

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debasish Kar Gupta
And
The Hon'ble Justice Shekhar B. Saraf

W.P.S.T. No. 45 of 2017

Confederation of State Government Employees, West Bengal & Ors.

Versus

The State of West Bengal & Ors.

For the Petitioners	: Mr. Sardar Amjad Ali, Ld. Senior Advocate, Mr. Prabir Chatterjee, Mr. Abhijit Chakraborty, Mr. Masum Ali Sardar
For the State	: Mr. Kishore Dutta, Ld. Advocate General, Mr. Joytosh Majumder, Ld. Government Pleader, Mr. Siddhartha Ghosh
For the Respondent 2A	: Mr. B.R. Bhattacharya, Ld. Senior Advocate, Mr. Firdous Samim

Heard on : 15/01/2018, 16/01/2018, 17/01/2018, 18/01/2018, 29/01/2018, 30/01/2018,
31/01/2018, 05/02/2018, 06/02/2018, 13/02/2018, 05/06/2018, 07/06/2018,
03/07/2018, 10/07/2018, 17/07/2018, 19/07/2018 & 24/07/2018

Judgment on: 31/08/2018

Debasish Kar Gupta , J. :

1. This Writ Application is filed against a final order dated February 16,

2017, passed by the West Bengal Administrative Tribunal dismissing the Original Application.

2. The above Original Application was filled by the applicants/writ petitioners before the learned Tribunal seeking following reliefs:-

- “(a) A direction upon the respondents authorities to forthwith release the 50% dearness allowances which is due upto January, 2006 immediately within a period of 1 (one) month from the date of receiving of the order;*
- (b) A direction upon the respondent authorities to immediately comply with the report and the recommendations of the 5th Pay Commission Report positively and without fail within a period of 1 (one) month from the communication of the order;*
- (c) A direction upon the respondent authorities to release the 50% of dearness allowances as the State Government without releasing the 50% dearness allowances for mere eye-wash set up a 6th Pay Commission who recommended for 10% interim relief upon the basic pay. But no whisper about due 50% dearness allowances and unless the court intervenes into it there may be every possibility of forfeiture of that 50% due dearness allowances which is the penultimate goal and gain of the State Government and the applicants will suffer irreparable loss and injury;*
- (d) The applicants pray for relief order directing the respondent authorities to grant 50% of the Dearness Allowances as that of the Central Government with arrear up to January, 2016 within a period of two weeks from the date of order;*
- (e) Costs pertaining to this application and incidental thereto;*
- (f) Such other further order or orders as Your Lordships may deem fit and proper.”*

3. The learned Tribunal arrived at the following findings at the time of dismissing the original application:-

- (i) Payment of Dearness Allowance to the employees of the Government of West Bengal was absolute prerogative falling with the discretionary domain of the Employer (read the State Government) and inaction and/ or refusal on the part of former cannot result in denial of an accrued right of the Employee for getting Dearness Allowance;*
- (ii) Though part of the recommendation of 5th Pay Commission might have been acted upon, it did not entail that as a necessary*

corollary the same had to be carried out to its logical conclusion;

(iii) The issue of discrimination in the matter of payment of Dearness Allowance to the Employees of the State of West Bengal with their counterparts serving in Banga Bhawan at New Delhi and in Youth Hostel at Chennai including the Employees of West Bengal State Electricity Development Corporation, could not be grappled and no analogy on the basis of the same could be derived in this context.

4. Necessary to point out that considering the submission made by the learned counsel appearing for the State respondents to admit the original application and to permit them to file reply to the same, the learned Tribunal was of the view that keeping the matter hanging for reply would serve no purpose as the issue was otherwise apparent and settled or in other words, according to the learned Tribunal, waiting for Reply upon admission would have been bringing Cinderella to ball.

5. It is submitted by Mr. Sardar Amjad Ali, learned Senior Advocate appearing on behalf of the petitioners, that the 5th Pay Commission was constituted by the State Government for recommending the revised pay structure of the State Government employees covering the issues relating to Dearness Allowance, Medical Allowance, House Rent Allowance and Non Practicing Allowance. According to Mr. Ali, the need for payment of Dearness Allowance so as to protect the loss of the Government employees caused by unabated pressure of inflation in the economy was dealt with in Chapter 10 of the report dated February 12, 2009, submitted by the above Pay Commission.

6. Drawing our attention towards paragraph 10.3 of the above report, it is submitted by Mr. Ali that according to the observation made by the Pay Commission the principle followed by the Government of India in the matter of calculation of the quantum of each instalments of Dearness Allowance had been followed by the State Government since April 1, 1979. According to Mr. Ali, the time lag in actual payment and when the same was payable, which did not include any arrears, was also taken into consideration by the Pay

Commission in paragraph 10.3 of the above report. It is further contended by him that the major grievance of most of the associations of employees was non-payment of Dearness Allowance instalments in time, which was payable twice in a year. It was also taken into consideration by the Pay Commission in its observation made in paragraph 10.4 of the above report.

7. Drawing our further attention towards the recommendation made in paragraph 10.6 of the above report it is submitted by Mr. Ali that the Pay Commission recommended to clear the backlog of the Dearness Allowance which had been sanctioned by the Government of India with effect from July 1, 2008 and then to fall in the line of Central Government pattern of sanctioning two instalments of Dearness Allowance each year. It is also submitted by him that the Pay Commission recommended the aforesaid course of action in order to mitigate a long standing grievance of almost all the State Government employees.

