IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE CITY
K O L K A T A – 700 091

Present :-

Hon'ble Justice Ranjit Kumar Bag,
Judicial Member.

-AND-

Hon'ble Dr. Subesh Kumar Das,
Administrative Member.

J U D G M E N T

Case No. : O.A. 1154 of 2016 :

CONFEDERATION OF STATE GOVERNMENT EMPLOYEES & OTHERS V. THE STATE OF WEST BENGAL & OTHERS

For the Applicants :-
Mr. Sardar Amjad Ali,
Learned Senior Advocate.
Mr. Masum Ali Sardar,
Mr. Prabir Chatterjee,
Learned Advocates.

For the State Respondents :-
Mr. Apurba Lal Basu,
Mr. Goutam Pathak Banerjee,
Mr. Biswa Priya Roy,
Learned Advocates.

For Respondent No. 2A :-
Mr. Firdous Samim,
Learned Advocate.

Judgment delivered on : July 26 , 2019.

JUDGEMENT

The petitioner No. 1, Confederation of State Government Employees is represented by its General Secretary, Malay Mukhopadhyay and the petitioner No. 2, Unity Forum is represented by its convener, Deboprasad Halder and the petitioners No. 3 and 4 are members of petitioner No. 1 and petitioner No. 2 respectively (hereinafter referred to as the petitioners).

2. The respondent No. 2A, Swapan Kumar Dey was impleaded as respondent when the writ application challenging the order of the Tribunal was pending for adjudication before the Hon'ble High Court. Naturally, the respondent No. 2A has also been impleaded in the original application by way of amendment after the matter was remanded to the Tribunal.

3. The petitioners in the original application have prayed for direction upon the respondents (i) for release of 50% Dearness Allowance (in short DA) upto January, 2016, (ii) for compliance with the recommendations of the report of the 5th Pay Commission, (iii) for release of 50% DA along with arrears upto January, 2016, so that the said arrears of 50% DA may not be forfeited after setting up of 6th Pay Commission by the State Government and (iv) other ancillary reliefs including costs.

4. On February 16, 2017 the Tribunal dismissed the original application by holding (i) that the payment of DA to the employees of State Government was absolute prerogative falling within the discretionary domain of the State and inaction and/or refusal on the part of the State cannot result in denial of accrued right of the employee for getting DA; (ii) that the State Government is not duty bound to act upon all recommendations of 5th Pay Commission and thereby the said recommendations did not entail that as a necessary corollary the same had to be carried out to its logical conclusion and (iii) that with regard to the issue of discrimination in payment of DA to the employees of the State Government working in Banga Bhavan at New Delhi and in Youth Hostel at Chennai and employees of West Bengal State Electricity Development Corporation Limited and their counterparts working throughout the State of West Bengal, cannot be

grappled and no analogy on the basis of the same can be derived in this context.

5. The above order of the Tribunal was challenged by the petitioners by filing writ application being WPST No. 45 of 2017 which was disposed of on August 31, 2018 by delivery of judgment. The Division Bench of the Hon'ble High Court formulated the following three issues for consideration in the said judgment :

(A) Whether the claim of the employees serving under the Government of West Bengal for DA is a legally enforceable right;

(B) Whether the claim of the employees serving under the Government of West Bengal for DA on the basis of the recommendations of the 5th Pay Commission is a legally enforceable right;

(C) Whether the discrimination in the matter of payment of DA to the employees of the State of West Bengal with their counterparts serving at Banga Bhavan in New Delhi and Youth Hostel in Chennai including the employees of West Bengal State Electricity Development Corporation requires consideration.

6. The Division Bench of the Hon'ble High Court has made the following observations with regard to issue (A) in paragraph 65 of the judgment :

"65. Therefore, as a consequence once the Government of West Bengal accepts the recommendation of the 5th Pay Commission for payment of Dearness Allowance to the extent as indicated hereinabove, it confers legally enforceable right on its employees to get the Dearness Allowance."

7. With regard to issues (A), (B) and (C), the observations made by the Division Bench of the Hon'ble High Court are summed up in paragraph 82 of the judgment, which are as follows :

"(i) The claim of the employees serving under the Government of West Bengal for Dearness Allowance is based on legally enforceable right of all employees serving under the Government of West Bengal up to such extent of the recommendations of the 5th Pay Commission which

has been accepted by the Government of West Bengal by virtue of the provisions of sub-rule (1) Rule 12 of ROPA Rules, 2009 read with paragraph 10 of the clarificatory memorandum bearing No. 1691-F dated February 23, 2009 on ROPA Rules, 2009 issued by the Government of West Bengal, Finance Department, Audit Branch, and paragraph 3 of memorandum bearing No. 1692-F dated February 23, 2009 in the matter of drawal of Dearness Allowance in revised pay structure under the ROPA Rules, 2009 issued by the Finance Department, Audit Branch, Government of West Bengal.

(ii) The claim of the employees serving under the Government of West Bengal to get Dearness Allowance at a rate equivalent to that of the employees of the Central Government requires adjudication upon consideration of the relevant materials on record for the purpose indicated hereinabove.

(iii) The claim of the employees serving under the Government of West Bengal for Dearness Allowance at a rate equivalent to that of the employees discharging their functions in Banga Bhavan at New Delhi and in Youth Hostel at Chennai requires consideration of the materials which may be brought on record by the Government of West Bengal for adjudication of the issue of arbitrariness in payment of Dearness Allowance at differential rates."

8. The Division Bench of the Hon'ble High Court had set aside the order passed by this Tribunal on February 15, 2017 and remitted the matter back to the Tribunal for fresh adjudication on merit the following two issues, viz. (i) whether the employees serving under the Government of West Bengal are entitled to get DA at a rate payable to the employees of the Central Government and (ii) whether the payment of DA to the employees of the State of West Bengal with that of their counterparts serving at Banga Bhavan in New Delhi and Youth Hostel in Chennai is discriminatory, after giving opportunity to both parties for exchange of reply and rejoinder and filing of the same before the Tribunal within stipulated period of time. The State respondents did not file reply within the stipulated period of time fixed by the Hon'ble High Court. Ultimately, the State respondents filed one review application being RVW No. 159 of 2018 along with CAN

8729 of 2018 praying for review of the earlier judgment and order passed by the Hon'ble High Court. The said review application was ultimately dismissed by the Division Bench of the Hon'ble High Court on March 7, 2019. By the judgment and order of dismissal of the review application, the Division Bench of the Hon'ble High Court extended the period of time for filing of reply and rejoinder. The State respondents filed reply and the petitioners filed rejoinder within the extended time fixed by the Hon'ble High Court.

