A.F.R.
Judgment Reserved on: 06.02.2023
Judgment Delivered on: 03.03.2023

Court No. - 1

Case :- SPECIAL APPEAL DEFECTIVE No. - 49 of 2023

Appellant :- Mission Director/Convenor Executive Committee National Health Mission Mandi Bhawan Lko. And Another
Respondent :- Dr. Ram Suresh Rai And Others
Counsel for Appellant :- Neerav Chitravanshi
Counsel for Respondent :- Amrendra Nath Tripathi,A.S.G.I.,C.S.C.

Hon'ble Ramesh Sinha J.
Hon'ble Subhash Vidyarthi J.

(Delivered by Hon'ble Subhash Vidyarthi J.)

Order on C.M. Application No.2 of 2023:

1. Heard Shri Anil Tiwari, Senior Advocate assisted by Shri Neerav Chitravanshi, learned counsel for appellants, Dr. L.P. Mishra along with Shri Amrendra Nath Tripathi, learned counsel for respondent nos.1 to 28, Shri S.B. Pandey, Assistant Solicitor General of India, appearing on behalf of respondent No.29-Union of India and Shri Indrajeet Shukla, learned Standing Counsel for State/respondent No.30.

2. This is an application for condonation of delay in filing special appeal.

3. The application is supported with an affidavit, in which the reasons for delay have been explained sufficiently.

4. Accordingly, application is *allowed*. Delay, if any, in moving this special appeal is hereby condoned.

Order on memo of special appeal:

5. The instant special appeal under Chapter VIII rule 5 of the Allahabad High Court rules has been filed against the judgment and order dated 12.12.2022 passed by Hon'ble single Judge

allowing Civil Misc. Review Application No.187 of 2022 reviewing the judgment and order dated 20.10.2022 passed in Writ-A No. 23479 of 2019 and a further prayer has been made for dismissal of the writ petition.

6. The aforesaid writ petition was filed by the respondent nos.1 to 29 to this Special Appeal, who will be referred to as the petitioners. Briefly stated, facts pleaded in the writ petition are that the petitioners are B.A.M.S./B.U.M.S./B.H.M.S. (Aayush) Doctors and they are engaged as Ayush Doctors across the state on contractual basis. The petitioners are aggrieved by the difference in honourarium paid to them and that paid to allopathic Doctors and they claim that the M.B.B.S. Doctors and B.D.S. Doctors are not superior to the Ayush Doctors.

7. Earlier some of the petitioners had filed Writ Petition No.738 (S/B) of 2014, which was dismissed by means of an order dated 12.04.2017. Some of the petitioners filed Special Leave Petitions before the Hon'ble Supreme Court and Hon'ble Supreme Court disposed of the petitions with liberty to the petitioners to make representation for the State government. When no decision was taken on the representations, the petitioners no. 1 to 3 had filed Writ Petition No. 22529 (S/B) of 2018, which was disposed of by means of an order dated 08.08.2018 with a direction to the state workmen to take a decision on the representation. The representation was rejected by means of an order dated 16.11.2018 passed by the Mission Director, National Health Mission.

8. Some of the petitioners had challenged the order dated 16.11.2018 by filing Writ Petition No. 5633 (S/S) of 2019, which was allowed by means of an order dated 7th March 2019 and a direction was issued to the State government to take a decision on the petitioners' claim regarding parity of honourarium. The claim

was rejected by means of an order dated 29th March 2019, passed by the Principal Secretary, Health and Family Welfare.

9. It has been stated in the order dated 29th March 2019 passed by the Principal Secretary that the services of Ayush doctors under the mainstreaming of Ayush program under the National Health Mission in U.P. do not fall within the purview of emergency services. Honourarium is payable to them on the basis of their duties for six hours a day and there is a provision that no physical charge is to be given to the Ayush Doctors and no medicolegal case is to be conducted by them. The M.B.B.S. lady doctors are assigned 24 hours emergency duty for operating the first referral units and when and E.M.O. is not available the contractual M.B.B.S. lady doctors are posted as E.M.O. By means of a Government Order dated 9th October 2015, it has been provided that Ayurved and Yunani doctors will not perform medicolegal cases, post-mortem examination, I.V. injection and surgeries other than pure Ayurvedic/Yunani surgeries like Ksharsootra. The order further states that the appointment of Ayush Doctors under National Health Mission is made against posts sanctioned by the Government of India in record of proceedings under any program/ scheme and these appointments are not made against any regular sanctioned posts of the State. Moreover, the honourarium paid to contractual Ayush Doctors in the State of Uttar Pradesh is equal to or higher than the honourarium paid to the Ayush Doctors of 26 States of the Union Territories. As per the directions and guidelines issued by the National Health Mission, the prescribed qualification, field of work and duties of contractual Ayush Doctors are not the same as those of contractual M.B.B.S. Doctors stop therefore, it would not be proper to pay any Ayush doctors equal to that paid to the MBBS Doctors.