8. The next contention of Mr. Ali is that while acting on the basis of the above recommendation of the Pay Commission, the State Government framed West Bengal Services (Revision of Pay and Allowance) Rule, 2009 (hereinafter referred to as the ROPA Rules, 2009) in exercise of power conferred by proviso to Article 309 of the Constitution of India. Our attentions have been drawn towards the provision of sub-paragraph (c) of paragraph 3 of the said ROPA Rules, 2009 to submit that the “existing emoluments” was defined as the ground of following components:-

- (i) existing basic pay,
- (ii) dearness pay appropriate to the basic pay, and
- (iii) dearness allowance appropriate to the basic pay *plus* dearness pay at index average 536 (1982=100).

9. According to Mr. Ali, the State Government accepted the recommendation of the Pay Commission relating to payment of Dearness Allowance to the State Government employees by incorporating the Dearness Allowance as a component of the “existing emoluments” while revising their pay structures by framing the said ROPA Rule, 2009.

10. In order to substantiate the above submission, Mr. Ali referred to

paragraph 10 of the memorandum no.1691-F dated February 23, 2009 issued by the Government of West Bengal, Finance Department, Audit Branch. According to the above provision, consequent upon revision of pay of Government employees in accordance with the said ROPA Rule, 2009, the Dearness Allowance to which a Government employee was entitled from time to time since January 1, 2006 needed to be related to pay in the revised pay structure.

11. Reference is also made by Mr. Ali to the memorandum no.1692-F dated February 23, 2009 issued by the Government of West Bengal, Finance Department, Audit Branch, to submit that the above memorandum was issued to relate the Dearness Allowance admissible to a Government employee to his basic pay in the revised pay structure in the case he had been elected or had been deemed to be elected to draw in revised pay structure prescribed under the said ROPA Rules, 2009.

12. He relies on Paragraph 2 of the above memorandum which referred to Rule 12 of the said ROPA Rules, 2009 to repeat and reiterate that no arrears of pay and allowances to which any Government employee might be entitled in respect of the period from January 1, 2006 to March 31, 2008, should be paid to the Government employee. The Dearness Allowance admissible to a Government employee needs to be related to his pay in the revised pay structure with effect from April 1, 2008.

13. In paragraph 3 of the above memorandum rates of Dearness Allowance per month on basic pay was prescribed for the period from April 1, 2009.

14. According to paragraph 5 of the above memorandum “basic pay” for the purpose of calculation of Dearness Allowance should mean the Pay drawn in the revised pay band including the Grade Pay and NPA, where admissible, but should not include any other type(s) of pay for those employees who had been elected or deemed to be elected to draw pay in the revised pay structure prescribed under the said ROPA Rules, 2009.

15. It is the contention of Mr. Ali that the right of the State Government employees to get Dearness Allowance has been recognized by framing the said ROPA Rules, 2009 in exercise of power conferred on it by the proviso to

Article 309 of the Constitution of India read with memorandum nos.1691-F and 1692-F dated February 23, 2009 issued by the Government of West Bengal Finance Department, Audit Branch. According to Mr. Ali, the learned Tribunal did not consider the aforesaid provisions at all while dislodging the claim of the members of the petitioners' association of Dearness Allowance as a matter of right.

16. The next contention of Mr. Ali is that the right of the members of the petitioners' association to get Dearness Allowance at par with that of the Central Government employee flows from the action on the part of the State Government to pay a group of State Government employees working for gain in Banga Bhawan at New Delhi and in Youth Hostel at Chennai. According to Mr. Ali, it is not open for the State Government to pay Dearness Allowance at differential rates on the basis of the situs of discharging their duties. It is further added that the Central Government employees have been getting Dearness Allowance at the same rate prescribed for them for all over the country. According to Mr. Ali, the learned Tribunal was wrong in arriving at a conclusion that when no right had been conferred upon the State Government employees to get Dearness Allowance, adjudication of the issue of hostile discrimination in between the State Government employees discharging functions in different States did not require any consideration in course of the judicial review.

17. The above submissions made on behalf of the petitioners are repeated and reiterated by Mr. Bikash Ranjan Bhattacharya, learned Senior Advocate appearing on behalf of the added respondent no.2A who has been working for gain under the State Government in the Finance Department.

18. The contention of Mr. Bhattacharya that the service of a State Government employee is a status which is guided by different statutory provisions. Therefore, once the said ROPA Rules, 2009 has been framed by the State Government in exercise of power conferred under proviso to Article 309 of the Constitution of India, it is not open for the State Government to deny the rights which have been conferred upon the State Government employees by virtue of the said ROPA Rules, 2009 read with clarificatory

memorandum nos.1691-F and 1692-F dated February 23, 2009 issued by the Government of West Bengal Finance Department, Audit Branch.

19. According to Mr. Bhattacharya, the learned Tribunal acted mechanically to adjudicate the issue of payment of Dearness Allowance to the State Government employees discussing the law in general instead of entering into the area of controversy relating to the aforesaid rules framed by the State Government in exercise of powers conferred on it by the Constitution under proviso to Article 309 of the Constitution of India read with the aforesaid clarificatory notes dated February 23, 2009.

20. It is the contention of Mr. Bhattacharya that the State Government took the aid of the All India Price Index average while fixing the initial pay of the State Government employees in the revised pay structure under the provisions of proviso to Rule 7 of the said ROPA Rules, 2009. Therefore, the consideration of All India Price Index should not have been lost sight of by the learned Tribunal while passing the final order impugned to this writ application.

21. It is further contented by Mr. Bhattacharya that the provisions of paragraph 10 of the clarificatory memorandum no.1691-F dated February 23, 2009 issued by the Government of West Bengal Finance Department, Audit Branch recognizes the right of the Government employee to get the Dearness Allowance. Mr. Bhattacharya harped upon the phrase “the Dearness Allowance to which the Government employee is entitled from time to time since January 1, 2006 needs to be related to pay in revised pay structure”, which has been incorporated in the aforesaid paragraph containing that necessary Government order in this regard has been issued by Finance Department memorandum no.1692-F dated February 23, 2009. According to Mr. Bhattacharya, there was no reflection of consideration of the above provision in the final order impugned to this writ application.

