part of basic pay for calculation of pension and Dearness Allowance and if the special pay being drawn by a deputy collector is protected on his elevation to IAS, there is no justification in denying the same to the applicant while fixing his pay on his induction into IAS.

7. Respondent no. 1 & 2 refuted the claim of applicant and filed joint written statement, wherein while reiterating the impugned fixation of applicant to be correct and in accordance with rules, it is categorically stated that the NPA is not covered in IAS (Pay) Rules, 2007 and is not tenable as per law. The pay of the applicant has been rightly fixed as per provisions contained in the IAS (Pay) Rules,

2007 and in accordance with law and instructions issued by the Ministry of Finance, Department of Expenditure. It is further contended that pay of the applicant has been fixed in terms of provisions contained in para 1 of Schedule 1 of IAS (Pay) Rules, 2007 as amended vide notification NO. 14021/11/2008-AIS-II (Pay Desk)-II dated 15.4.2009 (Annexure R/3). In the State service the applicant was drawing a pay of Rs. 25,910/- in the pay band 3 Rs. 15600-39100+ grade pay of Rs. 7600/-. Subsequent to his selection in IAS his pay was fixed by granting an increment @ 3% over his pay in the State Service. He was allowed a grade pay of Rs. 6600/- in terms of Rule 10 (b) (1) of IAS (Pay) Second Amendment Rules, 2008 (Annexure -II) which reads "1(1) Notwithstanding anything contained in the first proviso to sub-rule (1) of rule 3 and the Notes there under, the initial pay of a promoted officer or an officer appointed by selection, as the case may be, shall be fixed at the pay drawn by the officer in the Pay Band-3 or Pay Band-4 in the State Service in addition to one of the grade pay admissible for the three component of Senior Scale as per the eligibility of the officer in the following manner:

Pay in Pay Band	Grade Pay
Officer with pay up to Rs 29490/- in pay band-3	Rs. 6600/-
Officer with pay between Rs. 29491 to Rs. 30690 in pay Band-3	Rs. 7600/-
Officers with pay Rs. 3069 or above in Pay Band-3/Pay Band-4	Rs. 8700/-

It is stated that the NPA should be restricted to those Medical Posts for which qualification recognized under the Indian Medical Council Act, 1956 or under the Dentists Act, 1948 has been prescribed as an

WY

40

essential qualification (Annexure-III). Since such qualification is not prescribed for appointment/selection of IAS, no NPA is allowed. It is further stated that the 6th Central Pay Commission has noted that the demand for extension of NPA to categories other than Doctors had consistently been made before all the earlier Pay Commissions (baring First CPC) and none of the Commissions had recommended extension of NPA to the other categories. While recommending NPA, the Commission emphasized the fact that NPA to Doctors is paid not only for loss of private practice but also to compensate for longer duration of studies, longer working hours/nature of duties and to compensate for the relatively lesser promotional prospect that exist on account of entry level posts of Doctors necessarily having to be filled by direct recruitment, without any posts in the entry level being filled by promotion. The facility cannot, therefore, be extended to any other category. NPA should be restricted only to the medical Doctors occupying post for which minimum qualifications of a medical degree is prescribed. The 6th CPC did not accede to the demand for extension of the benefit of NPA in respect of Para medical staff like nurses, pharmacists, physiotherapists, technicians. Hence they have prayed for dismissal of the O.A.

8. The respondent no. 3 adopts the written statement filed on behalf of respondents no. 1 & 2.

9. The respondent no. 4 also filed separate written statement pleading dismissal of O.A. on the lines of respondents no. 1 & 2.

10. Respondents, thus, have categorically stated that the relevant rules as referred to above do not provide for including NPA as part of basic pay. They have argued that unless the new service to which an

Key

employee has been inducted into entails a doctor's responsibility and functions, NPA cannot be permitted.