10. The petitioners challenged the aforesaid order dated 29th March 2019 by filing Writ Petition No. 23479 (S/S) of 2019. The

writ petition was allowed by an Hon'ble single Judge means of a judgment and order dated 19th October 2022. The Hon'ble Single Judge proceeded to decide the writ petition on the premise that:

> *"The instant petition is directed against the order dated 28.02.2017, passed by the first respondent, Principal Secretary, Department of Finance, Civil Secretariat, Lucknow, whereby, the representation of the first petitioner claiming the benefit of Dynamic/Special Assured Career Progression (for short "SACP') Scheme made admissible to the Medical Officers of the Provincial Medical Health Services (for short "PMHS'), has been rejected. Further, a direction has been sought to grant the Medical Officers (Ayurvedic) the benefits of SACP w.e.f. the date it has been allowed to the Medical Officers of PMHS.*
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> *18. The facts, inter se parties, are not disputed.*
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> *19. The Medical Officers PMHS practice Allopathy stream of medicine. It appears that Medical Officers PMHS made a representation to the State Government for implementation of Dynamic ACP Scheme as made admissible to the Medical Officers under the Central Government. On considering their representation, the State Government vide order dated 14.11.2014, framed a scheme on the recommendation of the Committee. The SACP, primarily, provides that the Medical Officers PMHS would be entitled to upgradation of pay on completing 4, 11, 17 and 24 years of satisfactory service. The scheme was made applicable w.e.f. 01.12.2008.*
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> * * *
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> *31. The issue in the given facts is not with regard to equal pay for equal work, but the Scheme formulated for Career Progression to tide over stagnation on a post."*

11. The Hon'ble Single Judge concluded by holding that: –

> *"42. The State Government is justified in not accepting the Dynamic ACP formulated by the Central Government for its Medical Officers, instead formulated the SACP scheme falling within the realm of administrative policy. But the question is whether such a policy upon being provided can discriminate amongst different streams of medicine practiced by Medical Officers. Admittedly, the Medical Officers, irrespective of the stream of medicine (Allopathy or conventional) treat the patients which is the core underlying*

similarity. The comparison with regard to qualification, course of study/syllabus, nature of duty, responsibility etc. as is being pressed by the State 28 Government to carve out a class of Medical Officers i.e. PHMS being superior to other Medical Officers is misconceived and unfounded insofar it relates to conferment of SACP. The administrative policy is invariably discriminatory in keeping the Medical Officers (Ayurvedic) and other streams out of the scheme having regard to the concept of ACP as discussed earlier.

43. Accordingly, the writ petition is allowed.

44. The impugned order dated 29.03.2019, passed by the Principal Secretary, Medical and Health Department, Government of U.P., Lucknow, is hereby quashed. It is provided that the Special ACP Scheme (SACP) implemented vide Government Order dated 14 November 2014, shall be applicable to the Medical Officers of other streams also."

12. As the writ petition had been filed claiming parity in payment of honourarium to Ayush Doctors with that paid to Ayush Doctors and not claiming A.C.P. benefits, the petitioners themselves filed an application for review of the judgment passed in their favour. The review application was allowed by means of the judgment and order dated 12.12.2022. Even while allowing the review application the Hon'ble single Judge held that: –

"18. The High Court of Uttrakhand allowed the writ petition and held the AYUSH doctors should be treated at par with the Allopathic doctors and are entitled for the same honorarium. The said judgment was challenged before the Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 33645 of 2018, which was dismissed by means of order dated 24.03.2022. ***Same issue has been raised before this Court where the AYUSH doctors have been denied the benefit of ACP, which was made admissible to the medical officers of Provincial Medical Services, there also the State Government had tried discriminate between medical officers (Ayurvedic) from AYUSH and Allopathic doctors****.*

19. In view of the aforesaid discussions, the writ petitions is allowed. The impugned order dated 29.03.2019, passed by the Principal Secretary, Medical and Health Department, Government of U.P., Lucknow, is hereby quashed.