22. It is the next contention by Mr. Bhattacharya that the payment of arrear Dearness Allowance from April 1, 2008 has been recognized under paragraph 12 of the said ROPA Rules, 2009. According to him, in the clarificatory memorandum no.1692-F dated February 23, 2009, paragraph 3

prescribes the right of payment of Dearness Allowance to the State Government employees not only in respect of arrears but also for the periods from April 1, 2008 till April 1, 2009 and onwards. According to Mr. Bhattacharya, no further document was required to be placed before the learned Tribunal to substantiate the claim of the State Government employees to get Dearness Allowance from the State Government as a matter of right.

23. It is submitted by Mr. Bhattacharya in order to substantiate the claim of the State Government employees to get the Dearness Allowance at a rate at par with the Central Government employees, that such a claim was required to be taken into consideration by the learned Tribunal for the purpose of removing the arbitrariness on the part of the State Government to pay Dearness Allowance to the counter parts of the State Government employees who have been discharging their functions in Banga Bhawan at New Delhi and in Youth Hostel at Chennai and enjoying Dearness Allowance at a rate at par with the Central Government employee. According to Mr. Bhattacharya, the learned Tribunal did not even take the pain of finding out the reasonableness for such hostile discrimination while arriving at a conclusion theoretically that the claim of Dearness Allowance by the State Government employee was not based on a legally enforceable right.

24. The above submission made on behalf of the petitioners and the respondent no.2A are vividly opposed by Mr. Kishore Dutta, learned Advocate General, West Bengal. According to him, the finding of the learned Tribunal was that the claim of Dearness Allowance by the State Government employees was not based upon any legally enforceable right. According to him, the pre-revised scale of pay of the State Government employees has been transformed to pay band scale and Grade Pay by virtue of the said ROPA Rules, 2009. According to the learned Advocate General, after initial fixation of pay under the said ROPA Rules, 2009, no formula exists for fixation of Dearness Allowance payable to the State Government employees for the subsequent period. No prayer was made before the learned Tribunal in the original application for fixation of rate of Dearness Allowance in future.

25. Drawing our attention towards the prayers made in the original application, it is contended by the learned Advocate General that implementation of the recommendation of 5th Pay Commission was the prayer before the learned Tribunal. According to him, mere recommendation made by the 5th Pay Commission does not confer any legally enforceable right on the State Government employees to claim Dearness Allowance at a particular rate or in other words at a rate at par with the Dearness Allowance paid to the Central Government employees.

26. It is also contended by the learned Advocate General that after accepting the provisions of the said ROPA Rules, 2009, so far as the revision of pay and allowances of the State Government employees are concerned, it is not open for them to turn around for claiming such benefit which is not incorporated in the said ROPA Rules, 2009.

27. Drawing our attentions towards the statements made in paragraph 15 of the affidavit-in-opposition affirmed on behalf of the respondent nos.1 and 2, it is submitted that the payment of Dearness Allowance to the State Government employees working in Banga Bhawan at New Delhi as also in Youth Hostel at Chennai at a higher rate is based on the situs of discharging their duties. According to him, the State Government employees who are discharging their duties outside Kolkata are not affected by inflation in the same manner as the employees present in Kolkata. It is further contended by him that such a classification is reasonable and does not deserve consideration in course of judicial review on the ground of infringement of the right guaranteed under Article 14 of the Constitution of India.

28. It is further repeated and reiterated by the learned Advocate General after accepting the Dearness Allowance at a rate decided by the State Government, it is not open for the State Government employees applying the doctrine of waiver.

29. Reliance is placed by learned Advocate General on the decisions of ***The State of Madhya Pradesh vs. G.C. Mandawar***, reported in ***AIR 1954 SC 493***, ***Vinaya Krishna Sinha & Ors. vs. Union of India (UOI) & others***, reported in ***(2001) 10 SCC 565***, ***Secretary Mahatma Gandhi Mission &***

Ors. vs. Bhartiya Kamgar Sena & Ors., reported in (2017) 4 SCC 449, **State of Punjab & Ors. vs. Amar Nath Goyal & Ors.**, reported in (2005) 6 SCC 754, , **Association of WB Secretariat Assistants & Anr. vs. The State of W.B. & Ors.**, reported in (2006) 3 CAL LT 77 and **K.D. Baherji vs. Life Insurance Corporation of India**, reported in AIR 1961 Cal 285 in support of his above submissions.

30. We have heard the learned Counsels appearing for the respective parties at length and we have given our anxious considerations to the facts and circumstances of this case.

31. Before entering into the issues involved in this writ application, it will be profitable to recollect the settled principles of law relating to the relationship in between the Government and its employees, namely public servants, right of government employees to get remuneration, introduction of the concept of payment of Dearness Allowance to the government employees and mode of performing the function of fixing and revising the remuneration of the government employees by the Government which are as follows:-

Relationship between the Government and its employees, namely public servants :-

32. According to the settled principle of law, the origin of public services is in contract. Once such an employee enters service he attains a status and the terms and conditions of an employee in public services are normally guided by Statutory Rules, Instructions or Circulars issued from time to time. Reference may be made to the decision of **Roshan Lal Tandon vs. Union of India**, reported in AIR 1969 SC 1889. The relevant portion of the above judgement is quoted below:-

6. It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract.
(Emphasis supplied)

33. The aforesaid Statutory Rules or Instructions or Circulars are usually incorporated in the relevant order of appointment. However, in absence of such express incorporation, the public authority and the public servant are necessarily bound by such Statutory Rules or Administrative Instructions or Circulars by reason of the nature of relationship between the employer and the employee.