11. Given the facts of this case and the arguments put forth by the rival contentions, the following issues emerge as relevant to adjudication in this case:-

- a) whether NPA should be considered a part of basic pay for the purposes of fixing the applicant's pay on his induction into IAS?
- b) Is there a case for making a distinction between 'pay' and 'basic pay' in situations where the government employee is migrating from one service to another superior service and where he is also drawing a unique allowance like NPA or special pay?
- c) If it is held that the applicant's pay in IAS should be fixed considering the NPA as part of 'basic pay' or 'pay', should it be allowed to be in perpetuity? This issue assumes significance in view of the fact that the applicant obtains a recurring advantage over his colleagues in IAS inducted from a non medical background - an advantage that continues even without dispensing any responsibility of a medical officer which he was doing before getting inducted into IAS.

12. There cannot be any dispute on the conceptual aspect of the nature of NPA. NPA is an allowance and like all other allowances it is a compensation for forgoing something, in this case foregoing private practice. As a Government Doctor is not allowed to practice privately, he is compensated by granting him a non-Practicing Allowance (NPA). The same principle applies to all other allowances as well. One gets a housing allowance because government does not offer an accommodation to the employee; a medical allowance in the same way is a compensation for not giving the employee free institutional medical treatment. Notwithstanding the judgments that have held that NPA should be taken into reckoning while calculating the pension of the doctors, the fact remains uncontested that NPA is essentially compensation. Therefore, any NPA after induction into

Ver

IAS is incongruous and apparently wrong because an IAS officer does not work as a doctor even though he is professionally qualified to be a doctor.

13. The two judgments one of the Apex Court and another of Gujarat High Court, the first treating NPA as part of basic pay while fixing pension and the other allowing NPA while fixing the new DA pertain to doctors who have not migrated from medical service to another service as is the case in this OA. The third ruling which is closer to this case though not identical is with regard to treating special allowance as part of basic pay while fixing the pay on induction into IAS. Now, the nature of NPA and Special Pay is not identical. Special pay is not compensation. It is a pay which should have been a part of basic pay, but for some reason was denied to the employee. In normal course, this ought to have been a part of basic pay, but could not be granted for a valid reason and this omission is made good by sanctioning a special pay which is personal to the employee. Therefore, in our view personal pay is distinct from NPA for the reasons explained hereinabove.

14. So, while there is no controversy over the fact that the applicant is not entitled to any NPA after induction into IAS and joining this service the issue here is whether NPA drawn by him in the previous service should be taken as part of his basic pay for the purposes of fixing his pay on his induction into IAS?

15. The strongest support that the applicant gets in support of his contention comes, in our view, from the verdict of Gujarat High Court in Special Civil Application No. 9615 of 2006 titled **Mahesh Kumar Kapadia Vs. State of Gujarat** delivered on 21.10.2016. The operative part of the said order is reproduced below:-

Ver

“ 20. In the result, all the writ applications succeed and are hereby allowed. It is hereby declared that for the period between 1st April 2004 and 31st March 2009, the Non-Private Practicing Allowance shall be treated as a Basic Pay and shall be calculated along with the Basic Pay for the purpose of determining the Dearness Pay. The authority concerned shall calculate the difference accordingly in the case of each of the Medical Officers and pay the consequential benefits within a period of three months from the date of receipt of this order. Rule is made absolute accordingly.”

16. However, it will also be necessary to understand the grounds and rationale for reaching such a verdict. Our study of the judgment suggests that the strongest reason for the Gujarat High Court to reach the conclusion it reached, is enshrined in Paras 17 and 18. These paragraphs also need reproduction and are reproduced below:-

“17. The State Government, in my view, is incorrect in taking the view that the N.P.A is not a part of the Basic Pay, but is being taken into account only for the purpose of calculating the Dearness Allowance. In the Gujarat Civil Services (Revision of Pay) Rules 1987, the Non-Practicing Allowance was given a statutory recognition for the purpose of inclusion in the revision of pay-scale, and for the consequential benefits. The Gujarat Civil Services (Revision of Pay) Rules, 1987 provides that the Non-Practicing Allowance shall be included in the existing emoluments. Even the Gujarat Civil Services (Revision of Pay) Rules, more particularly, Rules 3(6) provides that the Basic Pay would include the revised Non-practicing Allowance.