20. The respondents are directed to pay honorarium to the petitioners who are working on the post of Ayush Medical Officers at par with the payments made to the Allopathic Medical Officers and Dental Medical Officers and the arrears of honorarium be paid to the petitioners from the date they were 25 discriminated in making payments of honorarium to the Allopathic Medical Officers and Dental Medical Officers."

(Emphasis supplied)

13. While Assailing the Aforesaid Judgment passed by the Hon'ble Single Judge, Shri Anil Tiwari Senior Advocate has submitted that the issue raised by the petitioners in the Writ Petition was payment of honourarium to Ayush Doctors equal to that which is paid to the M.B.B.S. Doctors and the issue of assured career progression was not involved in the writ petition as the petitioners are working on contractual basis and the scheme of grant of assured career progression is not applicable to persons working on contract. However, the learned Single Judge has decided the writ petition as well as the review application on the premise that the issue raised before him was denial of benefit of A.C.P. to the Ayush doctors.

14. The learned counsel for the petitioners has submitted that the issue regarding payment of honourarium to Ayush Doctors under the National health Mission was duly considered by a Division Bench of this Court while dismissing the Writ Petition No. 738 (S/B) of 2018 and other connected writ petitions by means of judgment and order dated 12 April 2017. The aforesaid judgment was challenged by filing a special leave petition before the Hon'ble Supreme Court and the Hon'ble Supreme Court had merely permitted the petitioner is to move representation, without setting aside the findings given by the High Court.

15. The learned counsel for the appellants has submitted that the petitioners have been engaged on contractual basis by a society

under a program called National health Mission and they have not been appointed against any regular post under the State government or under the Central government. The honourarium payable to the persons engaged on contract under the program is approved by the government of India and not by the State government. It has further been submitted by the learned counsel for the appellant that the petitioners are working under a contract and are being paid honourarium as per the terms and conditions of the contract, which are binding on them and which has rightly not been challenged by them, as the conditions of contract cannot be challenged in writ petition filed under article 226 of the Constitution of India.

16. Per contra, Dr. L.P. Mishra, the learned counsel appearing for the respondents no.1 to 28 (petitioners in the writ petition) has submitted that the mere fact that the Hon'ble Supreme Court had given the petitioners liberty to file a fresh representation implies that the order passed by this Court in Writ Petition No.738 (S/B) of 2018 was set aside and the representation ought to have been considered afresh without being influenced by the findings recorded in the judgment passed in the aforesaid writ petition.

17. In the judgment dated 12.04.2017 passed by this Court in Writ Petition Number 738 (S/B) of 2018 and several other connected writ petitions, this Court had held as follows: –

> *"19. Considering the qualification and duties as shown in the chart and advertisement, we are of the view that the work and qualification of the Ayush doctors are different from other MBBS or BDS doctors. The mere fact that they were doing work similar to other doctors cannot be treated as sufficient for applying the principal of equal pay for equal work. Any direction by the Court with the aid of Article 226 of the Constitution of India would burden the exchequer relating to financial and policy matter and interference in the policy decisions though the order in question does not suffer from any legal or constitutional infirmity and it is not*

possible to entertain the plea of the petitioners for payment of pay or honorarium or other monetary benefits at par with other employees of other cadre having separate eligibility criteria for appointment by complying the principle of equal pay for equal work.

33. After noticing the judicial precedents on the subject, we are of the view that the petitioners cannot invoke the theory of legitimate expectation for compelling the respondents to pay the honorarium which is paid to other doctors having different qualification and different duties.

34. Learned counsel for the petitioners has relied upon (1989) 2 SCC 235- Mewa Ram Kanojia v. All India Institute of Medical Sciences and others but the citation does not favour the petitioners. It has been stated in the above noted case that in judging the equality of work for the purposes of equal pay, regard must be had not only to the duties and functions but also to the educational qualifications, qualitative difference and the measures of responsibility prescribed for the respective posts. Even it the duties and functions are of similar nature but if the educational qualifications prescribed for the two posts are different and there is difference in measure of responsibilities, the principle of 'Equal pay for equal work' would not apply. There is a reasonable classification on the basis of qualification and duties and if qualification has reasonable nexus with the objective sought to be achieved, efficiency in the administration, the State would be justified in prescribing different pay scale but if the 21 classification does not stand the test of reasonable nexus and the classification is founded on unreal and unreasonable basis it would be violative of Articles 14 and 16 of the Constitution of India. Similarly in (1989) 3 SCC 191- V. Markendeya and others v. State of Andhra Pradesh and others, which has been relied upon by the learned counsel for the petitioners, does not favour the petitioners on the ground that the citation provides that the question what scale should be provided to a particular class of service must be left to the executive and only when discrimination is practised amongst the equals, the Court should intervene to undo the wrong and to ensure equality among the similarly placed employees. The Court however cannot prescribed equal scales of pay for different class of employees."