9. With the above backdrop of the present case, Mr. Sardar Amjad Ali, Learned Senior Counsel appearing on behalf of the petitioners, contends that the Division Bench of the Hon'ble High Court has already decided that the employees of the Government of West Bengal have legally enforceable right to receive DA as part of the salary. He submits that the real value of salary fixed periodically by the Pay Commission set up by the Government gets continuously eroded with the passage of time due to unabated pressure of inflation in the market. The Government employees are paid DA to mitigate the loss of value of basic salary consequent upon inflation in the market economy by following the Consumer Price Index (CPI) at all India level. By referring to Chapter-10 of the report of the 5th Pay Commission set up for the State Government employees he argues that the 5th Pay Commission recommended for payment of DA to the State Government employees at par with the employees of the Central Government. By referring to the definition of "existing emoluments" in Rule 3(1)(e) of the West Bengal Services (Revision of Pay and Allowances) Rules, 2009 (in short ROPA Rules, 2009), Mr. Ali submits that the DA appropriate to the basic pay of the employees was taken into consideration for calculation of "existing emoluments" of the employees for fixation of revised pay in terms of ROPA Rules, 2009. Even DA payable to the Medical Officers on non-practicing allowance was taken into consideration for fixation of initial pay of the Medical Officers in the revised pay structure in Rule 7 of ROPA Rules, 2009. By relying on paragraph 10 of Memorandum No. 1691-F dated February 23, 2009 issued by the Finance Department, Audit Branch, Government of West Bengal, it is contended that the State Government has emphatically declared for payment of DA to the State

Government employees as part of the revised pay w.e.f. January 1, 2006 in terms of ROPA Rules, 2009 and necessary order in this regard has been issued under Memorandum No. 1692-F dated February 23, 2009 of the Finance Department, Audit Branch, Government of West Bengal. By the said Memorandum No. 1692-F dated February 23, 2009, the Governor has decided that the DA would be payable to the State Government employees @2% of basic pay p.m. w.e.f. April 1, 2008 and @16% of basic pay p.m. w.e.f. April 1, 2009 onwards.

10. Mr. Ali categorically submits that the State Government has followed the pattern of Central Government for releasing DA to its employees till date. The All India Consumer Price Index is followed by the Central Government for release of DA to the employees on 1st of January and 1st of July of every year. The State Government has followed the said pattern for release of DA to its employees till 2010, but from a later date notified by the State Government from time to time. The backlog in clearance of instalments of DA has been increased from time to time due to apathy of the State Government to release DA to its employees, though the State Government employees have the right to get the DA as part of pay in terms of ROPA Rules, 2009. Mr. Ali has relied on unreported decision of "Tripura Government Employees Federation v. State of Tripura" [WP (C) No.268 of 2011 decided on April 28, 2016] in support of his contention that the State Government employees are entitled to get DA at par with the employees of the Central Government.

11. Mr. Ali submits that the employees of Government of West Bengal posted at Banga Bhavan in New Delhi and at Youth Hostel in Chennai are drawing DA at a rate payable to the employees of the Central Government. The State Government employees posted in New Delhi and in Chennai are now drawing DA admissible to the employees of the Central Government and the said DA is enhanced from 148% to 154% w.e.f. January 1, 2019, whereas the State Government employees working within the State of West Bengal are not getting DA at par with the said State Government employees. Mr. Ali argues that the Consumer Price Index is applicable for all over the country and no separate Consumer Price Index is notified for different places of the country as done for declaration of DA for the workmen

governed under the Industrial Disputes Act, 1947. Mr. Ali has relied on the decision of the Hon'ble Supreme Court in "Workmen v. Indian Oxygen Ltd." reported in (1985) 3 SCC 177 in support of his above contention.

12. The gist of submission of Mr. Ali is that the payment of DA to the State Government employees posted in New Delhi and in Chennai at the rate payable to the employees of the Central Government and the payment of DA to the State Government employees working within the State of West Bengal at a different rate notified by the State Government from time to time is discriminatory, unreasonable and violative of Article 14 of the Constitution of India.

13. Mr. Firdous Samim, Learned Counsel representing the Respondent No. 2A has adopted the submission made by Mr. Ali on behalf of the petitioners.

14. Mr. A. L. Basu, Learned Counsel representing the State respondents submits that the conditions of service of the employees of Government of West Bengal are different from that of the employees of the Central Government and as such the claim of the State Government employees for payment of DA at par with the Central Government employees is not justified under the law. By elaborating the submission, Mr. Basu further contends that the pay scale, nature of duty and working environment of the State Government employees are different from that of the Central Government employees and as such the State Government employees cannot claim equality with the employees of the Central Government in claiming DA at the rate payable by the Central Government to its employees. He also submits that the recommendations of the 5th Pay Commission set up by the Government of West Bengal is not binding on the State Government, unless the recommendations are accepted by the State Government by framing of rules under Article 309 of the Constitution of India or issuing administrative directions in the form of G.Os. The State Government is duty bound to make payment of pay and allowances including DA to its employees in terms of that aspect of the report of 5th Pay Commission, which has been accepted by the State Government by way of framing statutory rules or issuing

administrative directions in the form of G.Os. The State Government has been releasing instalments of DA for its employees from time to time depending on financial capacity of the State Government. He argues that the revenue generation of the State Government is gradually increasing, but the existing financial capacity of the State Government does not permit for clearing the backlog of instalments of DA to the State Government employees. The State Government is unable to mobilise the resources for increasing financial capacity for releasing more instalments of DA to the State Government employees.