34. Noteworthy, it is now well settled by reason of the decision in **Central Inland Water Transport Corporation Vs. Brojo Nath Ganguly**, reported in **(1986) 3 SCC 156**, that the terms and conditions of employees, whether contained in order of employment expressly or in it by reference, must not be unfair and unconscionable. The relevant portion of the above decision is quoted below:-

110. We would like to observe here that as the definition of the "the State" in Article 12 is for the purposes of both Part III and Part IV of the Constitution, State actions of the instrumentalities and agencies of the State, must not only be in conformity with the Fundamental Rights guaranteed by Part III but must also be in accordance with the Directive Principles of State Policy prescribed by Part IV. Clause (a) of Article 39 provides that the State shall, in particular, direct its policy towards "securing that the citizens, men and women, equally have the right to adequate means of livelihood". Article 41 requires the State, within the limits of its economic capacity and development, to "make effective provision for securing the right to work". An adequate means of livelihood cannot be secured to the citizens by taking away without any reason the means of livelihood. The mode of making "effective provision for securing the right to work" cannot be by giving employment to a person and then without any reason throwing him out of employment. The action of an instrumentality or agency of the State, if it frames a service rule such as clause (i) of Rule 9 or a rule analogous thereto would, therefore, not only be violative of Article 14 but would also be contrary to the Directive Principles of State Policy contained in clause (a) of Article 39 and in Article 41."
(Emphasis supplied)

35. The above view has been approved by majority of a Constitution Bench of the Apex Court in **Delhi Transport Corporation Vs. D.T.C. Majdoor Congress**, reported in **1991 Supp (1) SCC 600**, and the relevant portion of the above decision is quoted below:-

231. The employment under the public undertakings is a public employment and a public property. It is not only the undertakings but also the society which has a stake in their proper and efficient working. Both discipline and devotion are necessary for efficiency. To ensure both, the service conditions of those who work for them must be encouraging, certain

and secured, and not vague and whimsical. With capricious service conditions, both discipline and devotion are endangered, and efficiency is impaired.

232. *The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.*
(Emphasis supplied)

Right of government employees to get remuneration :-

36. As discussed hereinbefore, though the origin of public services is in contract, once an employee enters public service he attains a status. As a consequence of its original contractual character, fulfillment of well-known legal incidents are indispensable parts of public employment in order to constitute an enforceable contract. Consideration is one of the essential ingredient of an enforceable contract. In case of public services, the service rendered by an employee is the consideration moving from the employee to the employer, i.e. the State, and the remuneration payable to him for rendering such service constitutes the consideration moving from the employer to the employee. It was held by the Apex Court in this context in ***The State of Maharashtra Vs. Bhaishankar Avalram Joshi***, reported in **(1969) 1 SCC 804**, that the liability to pay remuneration to a public servant arises out of contract and the relevant portion of the above decision is quoted below:-

14. *It may be that these observations are not conclusive on the point under consideration. It seems to us, however, that some elements of relationship between a public servant and Government are based on contract within the meaning of Section 60 of the Bombay Reorganisation Act, 1960. In particular, the liability to pay salary, when it has been fixed, arises out of a contract to pay salary.*

37. I am pursued by the well-reasoned observation of a Division Bench of Bombay High Court (Aurangabad Bench) in ***Naseera Begum Vs. Syed Habibur Reheman***, reported in **(1995) II LLJ 462 (Bom) (DB)**, that though

the right to remuneration arises out of contract, it assumes the character of tangible movable property when it accrues and become due.

12.....

“movable property’ shall mean property of every description, except immovable property.

It, therefore, includes not only tangible corporeal movable property, but also the intangible movable such as a right to receive salary and wages from an employer.”

Introduction of the concept of payment of Dearness Allowance to the government employees :-

38. The remuneration which an employee in public services earns during the currency of his employment is commonly referred to as ‘Pay’ which includes Allowances. According to Concise Oxford English Dictionary, South Asia Edition (at page 1052), the word ‘Pay’ in relation to services means money due for work.

39. In India, the word ‘Pay’ in relation to public services has a technical connotation of its own depending upon the provisions providing for the same and the contextual interpretation thereof. It is evident from the definition of ‘Pay’ contained in various Service Rules that these definitions have certain common characteristics.

40. Under most of those service Rules, Dearness Allowance is basically a component of ‘Pay’ which is a fixed percentage of basic pay, aimed at hedging the impact of inflation.

41. In the year 1939, the World War-II engulfed the world which completely overhauled the consumer pattern and prices of essential commodities.

42. Dearness Allowance was introduced to meet increase in the cost of living which was initially known as “Food Allowance”. It is a concept peculiar to India, Ceylon, Pakistan and Bangladesh. While dealing with the concept of Dearness Allowance to find out neutralisation formula for industrial workers in ***Hindustan Lever Limited Vs. Hindustan Lever Employees Union & Ors.***, reported in ***1995 AIR (SCW) 602***, the Apex Court observed as follows:-

“11. The concept of dearness allowance, the second most important element in a worker’s wage-plan next to the basic wage, was introduced during the second world war to meet the increase in the cost of living caused by inflation. It was either linked to the cost of living index or was given by way of flat increases. When linked to the former, it was granted to all the income groups at a flat rate or was graded on a scale admissible to different income groups diminishing with rise in income. Basically, the concept of dearness allowance was designed to combat inflation and protect real wages and therefore it would appear that there should be cent per cent neutralization. This is a concept peculiar to India, Ceylon, Pakistan and Bangladesh.”

(Emphasis supplied)

43. After introduction of ‘variable Dearness Allowance’, the allowance comes at a revisional rate at a periodical interval for the Central Government employees and the State Government employees, the changed new rate is calculated taking into consideration the increase or decrease in the ‘Consumer Price Index’ (hereinafter referred to as the CPI).