18. The petitioners had challenged the aforesaid judgment dated 12.04.2017 by filing Special Leave Petition (Civil) No. 26625 of 2017 and Hon'ble Supreme Court disposed of the petition on 03.10.2017 by means of the following order: –

> *"Delay condoned.*
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> *Learned senior counsel appearing for the petitioners submits that the view of the High Court that the permission is required from the Central government for enhancement of honourarium is not correct. The petitioners are appointed by the State government. If that be so, we make it clear that it will be open to the petitioners to approach the State government for enhancement of honourarium, in which case, it will be open to the State government to consider the representation and the impugned judgment shall not stand in the way of the government taking appropriate decision.*
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> *With the aforesaid observation and directions, the special leave petitions are disposed off."*

19. A bare perusal of the aforesaid order indicates that the Hon'ble Supreme Court disposed of the special leave petition without granting leave to appeal and without setting aside the judgment dated 12.04.2017 passed by this Court or the findings recorded therein. The Hon'ble Supreme Court had merely granted liberty to the petitioners to approach the State government for enhancement of honourarium and it was left open to the State were meant to consider the representation without being influenced by the judgment dated 12.04.2017. There was not even any passing reference of the claim of parity with the M.B.B.S. doctors in payment of honourarium, what to say about any finding in this regard. Therefore, we are of the view that the findings recorded by this Court in the judgment dated 12.04.2017 have not been disturbed by the Hon'ble Supreme Court and the same have attained finality.

20. Dr. L. P. Mishra, the learned counsel for the respondents, has submitted that the order dated 12.04.2017 passed by this

Court in writ petition No. 738 of 2015 and other connected writ petitions, stood merged in the order dated 3 October 2017 passed by the Hon'ble Supreme Court. The doctrine of merger vis-à-vis rejection of S.L.P. was summarized by the Hon'ble Supreme Court in **Kunhayammed v. State of Kerala**, (2000) 6 SCC 359, in the following words: -

> *"44. To sum up, our conclusions are:*
>
> *(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law.*
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> *(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.*
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> *(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it.* ***Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of the petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter****.*
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> *(iv)* ***An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger****. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was*

not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC."

21. Order dated 03.10.2017 was passed by the Hon'ble Supreme Court disposing of the special leave petition without granting leave to appeal to the petitioners and without setting aside the findings of the High Court and recording any findings of its own, we are of the view that in light of the law summarized by the Hon'ble Supreme Court in the case of **Kunhayammed** (Supra), the order dated 12.04.2017 passed by this Court did not get merged in the order dated 03.10.2017 passed by the owner will Supreme Court. Therefore, the findings recorded by this Court in its previous judgment dated 12.04.2017 continues to bind the parties and the effect of the order passed by the Hon'ble Supreme Court is that the State government is free to take a decision for enhancing the

honourarium paid to the petitioners, although it is not bound to grant parity to the petitioners with M.B.B.S. doctors.

22. The Hon'ble Single Judge has allowed the writ petition and the review petition by extensively quoting and relying upon the judgment in the case of Dr. Om Prakash Gupta and another versus State of UP and another, Writ A No. 8366 of 2017 decided on 06/05/2022 , which was a case filed by confirmed class to officers working on the post of medical officers (Ayurvedic) challenging an order passed by the government denying the benefit of dynamic/special assured career progression scheme which was made admissible to the medical officers of the provincial medical health services. The issue of payment of honourarium doctors engaged on contractual basis was not involved in aforesaid case.

23. It is settled law that judgments are not to be read as statutes and the *ratio decidendi* of judgment is to be read along with the context in which the case was decided.

24. In ***Escorts Ltd. v. CCE, (2004) 8 SCC 335***, the Hon'ble Supreme Court held that: -

> ***"8.*** *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 neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. 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 into 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. In London Graving Dock Co. Ltd. v. Horton[2] (AC at p. 761), Lord MacDermott observed: (All ER p. 14 C-D)*
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> *"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules*

of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,…"

9. *In Home Office v. Dorset Yacht Co.*[3] *Lord Reid said (All ER p. 297g-h),*

"Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances."

Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2)[4] *observed: (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" And, in Herrington v. British Railways Board*[5] *Lord Morris said: (All ER p. 761c)*

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

10. *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."*

25. In **Bhavnagar University v. Palitana Sugar Mill (P) Ltd.**, (2003) 2 SCC 111, the Hon'ble Supreme Court held that: -

> ***"59.*** *A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."*

26. Therefore, we are of the view that the case of Dr. Om Prakash Gupta, which does not deal with the subject of payment of honourarium to doctors engaged on contract, has no application while deciding the claim of parity in payment of honourarium between Ayush doctors and M.B.B.S. doctors.

27. The learned Counsel for the respondents has relied upon the judgment in the case of ***North Delhi Municipal Corporation v. Ram***

Naresh Sharma, 2021 SCC OnLine SC 540, in which the Hon'ble Supreme Court held that: -

> ***"23.*** *The common contention of the appellants before us is that classification of AYUSH doctors and doctors under CHS in different categories is reasonable and permissible in law. This however does not appeal to us and we are inclined to agree with the findings of the Tribunal and the Delhi High Court that the classification is discriminatory and unreasonable since* ***doctors under both segments are performing the same function of treating and healing their patients.*** *The only difference is that AYUSH doctors are using indigenous systems of medicine like Ayurveda, Unani, etc. and CHS doctors are using Allopathy for tending to their patients. In our understanding, the mode of treatment by itself under the prevalent scheme of things, does not qualify as an intelligible differentia. Therefore, such unreasonable classification and discrimination based on it would surely be inconsistent with Article 14 of the Constitution. The order of AYUSH Ministry dated 24.11.2017 extending the age of superannuation to 65 Years also endorses such a view. This extension is in tune with the notification of Ministry of Health and Family Welfare dated 31.05.2016.*
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> ***The doctors, both under AYUSH and CHS, render service to patients and on this core aspect, there is nothing to distinguish them.*** *Therefore, no rational justification is seen for having different dates for bestowing the benefit of extended age of superannuation to these two categories of doctors. Hence, the order of AYUSH Ministry (F. No. D. 14019/4/2016-E-I (AYUSH)) dated 24.11.2017 must be retrospectively applied from 31.05.2016 to all concerned respondent-doctors, in the present appeals. All consequences must follow from this conclusion.*
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> *In light of the above discussion,* ***the appellant's actions in not paying the respondent doctors their due salary and benefits, while their counterparts in CHS system received salary and benefits in full, must be seen as discriminatory****. Hence, we have no hesitation in holding that the respondent-doctors are entitled to their full salary arrears and the same is ordered to be disbursed, within 8 weeks from today. Belated payment beyond the stipulated period will carry interest, at the rate of 6% from the date of this order until the date of payment. It is ordered accordingly. The appeals are disposed of in above terms without any order on cost."*

28. Dr. Mishra has also relied upon the decision in **Sanjay Singh Chauhan and Ors. vs. State of Uttarakhand and Ors.,** Writ Petition No. 484 (S/B) of 2014, decided on 03.04.2018, wherein the High Court of Uttrakhand held that:-

> *"6. There is no intelligible differentia so as to distinguish the Ayurvedic and Homeopathic Medical Officers viz-a-viz. Allopathic and Dental Medical Officers.* ***There is no rational why the similar situate persons have been discriminated against. The petitioners as well as Allopathic and Dental Medical Officers constitute homogenous class.***
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> *10.* ***In the instant case, the duties discharged by the petitioners viz-a-viz. Allopathic Medical Officers and Dental Medical Officers are of equal sensitivity and quality, even the responsibility and reliability are the same.*** *The classification made by the State Government is irrational."*

29. In **The State Of Uttarakhand vs Sanjay Singh Chauhan** SLP (C) No.33645/2018, the Hon'ble Supreme Court was pleased to provide that: -

> *"... the respondents who are* ***Ayurvedic doctors will be entitled to be treated at par with Allopathic Medical Officers and Dental Medical Officers under the National Rural Health Mission (NRHM/NHM) Scheme****. After the order was passed, learned counsel for the petitioners made a statement that petitioners would like to file a review petition before the High Court. It is not for this Court to issue any such direction. It is always open to the petitioners to pursue such remedy as may be available to them in law.*