18. Even in the Gujarat Civil Services (Revision of Pay) Rules 1998, which came to be notified vide the Notification dated 28th January 1998, it was provided that the practicing allowance should be calculated on the basis of Pay + Non-Practicing Allowance for calculating / arriving at the figure of the “emoluments” of the Medical Officers. The Gujarat Civil Services (Revision of Pay) Rules 1998 provides that the “revised emoluments” means the Basic Pay of a government servant in the revised scale of pay and would also include the revised Non-Practicing Allowance, if any, admissible in addition to pay. Thus, in my view, the reasoning assigned by the State Government proceeds absolutely on a wrong footing. I fail to understand why this objection is raised by the State Government only for the period between 2004 and 2009. After 1st April 2009, again the position has been restored as sought by the writ applicants herein for the period between 1st April, 2004 and 31st March, 2009.”

17. A reading of these paragraphs clearly suggests that in the state of Gujarat the Rules themselves provide inclusion of NPA in basic pay. The judgment rightly refers to the two Rules namely The Gujarat Civil Services (Revision of Pay) Rules, 1987 that provides that the NPA shall be included in the existing emoluments and Rule 3(6) of these

Rules provides that the Basic Pay would include the revised NPA. The other Rule that the verdict refers to is The Gujrat Civil Services (Revision of Pay) Rules 1998 that provides that the 'revised emoluments' means the Basic Pay of a government servant in the revised scale of pay and would also include the revised Non-Practicing Allowance, if any, admissible in addition to pay. The verdict, therefore, in our view overwhelmingly depends on rule formulation in this regard to reach its conclusion.

18. However, there is no such Rule of Government of India that makes such or similar provisions as the Rules of Gujrat contain with regard to the inclusion of NPA of Doctors making it part of the basic pay. Given this fact, the said judgment of Gujrat High Court does not squarely cover the case of the applicant.

19. It is well recognized that the Apex Court judgment in the case of **K.C. Bajaj and other vs. Union of India (supra)** was in the context of fixation of pension post pay commission recommendations and the circular of GOI dated 11.9.2001 that provided "it is clarified that NPA is not to be taken into consideration after refixation 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 7-6-1999" the Supreme Court held the same to be merely clarificatory in nature and which does not modify or amend the circular dated 7.6.1999 that led to the medical officers in the armed forces to get the benefit of NPA treated as part of their basic pay. The Apex Court also held that in **Col. B. J. Akkara (Retd.) Vs. Govt. of India & Ors.** (2006) 11 SCC 709 case judgment which became the reason and basis for

the Government of India's decision to not treat NPA as part of basic pay, was mechanically applied and hence becomes legally unsustainable. It is imperative that the relevant parts of the judgment be reproduced below:-

"30. The judgment in Col. B.J. Akkara's case cannot be applied to the appellants' case because the circulars, which fell for interpretation in that case and those under consideration in these appeals are different in material aspect. By circular dated 7.6.1999, the Ministry of Defence 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 L1275 p.m. and a maximum of up to 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- 1996 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-1-1-1996 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 24-11-1997, 27-5-1998 and 14-7-1998, as the case may be, his/her pension will not be revised to the disadvantage of the pensioner (vide clause 4)."

31. When the implementing departments sought clarification on the issue whether NPA admissible as on 1.1.1986 is to be taken into consideration after re-fixation of pay on notional basis as on 1.1.1986 and the same is to be added to the minimum of the revised scale while stepping up the consolidated pension on 1.1.1996, the Ministry issued clarification vide circular dated 11.9.2001 in the following terms:

"The undersigned is directed to refer to Ministry of Defence Letter No. 1(1)/99/D(Pension/Services) dated 7-6-1999, 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 1-1-1996 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 Department of Pension and Pensioners' Welfare and the Department of Expenditure and it is clarified that NPA is not to be taken into consideration after refixation 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 7- 6-1999."