15. Mr. Basu has strenuously argued that the State Government had to promulgate "The West Bengal Fiscal Responsibility and Budget Management" (FRBM) Act, 2010 as per mandate of the Government of India, by which the borrowing capacity of the State Government to meet the fiscal deficit cannot be increased more than 3.5% of State's Gross Domestic Product (GDP). The State Government is also handicapped in generating more revenue due to abolition of Value Added Tax (VAT) and other ancillary statutes for imposition of tax after introduction of GST by the Government of India w.e.f. July 1, 2017. The gist of the submission of Mr. Basu is that the State Government does not have financial resources and ability to clear the backlog of instalments of DA as declared by the Central Government for its employees. Mr. Basu has relied on the unreported judgment of the Hon'ble Supreme Court in "Tamil Nadu Electricity Board V. Tneb-Thozhilalar Aykkiya Sangam" (Civil Appeal No. 1653 of 2019 arising out of SLP (C) No.25005 of 2015 decided on February 13, 2019) in support of his contention that the State Government employees are not entitled to get DA at the rate payable to the Central Government employees.

16. With regard to the allegation of discrimination in making payment of DA to the State Government employees working at Banga Bhavan in New Delhi and at Youth Hostel in Chennai, Mr. Basu submits that the State Government has the authority to make reasonable classification of its employees for the purpose of making payment of DA at the rate prescribed by the Central Government for its employees. According to Mr. Basu, the State Government employees working in New Delhi and in Chennai can very well be

classified as a separate group in a reasonable manner for the purpose of giving incentive in the form of allowances including DA, so that the said employees can perform the duties at a place far away from the State of West Bengal. By referring to the office order dated April 2, 2019 issued by the Principal Resident Commissioner, Government of West Bengal, it is contended that the employees of the State Government working in New Delhi can very well get DA at the rate of the Central Government employees, which is now enhanced from 148% to 154% as sanctioned by Government of India w.e.f. January 1, 2019. Mr. Basu has relied on the judgments of "Air India v. Nergesh Meerza" reported in 1982 (1) SLR 117, "Harakchand, Ratanchand Banthia v. Union of India" reported in AIR 1970 SC 1453 and "D.S. Nakara v. Union of India" reported in AIR 1983 SC 130 in support of his contention that the Government of West Bengal has the power and authority to make reasonable classification of its employees working in New Delhi and in Chennai and the employees working within the State of West Bengal for the purpose of payment of DA and such reasonable classification is permissible under Article 14 of the Constitution of India.

17. Having heard Learned Counsel representing both parties and on consideration of pleadings and materials placed before us, we would like to consider the following two issues already framed by the Hon'ble High Court, viz, (i) Whether the employees of the Government of West Bengal are entitled to get DA at a rate equivalent to that of the employees of the Central Government and (ii) Whether the payment of DA to the employees of State of West Bengal posted at Banga Bhavan in New Delhi and at Youth Hostel in Chennai at the rate of payable to the employees of the Central Government and payment of DA to other State Government employees working within the State of West Bengal at a separate rate notified by the State Government from time to time, are discriminatory and violative of Article 14 of the Constitution of India.

18. Before addressing the above two issues as enjoined by the Hon'ble High Court, we would like to deal with the decisions cited on behalf of both the parties, so that we may get the guidance from the

proposition of law already settled by the Hon'ble High Court and the Hon'ble Supreme Court.

19. In "Tripura Government Employees Federation v. State of Tripura" [WP (C) No.268 of 2011 decided on April 28, 2016], the issue came up for consideration of Learned Single Judge of the Hon'ble Tripura High Court is whether the Court can issue continuous mandamus for grant of DA to the State Government employees at par with the DA payable to the employees of the Central Government. In this unreported case, Guwahati High Court, which had the jurisdiction over the State of Tripura at the relevant point of time, passed one judgment on February 7, 1996 in Civil Rule No. 525 of 1995 for payment of balance amount of 36% DA to the State Government employees to maintain parity with instalment of DA released by the Central Government for its employees. The petitioner as representative of the Government employees of Tripura prayed for issuance of mandamus in perpetuity for payment of subsequent balance amount of DA on revised pay recommended by subsequent Pay Commission and accepted by the State Government for its employees at par with the DA payable to the employees of the Central Government within specific period of time. The Hon'ble High Court has held that the State Government of Tripura has been paying the Central rate of DA to its employees and as such the State Government is obliged to release arrears of DA on the basis of the rate of DA released by the Central Government for its employees. In this unreported case, Learned Single Judge followed the previous judgment of the Hon'ble Guwahati High Court delivered on February 7, 1996 in Civil Rule No. 525 of 1995, whereby the Guwahati High Court already held that the Government employees of the State of Tripura are entitled to get arrears of instalment of DA at the rate payable to the employees of the Central Government and the said judgment attained finality without being challenged before the Higher Forum. Naturally, there was no scope for Learned Single Judge of the Hon'ble Tripura High Court to consider afresh the issue whether the employees of the State of Tripura are entitled to get DA at the rate payable to the employees of the Central Government, whereas in the instant case, we have to consider whether the employees of the State

Government are entitled to get DA at the rate payable to the employees of the Central Government. So, the said unreported case of Hon'ble Tripura High Court is of no assistance to the petitioners to claim DA for the State Government employees at the rate payable to the employees of the Central Government.

