

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE RABINDRANATH SAMANTA**

WPST 102 OF 2020

THE STATE OF WEST BENGAL & ORS.

-Vs-

**CONFEDERATION OF STATE GOVERNMENT EMPLOYEES, WEST BENGAL &
ORS.**

Mr. S.N. Mookherjee, Learned Advocate General,
Mr. Amitesh Banerjee, Adv.
Mr. Debasish Ghosh, Adv.
Mr. Shayak Chakraborty, Adv.

..... for the Petitioners

Mr. Bikash Ranjan Bhattacharya, Senior Advocate.
Mr. Firdous Samim, Adv.
Ms. Gopa Biswas, Adv.
Ms. Mousumi Hazra, Adv.

..... for the respondent no. 1

Mr. Bikash Ranjan Bhattacharya, Senior Advocate.
Mr. Prabir Chatterjee, Adv.
Mr. Dilip Chatterjee, Adv.
Mr. Durga Bhusan Mukherjee, Adv.
Ms. Debolina Bannerjee, Adv.

....for the respondent no.2

Mr. Kallol Basu, Adv.
Mr. Suman Banerjee, Adv.
Mr. Rohitendra Chandra Deb, Adv.
Mr. Guddu Singh, Adv.

.... For the added respondents

Heard On : **29.04.2022**

Judgment on : **20.05.2022**

Rabindranath Samanta, J:-

1. This writ petition has been filed by the petitioners the State of West Bengal through the Chief Secretary and the Principal Secretary, Finance Department, Government of West Bengal, challenging the judgment and order dated 26.07.2019 passed by the West Bengal Administrative Tribunal (hereinafter referred to as the Tribunal) in O.A. No. 1154 of 2016.
2. Disgruntled at the inaction and discriminatory action on the part of the State towards grant of Dearness Allowance to its employees in terms of the West Bengal Services (Revision of Pay and Allowance) Rules, 2009 (in short ROPA Rules, 2009) the respondents Confederation of State Government Employees, West Bengal, Unity Forum, an organisation of the salaried employees of the State Government and two others namely Indranil Mitra and Gopal Majumder of the unions brought the aforesaid original application seeking the following reliefs:-

“ a. A direction upon the respondents authorities to forthwith release the 50 % dearness allowance 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 upto 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. By the order dated 16.02.2017 the Learned Tribunal dismissed the application recording the following observations:-

“ i. Payment of Dearness Allowance to the employees of the Government of West Bengal was absolute prerogative falling within 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. Feeling aggrieved by the order of dismissal of the application the respondent Nos. 1 to 4 preferred a writ petition being WPST No. 45 of 2017 before this Court and a Co-ordinate Division Bench by the judgment dated 31.08.2018 set aside the order of the Tribunal and remanded the matter back to the Tribunal for fresh adjudication on some issues framed by the Division Bench.
5. To discern the observations made by the learned co-ordinate Division Bench and the issues framed by it for adjudication it

will be apposite to excerpt the relevant observations which are as under:-

“ 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.”

6. Dissatisfied with the judgment and order dated 31.08.2018 passed by the Co-ordinate Division Bench the petitioners herein filed review application being R.V.W.No. 159 of 2018 seeking review of the judgment. It appears that by a judgment dated 07.03.2019 the review application preferred by the petitioners was dismissed. However, on the prayer of the learned Advocate General, the Co-ordinate Division Bench allowed the petitioners time to file the affidavit-in-opposition before the Tribunal by a period of three weeks from date, reply if any, one week thereafter. By the order the Tribunal was requested to expeditiously hear and decide the matter preferably within a period of two months from date.

7. In compliance with the directions made by a Co-ordinate Bench in WPST No. 45 of 2017 and RVW No. 159 of 2018, the learned Tribunal heard the original application No. 1154 of 2016 and on consideration of the materials placed before it disposed of the

application vide the judgment and order dated 26.07.2019. In the judgment the following directions were made by the learned Tribunal :-

“ The respondent No. 1, Chief Secretary to the Government of West Bengal is directed to evolve norms/principles within a period of three months from the date of this order for release of DA on the basic pay of the State Government employees fixed in terms of ROPA Rules, 2009 by taking into consideration inflation on the basis of AICPI number (1982=100), so that DA can be paid to the State Government employees at least twice in a year till the date of giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal for its employees. The respondent no. 1 is directed to implement the norms/principles evolved as per direction of the Tribunal within a period of six months from the date of the order. The respondent No. 1 is further directed to make payment of arrears of DA on the basic pay to the State Government employees by taking into account level of inflation on the basis of AICPI number (1982=100) by following the norms/principles evolved as per direction of the Tribunal within a period of one year from the date of this order or before giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal, whichever is earlier. The respondent No.1 is at liberty to decide the mode and manner of payment of arrears of DA to the State Government employees within the period of time fixed by us. The respondent No. 1 is also directed not to give any effect to the office orders/memorandums issued for payment of DA to the State Government employees posted in New Delhi and Chennai at a rate payable to the employees of