Mode of performing the function of fixing and revising the remuneration of the government employees by the Government :-

44. Though the fixation of ‘Pay’ is essentially an executive function, it requires evaluation of duties and responsibilities of posts which should be determined by expert bodies like the Pay Commission. Reference may be made to the decision of **State of U.P. Vs. J.P. Chaurasia**, reported in (1989) **1 SCC 121** and the relevant portion of the above decision is quoted below:-

“18. The first question regarding entitlement to the pay scale admissible to Section Officers should not detain us longer. The answer to the question depends upon several factors. It does not just depend upon either the nature of work or volume of work done by Bench Secretaries. Primarily it requires among others, evaluation of duties and responsibilities of the respective posts. More often functions of two posts may appear to be the same or similar, but there may be difference in degrees in the performance. The quantity of work may be the same, but quality may be different that cannot be determined by relying upon averments in affidavits of interested parties. The equation of posts or equation of pay must be left to the Executive Government. It must be determined by expert bodies like Pay Commission. They would be the best judge to evaluate the nature of duties and responsibilities of posts.”

(Emphasis supplied)

45. In India, Pay Commissions are set up by the Central Government and the State Governments for their respective employees on a regular periodical gap, usually at an interval of ten years. Those Commissions are not statutory bodies. Those Commissions are constituted in exercise of powers conferred by Article 53 read with Article 73 of the Constitution of India in case of the Central Government employees and in exercise of powers conferred by Article 154 read with Article 162 of the Constitution of India in case of the State Government employees.

46. Every subsequent Pay Commission constituted by the Central Government or the State Government, as the case may be, is expected to reevaluate the 'Pay' of the employees in public services taking into account the various components of 'Pay'. All factors that feed into the calculation of 'Pay' of personnel in public services fall within the zone of consideration of the Pay Commission. Reviewing and changing of the multiplication factors also come under the purview of consideration of the Pay Commission. Dearness Allowance is also a part of such consideration for rolling out the next Pay Commission Report.

47. It is the age old settled principle of law that the recommendation made by the Pay Commission is not binding upon the Government and non-acceptance of the recommendation does not amount to violation of Article 14 or 16 of the Constitution of India, but in the event reference is made in respect of all employees of the Government concerned and it accepts the recommendations of the Pay Commission, it is bound to implement those recommendations in respect of all employees of the Government concerned. In this context, the observations of a Constitution Bench of the Hon'ble Supreme Court made in ***Purushottom Lal Vs. Union of India***, reported in ***(1973) 1 SCC 651***, is noteworthy and relevant portion of the above decision is quoted below :-

“15. Either the Government has made reference in respect of all Government employees or it has not. But if it has made a reference in respect of all Government employees and it accepts the recommendations it is bound to implement the recommendations in respect of all Government employees. If it does not implement the report regarding some employees only

it commits a breach of Articles 14 and 16 of the Constitution. This is what the Government has done as far as these petitioners are concerned.”
(Emphasis supplied)

48. Reiterating the above principles of law settled in **Purushottom Lal (supra)**, it was held by the Apex Court in **Union of India Vs. Ram Gopal Agarwal**, reported in **(1998) 2 SCC 589**, that in absence of cogent reasons, the recommendations of a Pay Commission could not be upset merely on the basis of affidavit affirmed in connection with a proceeding in which such an action of the Government is under challenge. The relevant portion of the above decision is quoted below:-

“11. In fact this distinction is being drawn on the basis of the report of the IVth Central Pay Commission submitted, which is an expert body in this regard. It is not possible for this Court, on the basis of the affidavits filed, to come to a clear conclusion specially in contradiction to the expert body report such as the IVth Central Pay Commission Report, to hold it arbitrary unless there are cogent facts and reasons brought before us, which is not in the present case.”

49. Now, I address the issues involved in this writ application as follows:-

A. Whether the claim of the employees serving under the Government of West Bengal for Dearness Allowance is a legally enforceable right?

50. It appears from the materials on record that the Government of West Bengal, constituted a Pay Commission in Finance Department resolution No.6020-F dated August 28, 2008, the terms of reference were as follows:-

- (1) *to examine the present structure of pay and conditions of service after taking into account the total package of benefits available to the following categories of employees and to suggest changes which may be desirable and feasible keeping in view the decisions of Central Government on the recommendations of the Sixth Central Pay Commission:-*
 - (a) *employees under the rule making control of the Government of West Bengal except members of the All India Services, West Bengal Judicial Service and the members of the services to whom the University Grants Commission Scales of pay and AICTE scales of pay are applicable;*
 - (b) *teaching and non-teaching employees of Government sponsored*

- aided –*
- (i) educational institutions,*
 - (ii) Training Institutions of Primary Teachers,*
 - (iii) Libraries,*
 - (iv) Polytechnics and Junior Technical Schools;*
- (c) non-teaching employees of non-Government Colleges (Sponsored or Aided);*
- (d) employees of the Municipalities, Municipal Corporations, Notified Area Authorities, District Primary School Councils and Panchayat Bodies;*
- (2) to examine the existing promotion policies and related issues and to suggest changes which may be desirable and feasible, having regard to need for improving people orientation, social accountability and efficiency of the administration;*
- (3) to examine special allowance and other allowances, concessions including leave travel concession and benefits in kind which are available to the employees in addition to pay and suggest changes which may be desirable and feasible;*
- (4) to examine issues relating to retirement benefits; and*
- (5) to make recommendations on each of the above having regard inter alia to the prevailing pay structure under the Central Government, Public Sector Undertakings and other State Governments etc., the economic conditions of the country, financial responsibility to the Government of India and the pattern of allocation of revenues to the State, the resources of the State Government and the demands thereon on account of the commitment of the State Government to development activities.*