20. Mr. Ali has relied on "Workmen v. Indian Oxygen Ltd." reported in (1985) 3 SCC 177 and submitted that the State Government cannot declare Dearness Allowance (DA) for its employees working in Chennai and Delhi at a rate different from those paid to the State Government employees working within the State, unless separate Consumer Price Indices are used for those places. In "Workmen v. Indian Oxygen Ltd" (supra), a union of the Workmen espoused their demand for upward revision of the variable DA by linking it to the Consumer Price Index number for industrial workers at Kanpur computed by Labour Bureau, Shimla and the same was referred to for adjudication. The respondent company entered into a settlement with another union in respect of the DA and then approached the Labour Commissioner, Kanpur for registering the settlement. Failing to get the settlement registered, the company enforced a new scheme of DA linked to the All India Average Consumer Price Index prepared by Labour Bureau, Shimla. The Hon'ble Supreme Court observed that the settlement by the respondent company was collusive. The principle laid down in this reported case that the workmen in different locations under an "industry-cum-region" wise agreement can be paid DA at different rates following different Consumer Price Index series. The concept of DA for the workmen under the Industrial Disputes Act based on the principle of "industry-cum-region" cannot be applicable in the present case where the claim is made for DA of State Government employees, whose service conditions are governed by the rules framed under Article 309 of the Constitution of India. This reported case ("Workmen v. Indian Oxygen Ltd") does not help the petitioners in establishment of their rights in the present application.

21. In "Tamil Nadu Electricity Board V. Tneb-Thozhilalar Aykkiya Sangam" (Civil Appeal No. 1653 of 2019 arising out of SLP (C) No.25005 of 2015 decided on February 13, 2019) cited on behalf of

the State respondents, the claim of the employees of the Board was for payment of revised Dearness Allowance (DA) at the rate and from the date declared by the Central Government for its employees. The employees of the Board agreed with the management of the Board for settlement of their pay related issues in terms of Memorandum of Settlement dated July 8, 1998 recorded under Section 18(1) of the Industrial Disputes Act, 1947. The said Memorandum of Settlement between the management of Board and its employees was adopted in the Board Proceedings dated July 18, 1998. It was stipulated between the management of Board and its employees and subsequently adopted in the proceeding of the Board that the employees of the Board would get DA as granted by the State Government to their employees at the same rate and from the same date. Even the subsequent wage settlement between the management of Board and its employees on October 15, 2005 also stipulated that the employees of the Board would get DA as granted by the State Government to their employees at the same rate and from the same date. In this unreported case, the employees of the Board received DA on the basis of agreement with the Management of the Board recognised under the Industrial Disputes Act, 1947. Accordingly, the Hon'ble Supreme Court turned down the claim of the employees to get DA at the rate and from the date as sanctioned by the Central Government for its employees. The facts of "Tamil Nadu Electricity Board" are clearly distinguishable from the facts of the present case where the claim is made for payment of DA to the State Government Employees in terms of the provisions of statutory rules and administrative instructions in the form of G.O. issued by the Government of West Bengal. The ratio of the decision of "Tamil Nadu Electricity Board" cannot be applied in the facts of the present case.

22. In "Air India v. Nergesh Meerza" reported in 1982 (1) SLR 117, the Hon'ble Supreme Court considered the constitutional validity of Regulations 46 and 47 of Air India Employees Service Regulations by which marriage within four years of entry into service and pregnancy stood on the way of continuation of service of Air Hostesses (AHs) and discretion was conferred on the General Manager to extend the retirement age of the AHs. By striking down some provisions of Air

India Employees Service Regulations, the Apex Court directed for extension of the retirement age of the Air Hostess upto 45 years. The Hon'ble Supreme Court has laid down the following propositions for invoking Article 14 of the Constitution of India in paragraph 37 of the Judgment, which are as follows :

"(1) In considering the fundamental right of equality of opportunity a technical pedantic or doctrinaire approach should not be made and the doctrine should not be invoked even if different scales of pay, service terms, leave, etc. are introduced in different or dissimilar posts.

Thus, where the class or categories of service are essentially different in purport and spirit, Art. 14 cannot be attracted.

(2) Art. 14 forbids hostile discrimination, but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases Art. 14 will be completely out of the way.

(3) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(4) Where equals and unequals are treated differently, Art. 14 would have no application.

(5) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(6) In order to judge whether a separate category has been carved out of a class of service, the following circumstances have generally to be examined :-

(a) the nature, the mode and the manner of recruitment of a particular category from the very start

(b) the classification of the particular category.

(c) the terms and conditions of service of the members of the category.

(d) the nature and character of the posts and promotional avenues.

(e) the special attributes that the particular category possesses which are not to be found in other classes, and the like.

It is difficult to lay down a rule of universal application but the circumstances mentioned above may be taken to be illustrative guidelines for determining the question."

23. The constitutional validity of some provisions of the Gold (Control) Act, 1968 came up for consideration before the Hon'ble Supreme Court in "Harakchand, Ratanchand Banthia v. Union of India" reported in AIR 1970 SC 1453. By striking down some provisions of the Gold (Control) Act, 1968 the Apex Court has laid down in paragraph 23 as follows :

"…. When a law is challenged as violative of Art. 14 of the Constitution it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and object of the Act the Court has to apply a dual test in examining its validity (1) whether the classification is rational and based upon an intelligible differntia which distinguishes persons or things that are grouped together from others that are left out of the group and (2) whether the basis of differentiation has any rational nexus or relation with its avowed policy and object."

24. In "D.S. Nakara v. Union of India" reported in AIR 1983 SC 130, the Hon'ble Supreme Court had to consider whether classification of the pensioners for giving benefit of the revised pension on the basis of date of retirement specified in the memorandum is arbitrary and violative of Article 14 of the Constitution of India. By striking down the memorandum for grant of revised pension based on a specific date of retirement, the Apex Court directed for payment of revised pension as computed under the liberalised pension scheme to all pensioners governed by the Central Civil Services (Pension) Rules, 1972, irrespective of the date of retirement. It is relevant to quote the

fundamental principle enunciated by the Hon'ble Supreme Court in paragraph 15 of the Judgment, which is as follows :

"15. Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differntia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question."

The propositions laid down by the Apex Court in above decisions are relevant for deciding the allegation of arbitrariness in giving DA to the State Government employees posted in New Delhi and in Chennai.