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

8. What we find from the judgment dated 31.08.2018 passed by Co-ordinate Bench in WPST No. 45 of 2017 and having withstood the test in the review application being RVW, it has been held by the Co-ordinate Bench in unambiguous term that the claim of the employees serving under the Government of West Bengal for Dearness Allowance is based on legally enforceable right on all the employees serving under the Government of West Bengal up to such extent of the recommendation of the 5th Pay Commission which has been accepted by the Government of West Bengal by virtue of provisions of sub-rule (1) Rule 12 of ROPA Rules, 2009 read with paragraph 10 of the clarificatory memorandum being 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 a revised pay structure under the ROPA Rules, 2009 issued by the Government of West Bengal, Finance Department, Audit Branch. As against such finding/direction of the Co-ordinate Bench, no appeal has been preferred by the petitioners before any higher forum. Therefore, this finding/direction of the Division Bench has attained finality.

9. Now, the seminal question involved in the instant matter is whether the judgment and the order passed by the learned Tribunal to adjudicate the aforesaid two issues in favour of the employees is sustainable ?

10. Before we consider the question as posed, the background facts, shorn of details, may be delineated as under :-

The State of West Bengal set up 5th Pay Commission in the year 2008 to examine the structure of emoluments of all employees under the control of the Government of West Bengal and to make recommendation on certain issues including principles for grant of Dearness Allowance with reference to the cost of living index. The 5th Pay Commission made various recommendations including revision of pay and allowances including Dearness Allowances to be paid to the employees of different departments of the Government and submitted its report to the State Government. The State Government accepted the recommendation of the Pay Commission by making Rules viz., ROPA Rules, 2009. These Rules provide for giving allowances viz., Dearness Allowances, medical allowance, house rent allowance and non-practising allowances. The grievances of the respondent Nos. 1 to 4 who were the applicants of the original application are against the non-grant of Dearness Allowance to the employees in terms of the recommendation of the Pay Commission as recommended in Chapter- X of the report. Owing to unabated pressure of inflation, the real value of salary fixed periodically by the Pay Commission gets continuously eroded with the passage of time. The cost of price living index is the basic factor for consideration of the Pay Commission for determination of Pay and Dearness Allowances to be paid to the employees. The State Government followed the same principles for computation and payment of D.A on basic pay fixed

under 5th Pay Commission as has been done by the Central Government under 6th Central Pay Commission. The Central Government has revised D.A twice in a year on 1st January and 1st July and paid them within third month on which the DA is payable, whereas the State Government initially paid D.A twice in a year but discontinued to pay twice in a year after the year 2010 and has delayed payments of D.A to its employees in most arbitrary manner. Compared to the D.A.s paid to the Central Government Employees, the State Government Employees are lagging far behind. By setting out comparative chart of D.A paid to the Central Government Employees and D.A paid to the State Government Employees the applicants/ respondent Nos. 1 to 4 have depicted the difference of D.A in the Tribunal application.

11. The State Government Employees who are serving at Banga Bhawan at New Delhi and Youth Hostel in Chennai are getting D.A at the same rate as admissible to Central Government Employees. Besides, the employees of West Bengal State Electricity Development Corporation are also getting D.A at the same rate as that of Central Government Employees. This action on the part of the Government of West Bengal is grossly discriminatory.

12. Under the aforesaid facts as briefly stated, the respondent nos. 1 to 4/ the applicants sought for the reliefs as quoted above.

13. Appearing for the petitioners Mr. S.N. Mookherjee, learned Advocate General by citing a decision in the case of ***India General Navigation & Railway Company Limited, Calcutta and Another-Vs- Workmen and Another*** reported in ***AIR 1960 SC 1286*** submits that the principle as to payment of Dearness Allowance depends upon the place of posting of an employee where his family members (i.e., wife and children) reside. Placing reliance

upon a decision in the case of ***Workmen Employed by Mesrs Indian Oxygen Limited –Vs- Mesrs Indian Oxygen Limited*** reported in ***(1985) 3 SCC 177*** learned Advocate General emphasises that Dearness Allowance for workmen of various units of an All-India concern should vary according to All-India Consumer Price Index for those respective units and cannot be based on All India Average Consumer Price Index with uniformity. Learned Advocate General points out that Industry-cum-Region Principle is applicable for adjudication of payment of disbursement of Dearness Allowance. Learned Advocate General emphatically submits that payment of Dearness Allowance is deeply interlinked to the financial ability of the employer and if the resources of the employer do not permit the employer to pay Dearness Allowance to neutralise the high cost of living of an employee the employer is within its lawful domain to decline payment or disbursement of Dearness Allowance. In support of his submission learned Advocate General has cited a decision in the case of ***Tamil Nadu Electricity Board represented by its Chairman –Vs- Tneb - Thozhilalar Aykkiya Sangam by its General Secretary*** reported in ***(2019) 15 SCC 235***. To sum up his submission learned Advocate General argues that payment of Dearness Allowance to the employees of the Government is within the discriminatory domain of the Government dependent on the factors like its financial resources, place of posting of an employee etc. and inability on the part of the Government to pay or disburse Dearness Allowance cannot be termed as denial of the accrued right of an employee.