51. The Commission submitted its report to the State Government on February 12, 2009. After due consideration of the recommendations of the Commission, it appears from the materials on record that the 5th Pay Commission in Chapter 10 of its report dated February 12, 2009 dealt with the major grievance of most of the associations of employees working for gain under the State Government regarding non-payment of Dearness Allowance in instalments in time. Needless to point out that the above consideration was covered by the terms of reference to the 5th Pay Commission. The above Pay Commission made its recommendation in paragraph 10.6 of Chapter 10 of its report dated February 12, 2009 which was as follows:-

10.6. It is evident from above that the State Government's sanction of the instalments does not follow any definite pattern. It is also clear that there are delays in payment of various instalments of DA and there cannot be any differences of opinion regarding the need to avoid the delays. We are of the

opinion that with some extra effort the State Government should be in a position to clear the backlog of the lone instalment, which was sanctioned by the Govt. of India w.e.f. July 1, 2008, and then fall in line with the Central Government pattern of sanctioning two instalments of DA each year. We recommend this course of action. If it is done, it will mitigate a long standing grievance of almost all employees within out terms.

52. After considering the above report, the ROPA Rules, 2009, was framed in exercise of power conferred by the proviso to Article 309 of the Constitution of India in sub-rule (c) of Rule 3 the term “existing emoluments” means the aggregate of –

(i) existing basic pay,

(ii) dearness pay appropriate to the basic pay, and

(iii) dearness allowance appropriate to the basic pay *plus* dearness pay at index average 536 (1982=100).

53. Therefore, it is evident that Dearness Allowance was also one of the components which came under the purview of its consideration for rolling out to the 5th Pay Commission report.

54. Sub-rule (1) of Rule 12 of ROPA Rules, 2009 provided that no arrears of pay to which Government employee might be entitled in respect of the period from 1st day of January, 2006 to 31st day of March, 2008, should be paid to the Government employee. Needless to point out that the above decision included non-payment of arrear Dearness Allowance for the period of 1st day of January, 2006 to 31st day of March, 2008.

55. The Government of West Bengal, Finance Department, Audit Branch issued a clarificatory memorandum bearing no.1691-F dated February 23, 2009 on the ROPA Rules, 2009 and on allied matters dealt with by the 5th Pay Commission. Paragraph 10 of the above clarificatory memorandum provides as follows:-

10. Dearness Allowance – Consequent upon revision of pay of Government employees in accordance with the West Bengal Services (Revision of Pay and Allowance) Rules, 2009, the dearness allowance to which a Government employee is entitled from time to time since the 1st day of January, 2006 needs to be related to pay in the revised pay structure. Necessary Government Order in this regard has been issued with Finance Department Memo No. 1692-F dated the 23rd February, 2009.

56. The Government of West Bengal, Finance Department, Audit Branch issued a further memorandum bearing no.1692-F dated February 23, 2009 in the matter of drawl of Dearness Allowance in revised pay structure under the ROPA Rules, 2009 in paragraph 2 of the above memorandum. It was categorically stated no arrears of pay and allowance to which Government employee might be entitled in respect of the period from 1st day of January, 2006 to 31st day of March, 2008, should be paid to the Government employee, the Dearness Allowance admissible to a Government employee needed to be related to pay in revised pay structure with effect from 1st April, 2008 only. The rate of Dearness Allowance payable to a Government employee with effect from April 1, 2008 to April 1, 2009 and onwards was provided in paragraph 3 of the above memorandum as follows:-

3. Accordingly the Governor is pleased to decide that the Dearness Allowance payable to a Government employee with effect from 1st April, 2008, shall be at the following rates:-

<i>Period for which payable</i>	<i>Rate of Dearness Allowance per month on basic pay</i>
<i>01.04.2008 to 31.05.2008</i>	<i>2%</i>
<i>01.06.2008 to 31.10.2008</i>	<i>6%</i>
<i>01.11.2008 to 28.02.2009</i>	<i>9%</i>
<i>01.03.2009 to 31.03.2009</i>	<i>12%</i>
<i>01.04.2009 onwards</i>	<i>16%</i>

57. The above paragraph purports that the rate of Dearness Allowance after April 1, 2009 would be fixed from time to time and the same was payable to all the employees serving under the Government of West Bengal at a rate to be determined on the basis of the accepted guidelines.

58. As discussed hereinabove with reference to the decision of ***Purushottom Lal (supra)***, it is the age old settled principles of law that the recommendation made by a Pay Commission is not binding upon the Government and non-acceptance of the recommendation does not amount to violation of Article 14 or 16 of the Constitution of India but in the event reference is made in respect of all employees of the concerned Government and it accepts the recommendations of the Pay Commission, it is bound to

implement those recommendations in respect of all employees of the Government concerned.

59. From the provisions of Rule 12 of ROPA Rules, 2009 read with the contents of paragraph 10 of the clarificatory memorandum no.1691-F dated February 23, 2009 and those of paragraphs 2 and 3 of memorandum no.1692-F dated February 23, 2009, both issued by the Government of West Bengal, Finance Department, Audit Branch, there is no doubt that the Government of West Bengal accepted Dearness Allowance basically as a component of pay which is a fixed percentage of basic pay, on the recommendation of the 5th Pay Commission made in its report dated February 12, 2009 aiming at hedging the impact of inflation.

60. The learned Tribunal did not consider the issue involved in the original application from the above angle at the time of coming to the erroneous conclusion that the payment of Dearness Allowance was absolute prerogative falling within the discretionary domain of the Employer (read the State Government) and inaction and/or refusal on the part of the former cannot result in denial of any right of Dearness Allowance as it was not an accrued right of the employee.