25. Now, we would like to consider the first issue, viz. (i) whether the employees of the Government of West Bengal are entitled to get DA at a rate payable to the employees of the Central Government. The report of the 5th Pay Commission set up by the Government of West Bengal has been accepted by framing of statutory rules under Article 309 of the Constitution of India, viz. ROPA Rules, 2009 and also by issuing administrative directions in the form of Memorandum No.1691-F dated February 23, 2009 and Memorandum No. 1692-F dated February 23, 2009 – both issued by the Finance Department, Audit Department, Government of West Bengal. The DA is recognised as part of the existing emoluments in Rule 3 (1)(e) of ROPA Rules, 2009 for fixation of pay in the revised pay structure of the State Government employees. Even DA payable to the Medical Officers on non-practicing allowance (NPA) was taken into consideration for fixation of initial pay of the Medical Officers in the revised pay structure in terms of Rule 7 of ROPA Rules, 2009. Paragraph 10 of Memorandum No. 1691-F dated February 23, 2009 issued by the Finance Department, Audit Branch, Government of West Bengal has laid down that the DA to which the State Government employee is entitled from time to time since first day of January, 2006 must be related to basic pay in the revised pay structure. The modalities for release of DA along with revised pay of the State

Government employees have not been spelt out either in the Memorandum No. 1691-F dated February 23, 2009 or in Memorandum No. 1692-F dated February 23, 2009. What has been specifically laid down in Memorandum No. 1692-F dated February 23, 2009 is that the DA will be related to basic pay in the revised pay structure w.e.f. April 1, 2008 @2% of basic pay p.m. and on subsequent dates till w.e.f. April 1, 2009 @16% of basic pay p.m. We are informed that the State Government employees are getting DA @125% of basic pay fixed in terms of ROPA Rules, 2009, whereas the Central Government employees are getting DA @154% of pre-revised basic pay as per recommendation of 6th Central Pay Commission with effect from January 1, 2019. There is no mandate either in the statutory rules framed by the State Government or in the administrative directions issued by the State Government, as to how DA will be released by the State Government for its employees from time to time, whereas the Central Government has specifically accepted the recommendations of the 6th Pay Commission for release of DA to its employees twice a year as on 1st January and 1st July payable with the salary of March and September respectively for administrative convenience with inflation neutralisation being maintained at 100% at all level. However, what is explicit from Rule 3(1)(e) of ROPA Rules, 2009 is that the State Government has adopted AICPI with base year 1982 (1982=100) as the basis for determination of revised pay structure in terms of ROPA Rules, 2009 by following the index average of 536 (1982=100) as on January 01, 2006. It is also pertinent to point out what is implicit from Rule 3(1)(e) read with Rule 7 of ROPA Rules, 2009 along with paragraph 10 of memorandum No. 1691-F dated February 23, 2009 and memorandum No. 1692-F dated February 23, 2009 is that the State Government has followed the pattern of Central Government in payment of DA to its employees at the same rate but from a different date at least till the year 2010.

26. The question crops in our mind what norms or principles were adopted by the State Government for payment of DA along with basic pay in the revised pay structure in terms of ROPA Rules, 2009. The admitted position is that the State Government has released DA @125% of basic pay w.e.f. January 1, 2019. On our specific query to

Mr. Basu as to what norms / principles were followed by the State Government for payment of DA to its employees, he has categorically submitted that the State Government released instalments of DA for its employees on adhoc basis depending on financial capacity of the State Government. Similarly, on our specific query to Mr. Basu as to what pattern was followed by the State Government for release of DA @16% of basic pay p.m. w.e.f. April 1, 2009, he has fairly submitted that the State Government has followed the pattern of the Central Government for release of instalment of DA for its employees. The instalment of DA released by the State Government for its employees w.e.f. April 1, 2008 to January 1, 2019 and by the Central Government for its employees w.e.f. July 1, 2006 to January 1, 2010 can be shown in the following table :

G.O. No. of Finance Department, Government of W.B.	Rate of DA (%) released by State Government	Date of effect given by State Government	Rate of DA (%) released by Central Government	Date of effect given by Central Government
1692-F dt. 23.02.2009	2	01.04.2008	2	01.07.2006
Do	6	01.06.2008	6	01.01.2007
Do	9	01.11.2008	9	01.07.2007
Do	12	01.03.2009	12	01.01.2008
Do	16	01.04.2009	16	01.07.2008
10900-F dt. 09.12.2009	22	01.12.2009	22	01.01.2009
2580-F dt. 06.04.2010	27	01.04.2010	27	01.07.2009
10850-F dt. 23.11.2010	35	01.12.2010	35	01.01.2010
11080-F dt. 12.12.2011	45	01.01.2012		
10615-F dt. 31.12.2012	52	01.01.2013		
8840-F dt. 16.12.2013	58	01.01.2014		
143-F dt. 09.01.2015	65	01.01.2015		
8430-F dt. 14.12.2015	75	01.01.2016		
18-F(P2) dt. 02.01.2017	85	01.01.2017		
5724-F(P2)dt.12.09.2017	100	01.01.2018		
4037-F(P2) dt.21.06.18	125	01.01.2019		

27. There is no doubt that the payment of DA to the Government employees stems from the need to protect the erosion in the real value of basic salary on account of inflation in the market. Naturally, DA admissible to a Government employee is correlated to the level of inflation. The successive Pay Commissions set up by the Central Government as well as State Government for revision of pay and allowances of the employees have made various changes in the modalities for payment of DA. Before implementation of the recommendation of 7th Central Pay Commission, the Government of India has calculated the level of inflation for the purpose of grant of DA to the Central Government employees on the basis of All India Consumer Price Index (AICPI) by taking the base year 1982 (1982=100). The inflation is measured by the change of Consumer Price Index (CPI), which is determined by the Labour Bureau, Shimla on the basis of survey of markets all over India and then published in the form of AICPI, which is used for determination of DA of the Government employees. Be that as it may, the Government of West Bengal has released DA for its employees from time to time by following the pattern of release of DA by the Central Government for its employees, though the State Government has released instalments of DA at different rates and from subsequent dates after release of DA by the Central Government.