30. In WRIT-A No.-8366of 2017, **Dr.Om Prakash Gupta And Anr.Versus State Of U.P.** it has been held that under: -

> *"It goes without saying that the Western medicine (Allopathy) is integral to our current health care system, but so are other alternative and complementary health care modalities that are available for the people to choose. Western medicine is sometimes at a loss when it comes to treating the patients holistically. The submission of the learned State Counsel that the classification of Medical Officer (Ayurvedic) and Medical Officers PMHS is reasonable for the purposes of SACP having regard to their qualification and the nature of duties is not*

convincing. The classification is discriminatory and unreasonable since Medical Officers of both the segments are primarily performing the same function i.e. treating the patients. The difference is that one stream of doctors are using indigenous system of medicine and the other stream Allopathy for treating their patients. The mode of treatment, by itself does not qualify as an intelligible differentia. At the root is treatment of patients. The Medical Officers, both Ayurvedic and Allopathy render medical service to the patients and on this aspect, there is nothing to distinguish them. Treatment of patients is the core function common to the Medical Officers of different streams, therefore, no rational justification is seen to having different ACP scheme of bestowing the benefit of career progression to Medical Officers. As discussed earlier, the ACP scheme is personal to the government servant suffering stagnation and the pay upgradation does not rest upon any other (10) consideration viz. status of post, qualification, nature of duty or seniority. The scheme is purely compensatory. In the circumstances the Medical Officers of the State cannot be discriminated against by providing different period of service to earn the benefit of career progression. Therefore, the classification on face value is discriminatory and violative of Article 14 of the Constitution of India.

The State Government is justified in not accepting the Dynamic ACP formulated by the Central Government for its Medical Officers, instead formulated the SACP scheme falling within the realme of administrative policy. But the question is whether such a policy upon being provided can discriminate amongst different streams of medicine practised by Medical Officers. Admittedly, the Medical Officers, irrespective of the stream of medicine (Allopathy or conventional) treat the patients which is the core underlying similarity. The comparison with regard to qualification, course of study/syllabus, nature of duty, responsibility etc. as is being pressed by the State Government to carve (11) out a class of Medical Officers i.e. PHMS being superior to other Medical Officers is misconceived and unfounded insofar it relates to conferment of SACP. The administrative policy is invariably discriminatory in keeping the Medical Officers (Ayurvedic) and other streams out of the scheme having regard to the concept of ACP as discussed earlier."

31. In the case of **Indian Drugs & Pharmaceuticals Ltd. v. Workmen**, (2007) 1 SCC 408, the Hon'ble Supreme Court clarified that *"a mere direction of the Supreme Court without laying*

down any principle of law is not a precedent. It is only where the Supreme Court lays down a principle of law that it will amount to a precedent."

32. The reasons recorded in the order dated 29/03/2019 passed on the representation of the petitioners, that the working conditions of Ayush doctors engaged on contractual basis are not the same as those of M.B.B.S. Doctors for the reasons that their duty is for six hours today, they are not given any physical charge, they are not required to deal with medicolegal cases and to conduct post-mortem examinations, there not required to administer I.V. injections and they do not perform surgeries other than only Ayurvedic/Yunani surgeries like *ksharsutra*, has not been found to be perverse or unsustainable. Therefore, the law laid down in the aforesaid cases referred by the learned Counsel for the respondents would not apply to the present case.

33. In view of the aforesaid discussion, we are of the considered opinion that the order dated 29/03/2019 passed by the government rejecting the representation of the petitioners does not suffer from any such error or illegality, as warranted and interference by this Court in exercise of its extraordinary jurisdiction under article 226 of the Constitution of India.

34. The Hon'ble Single Judge has allowed the writ petition and the review petition under mistaken belief that the benefit of assured career progression was being denied to the petitioners and that they were entitled to the same whereas the petitioners having been engaged on contractual basis, are not entitled to assured career progression and they had not raised any such claim. In view of the discussion made above, we do not find ourselves in agreement with the view taken by the Hon'ble single Judge while allowing the writ petition and the review petition.

35. Accordingly, the instant special appeal is ***allowed***. The judgment and order dated 12.12.2022 passed by the Hon'ble single Judge in Civil Miscellaneous Review Application Number 187 of 2022 as well as the judgment and order dated 20/10/2022 passed in Writ A No. 23479 of 2019 are hereby set aside and Writ A No. 23479 of 2019 is dismissed.

(Subhash Vidyarthi, J.) **(Ramesh Sinha, J.)**

Order Date :- 3rd March, 2023.
Ram.

Digitally signed by :-
RAM SINGH
High Court of Judicature at Allahabad,
Lucknow Bench