14. Mr. Bikash Ranjan Bhattacharya, learned Senior Counsel appearing for the respondent Nos. 1 to 4 submits that most of the State Governments have adopted the method of payment of

Dearness Allowance to its employees at the same rate as admissible to the Central Government employees which is assessed as per the All India Average Consumer Price Index prepared by Labour Bureau, Shimla. Mr. Bhattacharya submits that the methodology or principle behind payment of Dearness Allowance is to mitigate the loss of value of basic salary of an employee on inflation in the market economy. Mr. Bhattacharya by referring to an unreported judgment of a Co-ordinate Division Bench of this High Court rendered in MAT 501 of 2020 with MAT 502 of 2020 (***West Bengal State Electricity Transmission Company Limited and Others -Vs- West Bengal State Electricity Board Engineers Association and Others***) submits that the West Bengal State Electricity Transmission Company Limited, a State Government undertaking, has been directed to pay the Dearness Allowance to its employees at the same rate as admissible to Central Government Employees. Mr. Bhattacharya argues that the submission of the State that due to financial inability it is not in a position to pay Dearness Allowance to its employees is not acceptable as this Government disburses Dearness Allowances at the rate of Central Government to the members of All India Administrative Service and All India Police Service who are serving under the direct control of the State Government. Mr. Bhattacharya further submits that those employees who are employed at Delhi and Chennai, but governed under the statutory Rules of the State Government are getting Dearness Allowances at the rate as that of the Central Government and this action on the part of the Government offends the golden Rule of equality enshrined in Article 14 of the Constitution. Lastly Mr. Bhattacharya by drawing our attention to the definition of “existing emoluments” under Rule 3 of the West Bengal ROPA Rules, 2009 emphasises that after the advent of ROPA Rules, 2009 the claim of

Dearness Allowance of an employee has fructified as the statutory right and it is enforceable by the writ Court or Administrative Tribunal. To counter the submission of the learned Advocate General Mr. Bhattacharya submits that the decisions cited by learned Advocate General relate to workmen governed under the Labour Laws, especially the Industrial Disputes Act and the conditions of service of them are contractual whereas the service conditions of Government Employees are governed by the statutory Rules emanating from Article 309 of the Constitution. On this score, Mr. Bhattacharya argues that the judgment rendered by the learned Tribunal is quite justified and it does not warrant any interference by this Court.

15. Mr. Kallol Basu, learned Counsel appearing for the added respondents adopts the submission as advanced by Mr. Bhattacharya.

16. Before we advert to and consider the submissions advanced by the learned Counsels appearing for the parties we feel it necessary to refer to the relevant portion of the report of the 5th Pay Commission and the relevant provision of the ROPA Rules, 2009.

17. The 5th Pay Commission under Chapter- 10 relating to allowances has, amongst others, reported and recommended as under :-

***“10.2. Now we first deal with Dearness Allowance. Due to the unabated pressure of inflation in the economy the real value of salary fixed periodically by Pay Commission gets continuously eroded with the passage of time. Thus arises the need for payment of Dearness Allowance so as to protect this loss.*”**

10.3 The State Government since 01.04.1979 has been following the same principles followed by the Government of India in the matter of calculation of the quantum of each instalment of Dearness Allowance. But almost invariably there is a time lag in actual payment and when the same is paid, the same does not include any arrears. Right now only one such instalment has remained due which the Government of India sanctioned on 01.07.2008. The last instalment which the State Government has sanctioned with effect from 01.03.2009 was sanctioned by the Government of India with effect from 01.01.2008.

10.4. A major grievance of most of the associations of employees has been non-payment of the D.A instalments in time (as per of Government of India's announced policy, this is payable twice a year viz., w.e.f. 1st January and 1st July each year). They are also aggrieved because of non-payment of arrears.

10.6. It is evident from the above that the State Government's sanction of instalments does not follow any definite pattern. It is also clear that there are delays in payment of various instalments of D.A 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 Government of India w.e.f July 1, 2008, and then fall in line with the Central Government pattern of sanctioning two instalments of D.A each year. We recommend this course of action. If it is done, it will mitigate a long standing grievance of almost all employees within our terms."