28. Since we have to examine whether the employees serving under the Government of West Bengal are entitled to get DA at a rate payable to the employees of the Central Government, we need to first understand what are the issues and processes involved in payment of DA to the Government employees. On scrutiny of ROPA Rules, 2009 and the memorandum issued for payment of DA and revision of DA (1691-F dated February 23, 2009 and 1692-F dated February 23, 2009 and subsequent notifications of the State Government) and various orders/notifications issued by the Ministry of Finance, Department of Expenditure, Government of India, we find the following similarities and differences in payment of DA to the State Government employees as compared to that of the Central Government employees :

(i) DA has been paid as a percentage of the basic pay (not on the full pay packet) for both the Central Government employees and State Government employees.

(ii) Both the Central Government (in terms of 6th Central Pay Commission) and the State Government (in terms of 5th State Pay Commission) have used AICPI (1982=100) for industrial workers for measurement of inflation.

(iii) The base AICPI (1982=100) for calculation of DA with effect from January 1, 2006 (when DA has been considered as zero) has been the AICPI of 536 as per 1982 Series (1982=100), which has been same for the Central Government employees under 6th Central Pay Commission and the State Government employees under 5th State Pay Commission.

(iv) In fixing the initial basic pay in the revised pay structure as on January 1, 2006, the same AICPI point of 536 (1982=100) has been used by both the Central Government under 6th Central Pay Commission and the State Government under 5th State Pay Commission.

(v) In case of Central Government employees it has been specifically mentioned in the notification that the inflation neutralisation will be 100% meaning thereby that the DA percentage increase will be same as the percentage increase in AICPI. In case of the State Government employees, it has not been specifically mentioned that inflation neutralisation will be 100%, but the pattern of payment of DA in the initial years till 2010 indicates that the State Government has also followed the same principles in payment of DA.

(vi) It has been notified by the Central Government while accepting the recommendation of 6th Pay Commission that DA will be sanctioned twice in a year on 1st January and on 1st July. This has not been clearly spelt out by the State Government by any notification, though on scrutiny of notifications we find that while in the initial years till 2010 the payment of DA was made twice in a year, but after 2010 the State Government has not followed this pattern. The practice of revision of DA on 1st

January and 1st July of each year as is done by the Central Government has never been followed by the State Government.

(vii) The Central Government has notified that the revised DA on 1st January and 1st July will be payable with the salary of March and September respectively. This timely payment of DA has guaranteed compensation for erosion of basic salary within a reasonable period of time. In case of the State Government employees, there is no such notification and no such principles have been followed and there have been long delay in protecting the erosion of real value of basic salary due to inflation.

29. On comparison of payment of DA by the Central Government to its employees and by the State Government to its employees, we find that the principles followed by the State Government in terms of relationship between DA and basic pay, use of AICPI as a measure of inflation, relationship between DA and AICPI, and computation of DA are the same as that of the Central Government. The State Government has followed the same principles for computation and payment of DA on basic pay fixed under 5th State Pay Commission as has been done by the Central Government under 6th Central Pay Commission. The Central Government has revised DA twice in a year on 1st January and 1st July and paid them within 3rd month on which the DA is payable, whereas the State Government initially paid DA twice in a year, but discontinued to pay twice in a year after the year 2010 and has delayed payments of DA without following any principle in an arbitrary manner. The Division Bench of the Hon'ble High Court has observed that Dearness Allowance is a legally enforceable right of the State Government employees, which means that the State Government employees have the right to be compensated for the erosion of their basic salary due to inflation. If the real value of basic pay decreases due to inflation, then the State Government employees have the right to be compensated and if such compensation is not given effect within a period of reasonable time, then their right to get compensated is infringed. Inflation changes with time and thus the period of time within which the employees are to be compensated is extremely important and as such the right to get DA within reasonable

period of time is an integral part of the legally enforceable right to get DA.

30. What norms / principles have been followed by the State Government for release of DA for its employees ? No satisfactory answer in this regard came from Mr. Basu, Learned Counsel representing the State respondents. Mr. Basu has merely tried to impress upon us that the State Government has followed the pattern of the Central Government in releasing DA to its employees, but the State Government could not pay DA at the rate and from the date paid by the Central Government to its employees due to lack of financial resources of the State Government. The manner of release of DA by the State Government to its employees from 2% of basic pay to 125% of basic pay on different dates from April 1, 2008 to January 1, 2019 unerringly points out that the DA has been released by the State Government for its employees on an adhoc basis without following any norm or principle. The adoption of adhoc measure is the breeding ground of arbitrariness. Since the object of payment of DA is to mitigate the loss of value of basic salary consequent upon inflation in the market and since it is the bounden duty of the State Government to protect the erosion in the real value of basic salary on account of inflation, we are of the view that the State Government should have evolved proper norm or principle for release of DA to its employees. On an analysis of release of DA to its employees by the State Government for a period of last almost 10 years from April 1, 2008 to January 1, 2019, we find that the State Government has released DA to its employees only once in a year from 2012 to 2019 while no DA was released in the year 2011 i.e. by giving effect from any date in the year 2011. The State Government paid DA to its employees at the same rate of basic pay as paid by the Central Government to its employees w.e.f. 01.04.2008 to 01.12.2010, but from subsequent dates twice in every year. No DA was paid in the year 2011. The payment of DA during the period from 2012 to 2019 was done only once in a year. This irregular payment of DA on the basic pay by the State Government leads us to hold that the State Government has been paying DA to its employees in an arbitrary and whimsical manner without following any norm or principle.

31. We have already observed that the payment of rate of DA on the basic pay is calculated to mitigate the loss of value of basic salary consequent upon inflation on the basis of AICPI number. The State respondents have failed to place any material on record to establish that there is any other mode of calculation of rate of DA for its employees. On the contrary, the State respondents have followed the pattern of releasing rate of DA on basic pay as followed by the Central Government for payment of DA for its employees, though the State Government has been releasing DA at a lesser rate and with effect from subsequent date. In the absence of production of materials to establish any alternative mode of calculation for release of DA to the employees by the State Government, we are constrained to hold that the State Government is duty bound to pay DA to its employees by taking into consideration inflation measured by Labour Bureau by publication of AICPI number with the base year 1982 (1982=100), which is used for determination of rate of DA of the Government employees of the entire country.