61. Further, I do not find that there was refusal on the part of the Government of West Bengal to recognize the right of its employees to Dearness Allowance as evident from the provisions of Rule 12 of ROPA Rules, 2009 read with the provisions of paragraph 10 of the clarificatory memorandum nos.1691-F and 1692-F both dated February 23, 2009 issued by the Government of West Bengal, Finance Department Audit Branch.

62. Before dealing with the decisions, which are relied upon by Learned Advocate General, one must keep in mind that the observation of court is not to be read as provisions of the statute. Those observations must be read in the context in which they appear. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Reference may be made to the decision of ***Haryana Financial Corporation & Anr. vs. Jagadamba Oil Mills & Anr.***, reported in **(2002) 3 SCC 496** and the relevant portions of the above decision is quoted below:-

19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes.

20.

21. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

63. In **G.C. Mandawar (supra)** the point for decision was whether a resolution of the Government of Central Provinces and Berar, (now Madhya Pradesh) dated September 16, 1948 fixing a scale of Dearness Allowance to be paid to its servants was repugnant to Article 14 of the Constitution. The above point was decided in the light of provisions of the Fundamental Rules. Ultimately, it was decided by the Hon'ble Supreme Court in the above case that the scale of Dearness Allowance as recommended by the Commission and sanctioned by the Central Government could furnish no ground for holding that the scale of Dearness Allowance recommended by the Committee and adopted by the Central Government was repugnant to Article 14 of the Constitution. In view of the distinguishable facts and circumstances of the case in our hand, the observations made in the above decision does not help the respondents to the context of the case in hand.

64. Similarly, in **Vinaya Krishna Sinha (supra)** the Point in issue was the entitlement of those pensioners to get dearness relief on full pension who had commuted 100% pension. So, the above decision does not help me to decide the issue involved in the case in hand.

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.

B. Whether the claim of the employees serving under the Government of West Bengal for Dearness Allowance on the basis of the recommendations of the 5th Pay Commission is legally enforceable right?

66. As discussed hereinabove, it was decided by the Hon'ble Supreme Court in the matter of *Purushottom Lal (supra)* the recommendation made by a Pay Commission is not binding upon the Government and non-acceptance of the recommendation does not amount to violation of Article 14 or 16 of the Constitution of India. As a corollary to the above decision, I find that the recommendation of a Pay Commission is binding upon the Government only up to that extent which has been accepted by the Government.

67. At the cost of repetition it may be observed here that Government of West Bengal while calculating the "existing emolument" of the employees serving under the above Government, under sub-rule (c) of Rule 3 of the above Rule dearness allowance was also incorporated therein as one of the factors which came under the purview of its consideration for rolling out to the Pay Commission's report.

68. Under sub-rule (1) of Rule 12 of the ROPA Rules, 2009, it was declared that no arrears of pay to which Government employee might be entitled in respect of period from 1st day of January, 2006 to 31st day of March, 2008 should not be paid to the Government employee. I have already found that paragraph 10 of the clarificatory memorandum bearing No.1691-F dated February 23, 2009 on the ROPA Rules, 2009 and on allied matters provided that the Dearness Allowance to which an employee serving under the Government of West Bengal was entitled from time to time since 1st day of January, 2006 needed to be related to pay in revised pay structure and necessary Government order in this regard had been issued under Finance Department memorandum bearing No.1692-F dated February 23, 2009.

69. Paragraph 3 of the aforesaid memorandum bearing No.1692-F dated February 23, 2009 provided for the rate of Dearness Allowance per month on the basic pay of an employee serving under the Government of West Bengal

for the purpose from April 1, 2008 to April 1, 2009 and onwards that is the extent up to which the Government of West Bengal accepted the recommendation of the 5th Pay Commission till the period of April 1, 2009 leaving the calculation for the subsequent period for its future consideration at a rate on the basis of the accepted guidelines.

70. On the basis of the settled principles of law as decided by the Hon'ble Supreme Court in the matter of **Ram Gopal Agarwal (supra)** as discussed hereinabove, it is not possible for the Court to come to a clear conclusion specifically as to whether the action on the part of the Government was arbitrary or not unless cogent facts and reasons are brought on record to show that the decision making process of the Government in fixing the rate of Dearness Allowance was not arbitrary in the light of the recommendation made by the Pay Commission.

71. It will not be out of context to observe here that instead of adopting a procedure on bringing the relevant materials on record, the learned Tribunal discussed the right of the employees working for gain under the Government of West Bengal placing reliance on the general theory of law to reject the claim of the petitioners.

72. In **Secretary, Mahatama Gandhi Mission (supra)** and **Amar Nath Goyal (supra)**, it was decided that the recommendation of the Pay Commission is not *ipso facto* binding upon the Government. But the point for consideration in the case in hand is that upto what extent the recommendation of the 5th Pay Commission has been accepted by the Government of West Bengal by framing the ROPA, 2009, read with the clarificatory memorandum nos.1691-F and 1692-F both dated February 23, 2009 issued by the Government of West Bengal, Finance Department Audit Branch. In view of the above, the above decision has no manner of application in this case.

73. As observed hereinbefore, a prayer was made by the learned State advocate to admit the original application permitting them to file reply to the same but such prayer was not taken into consideration in its proper perspective for the purpose indicated hereinabove on the pretext that keeping

the matter hanging for reply would serve no purpose as the issue was otherwise apparent and settled or in other words, according to the learned Tribunal, waiting for reply upon admission would have been bringing Cinderella to ball. I am of the considered view that the learned Tribunal misdirected in making such observation in the light of the discussions made hereinabove.

C. Whether the discrimination in the matter of payment of Dearness Allowance to the Employees of the State of West Bengal with their counterparts serving in Banga Bhawan at New Delhi and Youth Hostel in Chennai including the Employees of West Bengal State Electricity Development Corporation required consideration?