Ver
32. This Court treated circular dated 11.9.2001 as clarificatory in nature and held that it neither amends nor modifies circular dated

7.6.1999. The most striking difference between O.M. dated 7.4.1998 issued by Department of Pension and Pensioners' Welfare, Ministry of Personnel (Public Grievances and Pension) and circular dated 7.6.1999 issued by the Defence Ministry is that the decision of the President conveyed vide O.M. dated 7.4.1998 was that NPA shall count as pay for all service benefits including retirement benefits but no such decision was contained in circular dated 7.6.1999. Therefore, the clarification issued by the Ministry of Defence vide circular dated 11.9.2001 cannot be equated with O.M. dated 29.10.1999 which had the effect of modifying the decision of the President but was issued without his approval. Unfortunately, the Tribunal and the Division Bench of the High Court overlooked this vital distinction between O.M. dated 7.4.1998 issued by the Ministry of Personnel (Public Grievances and Pension), Department of Pension and Pensions' Welfare and Circular dated 7.6.1999 issued by the Ministry of Defence and mechanically applied the ratio of Col. B. J. Akkara's case for deciding the cases of the doctors, who served in Central Health Services, the Railways and other departments of the Government. Therefore, the impugned order is legally unsustainable.

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

Appeal allowed."

20. After carefully considering this matter and carefully going through the judicial pronouncements placed before us by the applicant, our considered view is that NPA should not be treated as part of basic pay. Our view is based on the following considerations:-

a) There is no judgment, neither to the best of our knowledge nor placed before us by the applicant that unequivocally holds that NPA has to be recognized as part and parcel of basic pay for all intents and purposes. The rulings discussed in preceding paragraphs have been given in unique contexts and their universality is not expressly stated.

b) NPA as we have discussed earlier in this order is an allowance- a compensation for the income that the government doctors forego when they do not practice privately. It is comparable to any other allowance like House Rent Allowance or Medical allowance. No other allowance is treated as part of basic pay.

c) By treating the NPA as part of the basic pay, the additional financial advantage to the such applicants is perpetuated as it becomes a permanent part of his basic pay and entitles such persons to the consequential benefits accruing from this increased basic pay.

d) The Rules in this regard do not provide for such a benefit explicitly and specifically. In case of the doctors of Gujarat Government, the state rules treated NPA as part

Ke

of basic pay and therefore, the decision of the state of Gujrat denying the doctors the benefit of NPA while fixing their DA was held to be wrong as this decision violated their own rules.

21. Once this first issue is settled, the second issue with regard to the justification or desirability of drawing a distinction between 'pay' and 'basic pay' assumes added significance. The Principle of pay protection implies that the emoluments of a government servant can not be reduced on his promotion. Induction into IAS is not only a promotion, it entails far greater responsibility. Therefore, it will be extremely difficult to justify reduction in the total emoluments that the applicant was getting before joining IAS. The pay protection principle is not restrictive and does not qualify such protection to the exclusion of certain allowances or 'special pay'; it also does not make any reference to the protection of only 'basic pay'. In a situation like the one we are dealing with, it cannot be denied that notwithstanding the fact that the NPA was not his basic pay, it was still part of his pay and the pay that the applicant was drawing can not be reduced. The distinction between 'pay' and 'basic pay' becomes quite necessary here to ensure that the applicant is not put to any financial loss due to his induction into IAS, which is perceived to be an elevation and not a demotion. An elevation must not reduce the existing pay and emoluments that the applicant was already drawing. This settles the second issue raised in Para 11.

22. Having held that, and on thoughtful consideration of the third issue with regards to the perpetuity or otherwise of this protection, we are of the clear view that perpetuating this advantage in fixation of pay for all times to come in the applicant's career will clearly be violative of equity and fairness vis-a-vis his other colleagues who

have come from non-medical background. While his initial pay protection including NPA is justified following the principle of pay protection, continuing it at every subsequent stage when the pay band of the applicant will be refixed on his promotion, will lead to an advantage as if the applicant was still working as a doctor and was entitled to getting the NPA. We are of this view, therefore, that the respondents should have the liberty to take a view at the next stage of his pay band/ pay scale revision/refixation and should be free to take a call with regard to perpetuating this additional element of NPA that the applicant ought to be given at the first fixation of pay on his induction into IAS.

23. The OA is accordingly allowed. The impugned order is quashed. The pay of the applicant be fixed taking into account the element of NPA to his emoluments in his previous service, the same being part of his 'pay' though not of 'basic pay'. The grade pay also shall accordingly be fixed. Our observations in Para 22 shall also be taken into consideration while implementing this order.

24. There shall be no order as to costs.

(UDAY KUMAR VARMA)
MEMBER (A)

(JUSTICE M.S. SULLAR)
MEMBER (J)

Dated: 03.03.2017
'SK'