32. The contention of the State respondents is that the State Government is not in a position to clear the backlog of instalments of DA to its employees for lack of financial resources. We cannot be oblivious of the argument of Mr. Basu that the revenue generation of the State Government has been increasing day by day, but the State Government is not in a position to generate more revenue by imposition of new tax due to coming into force of GST w.e.f. July 1, 2017 and by borrowing from other sources due to promulgation of West Bengal Fiscal Responsibility and Budget Management Act, 2010. The borrowing by the State Government from other sources can never be construed as generation of revenue for the purpose of payment of DA to its employees. Nor can we persuade ourselves to accept the contention of the State respondents that the State Government is unable to generate more revenue due to coming into force of GST, as the State Government has specific share of revenue under GST which came into force only in the year 2017. We do not find any merit in the above argument advanced on behalf of the State respondents. The adhoc measure adopted by the State Government for release of DA to its employees during last 10 years and the apathy of

the State Government to formulate the policy for release of DA to its employees in a systematic manner to mitigate the loss of value of basic salary on the basis of AICPI number, have led to the backlog in clearing instalments of DA to the employees even though the State Government has adopted the pattern followed by the Central Government. It needs to be mentioned that DA only compensates for loss of value of basic salary due to inflation and not loss of value of full salary due to inflation.

33. We have already observed that there is no mandate either under the statutory rules viz. ROPA Rules, 2009 or in the administrative directions issued by the State Government in the form of Memorandum No. 1691-F dated February 23, 2009 and Memorandum No. 1692-F dated February 23, 2009 that the DA will be paid to the employees by the State Government at a rate and from the date as paid by the Central Government to its employees. In the absence of any mandate under the statutory rules or the administrative directions, we are unable to hold that the State Government employees are entitled to get DA at a rate payable to its employees by the Central Government. However, from the discussion made by us hereinabove, we can hold without hesitation that the State Government employees are entitled to get DA on the basic pay at the rate to be calculated on the basis of AICPI number published from time to time by taking the base year 1982 (1982=100). It is the bounden duty of the State Government to evolve norms/principles for payment of DA to its employees by calculating the same on the basis of AICPI on the basic pay fixed in terms of ROPA Rules, 2009 till the date of giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal. The State Government is also duty bound to pay arrears of DA to its employees after fixing the rate on the basis of AICPI number before implementation of the report of 6th Pay Commission set up by the Government of West Bengal. We would like to observe that the State Government has the discretion to make payment of arrears of DA to its employees either in cash or by giving direction for depositing the same in the General Provident Fund (GPF) with suitable restriction on withdrawal of the same within specific period of time. The first issue whether the employees of the State Government are

entitled to get DA at the rate payable to its employees by the Central Government is decided accordingly.

34. The next issue for our consideration is whether the payment of DA to the employees of State Government at Banga Bhavan in New Delhi and at Youth Hostel in Chennai at the rate payable to the employees of the Central Government and payment of DA to other State Government employees working within the State of West Bengal at a different rate, is discriminatory and violative of Article 14 of the Constitution of India. The admitted position is that the State Government employees working at Banga Bhavan in New Delhi and at Youth Hostel in Chennai are getting DA at a rate payable to its employees by the Central Government. The latest office order no. 583-RCWB-RC/16/2019 dated April 2, 2019 issued by the Principal Resident Commissioner, Government of West Bengal has indicated about enhancement of DA payable to the State Government employees posted at Banga Bhavan in New Delhi from the existing rate of 148% to 154% as sanctioned by the Government of India, Department of Expenditure vide office memorandum dated March 8, 2019 with retrospective effect from January 1, 2019. Admittedly, the State Government employees posted at Youth Hostel in Chennai will also be entitled to get DA at the enhanced rate of 154% of basic pay w.e.f. January 1, 2019 as declared by the Government of India. According to Mr. Basu, the State Government employees working in New Delhi and in Chennai have been reasonably classified as a separate group for the purpose of giving incentive for discharge of their duties at a place far away from the State of West Bengal. Per contra, Mr. Ali has emphatically argued that payment of DA to the State Government employees working in New Delhi and Chennai at a different rate from that of the State Government employees working within the State of West Bengal is discriminatory, unreasonable and violative of Article 14 of the Constitution of India.

35. The question which calls for our determination is whether the State Government employees posted in New Delhi and in Chennai form a separate class and thereby do not come within the ambit of hostile discrimination forbidden by Article 14 of the Constitution of India and thereby payment of DA to those employees at a rate payable

to the Central Government employees is permissible by way of reasonable classification under Article 14 of the Constitution of India. By following the proposition laid down in paragraph 37 of the judgment in "Air India v. Nergesh Meerza" (supra), we have to see whether the State Government employees working in New Delhi and Chennai can be classified as a separate category of State Government employees for the purpose of payment of DA at a different rate. No materials have been placed by the State respondents to establish that the mode and manner of recruitment, terms and conditions of service, promotional avenues and retirement benefits of State Government employees working in New Delhi and Chennai are different from that of the State Government employees working within the State of West Bengal. In the absence of any material on record, we are constrained to hold that the mode and manner of recruitment, terms and conditions of service, promotional avenues and retirement benefits of the State Government employees working in New Delhi and Chennai are same as that of State Government employees working within the State of West Bengal. Naturally, by following the proposition of law laid down in paragraph 37 (6) of "Air India v. Nergesh Meerza" (supra), we can safely hold that the State Government employees working in New Delhi and Chennai cannot be categorised as a separate class for the purpose of payment of DA at a different rate as contended on behalf of the State respondents. Those State Government employees cannot be treated as a separate class only for the purpose of grant of DA at the rate payable to the Central Government employees on the sole ground of their posting at a place far away from the State of West Bengal. The rate of DA on the basic pay of the State Government employees is determined on the basis of AICPI, which is same for all State Government employees irrespective of whether they are posted in New Delhi or Chennai or within the State of West Bengal. We do not find any merit in the argument of Mr. Basu that the State Government employees posted in New Delhi and Chennai form a separate class and thereby they are entitled to get DA at a rate payable to the Central Government employees. The State Government has power, authority and discretion to give incentive to its employees posted in New Delhi and Chennai by way of special allowances. We

would like to reiterate that the DA is paid to the State Government employees to mitigate the erosion in the real value of basic salary on account of inflation. This inflation is surveyed by the Labour Bureau, Shimla for fixation of AICPI number, which is used for each part of the country. The DA cannot be paid at a different rate to the State Government employees depending on the place of posting as the rate of DA on the percentage of basic pay is calculated on the basis of AICPI number, which is the same for the whole country. The concept of different rates of DA payable on the principle of "Industry-cum-Region" applicable to the workmen under the Industrial Disputes Act, cannot be invoked for the purpose of payment of DA to the State Government employees. We accept the contention of Mr. Ali in this regard.