74. The principles of law in this regard has already been discussed by us hereinabove with reference to the decision of the Constitution Bench of the Hon'ble Supreme Court in **Purushottom Lal (supra)** when the Government accepts the recommendations of Pay Commission it is bound to implement those recommendations in respect of all employees of the Government Concerned.

75. True that reasonable classification may be made in between different classes of employees serving under the Government on the basis of cogent reasons. The factors which were required to be taken into consideration by the Body concerned to determine the rate of Dearness Allowance, were the change in the consumer price index, its effect on the purchasing capacity with the existing pay packet of the employee working under a Government and the economic and financial position of the Government to meet the expenditure.

76. Further, the factors which were taken into consideration by the Central Government in fixing the rate of Dearness Allowance for its employees were required to be taken into consideration with those taken into consideration by the Government of West Bengal. In the event the factors were common and same for both the Governments then the element of arbitrariness were required to be examined in that context.

77. The learned Tribunal was under obligation to allow the State

Government to bring on record the relevant materials for assigning cogent reasons for the differential treatment of its employees serving in Banga Bhawan at New Delhi and in Youth Hostel at Chennai instead of rejecting the claim of the petitioners in a hot haste without allowing the State Government to file reply for bringing those materials on record.

78. Necessary to point out here that a statement is made before us in the paragraph 15 of the affidavit-in-opposition affirmed on behalf of the respondent Nos.1 and 2 that the employees of State Government posted in Banga Bhawan at New Delhi and those of State Youth Service Department posted at Chennai were not affected by inflation in the same manner as the employees present in Kolkata. If the differential rates of Dearness Allowance were fixed by the Government of West Bengal keeping in mind the aforesaid factor, the same cannot be accepted for the reason that the rate of Dearness Allowance was fixed by the Central Government at one and same rate for the employees discharging functions throughout the country taking into consideration the Consumer Price Index on all India basis. Since, the above reason of fixing Dearness Allowance at differential rates cannot be acceptable in the eye of law, it strengthens the allegation of the petitioner association of hostile discrimination in between the similar class of employees working under the Government of West Bengal. However, no opportunity of bringing relevant material was made available before the learned Tribunal for assigning the cogent reasons for such differential treatment.

79. The rate of Dearness Allowance of the employees of West Bengal State Electricity Development Corporation cannot be taken into account for adjudication of the issue involved in the matter as they are guided by the Rules of the company concerned having no nexus with the decision making process of fixing pay and allowances of the employees working under the Government of West Bengal.

80. In the decision of ***Association of West Bengal Secretariat Assistants (supra)***, which is relied upon by the Learned Advocate General, issue was validity of the decision making process of the Government in fixing different rates of House Rent Allowance for the employees working in two

different A-1 cities. In our considered view, the factors which are relevant for determining rate for House Rent Allowance are hopelessly irrelevant for calculating rate of Dearness Allowance and as a result the above decision has no manner of application in this case.

81. Similarly, the point for adjudication in the matter of ***K.D. Banerji (supra)***, was whether all Assistant Managers of The Life Insurance Corporation of India belong to one and same class irrespective of their respective field of work. I have no other alternative but to repeat and reiterate that the factors which are relevant for determining the issue involved in that case are hopelessly irrelevant for calculating rate of dearness Allowance in the case in hand due to distinguishable facts and circumstances and as a result the above decision has no manner of application in this case.

82. In view of the discussions and observations made hereinabove, I sum up as follows:-

- (i) The claim of the employees serving under the Government of West Bengal for Dearness Allowance is based on legally enforceable right on the 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 drawl of Dearness Allowance in revised pay structure under the ROPA Rules, 2009 issued by the Government of West Bengal, Finance Department, Audit Branch.
- (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 Bhawan 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.

83. The aforesaid second and third issues, namely, **(i)** Whether the claim of the employees serving under the Government of West Bengal for Dearness Allowance at a rate equivalent to that of the employees of the Central Government, and **(ii)** Whether the discrimination in the matter of payment of Dearness Allowance to the Employees of the State of West Bengal with their counterparts serving in Banga Bhawan at New Delhi and in Youth Hostel at Chennai, which require adjudication after bringing relevant materials on record, cannot be done in this writ application acting as a Court of first instance in view of the principles of law settled in the matter of **L. Chandra Kumar vs. Union of India**, reported in **AIR 1997 SC 1225**. The Learned Tribunal is the appropriate forum to discharge the above function as a court of first instance.

84. As a consequence the order impugned to this writ application stands quashed and set aside remanding the matter back to the learned Tribunal for adjudication of the aforesaid two issues, namely **(i)** Whether the claim of the employees serving under the Government of West Bengal for Dearness Allowance at a rate equivalent to that of the employees of the Central Government, and **(ii)** Whether the discrimination in the matter of payment of Dearness Allowance to the Employees of the State of West Bengal with their counterparts serving in Banga Bhawan at New Delhi and Youth Hostel in Chennai, on its merit without being influenced by its earlier observations made in the order impugned to this writ application.

85. Since the considerable period of time has passed let there be a direction upon the respondents to file reply to the original application before the Tribunal bringing relevant materials on record within three (3) weeks, rejoinder thereto, if any, be filed by the applicants/petitioners before the learned Tribunal within one (1) week thereafter.

86. Liberty is given to the parties to mention the matter before the learned Tribunal for expeditious hearing of the original application after expiry of the aforesaid periods and in the event of such mentioning, the learned Tribunal is requested to dispose of the original application expeditiously and preferably within two months thereof subject to the intervening vacation/s of the learned Tribunal and without granting unnecessary adjournment to either of the parties.

87. This writ application stands disposed of accordingly.

88. There will be, however, no order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

I agree.

(Debasish Kar Gupta, J.)

(Shekhar B. Saraf, J.)