36. The principle enunciated in paragraph 15 of "D.S. Nakara v. Union of India" (supra) and in paragraph 23 of "Harakchand, Ratanchand Banthia v. Union of India" (supra) is that the classification must be rational and based on intelligible differentia which distinguishes the persons who are grouped together from others that are left out of the group and the basis of differentiation must have rational nexus with the object sought to be achieved by such classification. In the instant case, the State Government employees working in New Delhi and Chennai have been classified as a separate group for the purpose of payment of DA at a different rate without having any rationale behind it and this classification is not based on an intelligible differentia, particularly when the recruitment, conditions of service, promotion, retirement benefits etc. of those employees are the same as that of the employees working within the State of West Bengal and they are being paid DA on the basis of same AICPI number. We do not find any rational nexus of classifying the State Government employees working in New Delhi and Chennai as a separate entity with the object of classification sought to be achieved. It goes without saying that AICPI is a mechanism for measuring inflation for the whole country and AICPI number used for calculation of DA is not different in Delhi and Chennai as compared to that of West Bengal. In view of our above observation, we are constrained to hold that the State Government employees working in New Delhi and

Chennai are equal with their counterparts working within the State of West Bengal and they have been treated separately only for the purpose of grant of DA at the rate payable to the Central Government employees without any rationale behind it. Accordingly, equals have been treated differently without any reasonable basis and thereby the payment of DA to the State Government employees working in New Delhi and Chennai at a rate payable to the Central Government employees is arbitrary, unreasonable and violative of Article 14 of the Constitution of India. However, the State Government should not recover any amount of excess payment of salary from the State Government employees working at Banga Bhavan in New Delhi and at Youth Hostel in Chennai, as those employees are not responsible for the over payment made by the State of West Bengal. Moreover, the State Government may give incentive to its employees posted in New Delhi and Chennai by payment of Special Allowances. The second issue is decided accordingly in favour of the petitioners.

37. While remitting the case back to the Tribunal, the Division Bench of the Hon'ble High Court has emphatically decided that the State Government employees have the right to receive DA on the basic pay fixed in terms of ROPA Rules, 2009. The Tribunal was called upon to decide two issues, which have been addressed by us by giving our observations. The upshot of our observations is that the State Government employees are entitled to get DA on the basic pay fixed in terms of ROPA Rules, 2009 at a rate to be calculated on the basis of AICPI number (1982=100) published from time to time till the date of giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal. The State Government employees are also entitled to get arrears of DA on the basic pay to mitigate the loss of value of basic salary due to inflation after calculation of the rate of DA on the basis of AICPI number (1982=100) within a period of one year or before giving effect to the recommendation of 6th Pay Commission, whichever is earlier. The office orders / memorandums under which DA was paid to the State Government employees working at Banga Bhavan in New Delhi and at Youth Hostel in Chennai at the rate payable to the employees of the Central Government are struck down as arbitrary, unreasonable and violative

of Article 14 of the Constitution of India. This order will not stand on the way of giving any incentive to the State Government employees working in New Delhi and Chennai by way of special allowance or any other allowances to compensate the loss suffered by them for their posting at a place far away from the State of West Bengal.

38. The function of the pleadings is only to state the material facts and it is for the Court or Tribunal to determine the legal result of those facts and to mould the relief in accordance with that result, as decided by the Federal Court in "Messers Moolji Jaitha and Co. v. Khandesh Spinning and Wearing Mills Co. Ltd." reported in AIR 1950 FC 83: 1950 SCC online FC3. Accordingly, we would like to give the following directions on the basis of the findings made by us. The respondent No. 1, Chief Secretary to the Government of West Bengal is directed to evolve norms/principles within a period of three months from the date of this order for release of DA on the basic pay of the State Government employees fixed in terms of ROPA Rules, 2009 by taking into consideration inflation on the basis of AICPI number (1982=100), so that DA can be paid to the State Government employees at least twice in a year till the date of giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal for its employees. The respondent No. 1 is directed to implement the norms/principles evolved as per direction of the Tribunal within a period of six months from the date of the order. The respondent No. 1 is further directed to make payment of arrears of DA on the basic pay to the State Government employees by taking into account level of inflation on the basis of AICPI number (1982=100) by following the norms/principles evolved as per direction of the Tribunal within a period of one year from the date of this order or before giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal, whichever is earlier. The respondent No. 1 is at liberty to decide the mode and manner of payment of arrears of DA to the State Government employees within the period of time fixed by us. The respondent No. 1 is also directed not to give any effect to the office orders/memorandums issued for payment of DA to the State Government employees posted in New Delhi and Chennai at a rate payable to the employees of the Central

Government, but the respondent No. 1 will not make any recovery for excess payment of salary to those State Government employees. The respondent No. 1 is at liberty to give incentive to the State Government employees working in New Delhi and Chennai by payment of special allowance or any other allowances as the State Government may deem fit and proper. With the above directions, the original application stands disposed of.

39. The urgent Xerox certified copy of the judgment and order, if applied for, be supplied to the parties on priority basis on compliance of all necessary formalities.

(Dr. Subesh Kumar Das)
MEMBER(A)

(Ranjit Kumar Bag)
MEMBER (J)