18. The aforesaid recommendation of the 5th Pay Commission has been accepted by the Government by promulgating the ROPA Rules, 2009. As per Rule 3 (c) “existing emoluments” mean 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).

19. As quoted above, the Co-ordinate Division Bench in the judgment rendered in WPST No. 45 of 2017 has held that 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 upto 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. This observation, as stated above, has attained finality. Therefore, we have no hesitation in our mind to hold that the State Government employees under the ROPA Rules, 2009 has acquired legally enforceable right to get Dearness Allowance at the rate to be calculated on the basis of All India Consumer Price Index as embedded in Rule 3 (c) of the ROPA Rules, 2009.

20. In view of the decision of a Co-ordinate Division Bench in MAT 501 of 2020 with MAT 502 of 2020 (**West Bengal State Electricity Transmission Company Limited and Others -Vs-**

West Bengal State Electricity Board Engineers Association and Others) the Employees under West Bengal State Electricity Transmission Company Limited are entitled to Dearness Allowances at the rate of Central Government.

21. The learned Tribunal in the impugned judgment has struck down the relevant office orders/memorandums under which D.A was paid to the State Government Employees working at Banga Bhawan in New Delhi and at Youth Hostel in Chennai at the rate payable to the employees of the Central Government holding the orders/memorandums discriminatory offending the doctrine of equality under Article 14 of the Constitution. Bearing in mind the principle enunciated by the Hon'ble Apex Court in the decision in the case of **D.S. Nakara -Vs- Union of India** reported in **AIR 1983 SC 130** we hold that the classification of the State Government Employees working at West Bengal and State Government Employees working at Delhi and Chennai governed by the same statutory Rules is discriminatory *sans intelligible differntia* and offends the golden doctrine of equality under Article 14 of the Constitution.

22. Since the claim of the State Government Employees of Dearness Allowance at the rate to be calculated on the basis of All India Consumer Price Index has fructified as a legally enforceable statutory right the decisions reported in **AIR 1960 SC 1286** and **(1985) 3 SCC 177 (supra)** cited by learned Advocate General pertaining to payment of Dearness Allowance to workmen whose conditions of services are contractual in nature under private individuals/organisations are not applicable to the facts of the case on hand. Similarly, in view of the factual and legal scenario as above the decision in the case of **Tamil Nadu Electricity Board represented by its Chairman -Vs- Tneb - Thozhilalar Aykkiye**

Sangam by its General Secretary reported in **(2019) 15 SCC 235** is also not applicable.

23. As the pleadings indicate, it stands undisputed that due to erosion of value of the salary of Government Employees and non-payment of Dearness Allowance since long to neutralize the erosion, sustaining livelihood of Government Employees has been affected to a great extent as revealed in the report of the 5th Pay Commission. As held above, to get Dearness Allowances at the rate to be calculated in terms of All India Consumer Price Index average 536 **(1982=100)** is now the legally enforceable right of the State Government Employees. What we feel, apart from acquiring the enforceable legal right to get Dearness Allowance using the methodology of All India Consumer Price Index, such right of the employees to sustain their livelihood with human dignity has been fructified or elevated as fundamental right as enshrined in Article 21 of the Constitution. Such right available to Government Employees who are the main workforce behind the functioning of a Government in right direction cannot be denied by the State. As observed by the Pay Commission, we are of the same view that to pay respect to the statutory rights of the Government Employees to get D.A Allowances at the rate as above, the Government must generate all its resources. We feel that denial or deprivation of the legitimate claim of Dearness Allowance of the employees to sustain their livelihood in a dignified manner may have demoralizing effect upon them which may in turn adversely affect the smooth functioning of the Government. In such backdrop, the stand taken by the State that due to financial inability it is not in a position to pay Dearness Allowance to its Employees at the rate to be calculated using the methodology of uniform All India Consumer Price Index average 536 **(1982=100)** is not acceptable. While the

claim of the employees to Dearness Allowance is backed by statutory and fundamental rights and the Court finds that the State turns deaf ears to such rights, this Court in exercise of its extraordinary judicial power may direct the State to implement such rights of the employees.

24. In view of the factual and legal scenario as discussed above, we find that the learned Tribunal by the judgment impugned adjudicated the two issues formulated by the Division Bench in justified manner. There is no infirmity in the judgment which warrants any interference by this Court.

25. Therefore, the question as raised is answered in the affirmative.

26. Accordingly, the writ petition filed by the State of West Bengal is dismissed on contest. No order as to costs.

27. The petitioners are directed to release the Dearness Allowance and Arrear Dearness Allowance to its employees at the rate to be calculated on the basis of All India Consumer Price Index average 536(1982=100) commensurate with their pay as per the ROPA Rules, 2009 as directed by the Tribunal within three months from date.

28. Urgent certified copies of this judgment, if applied for, be given to the parties upon compliance with all requisite formalities.

(*Rabindranath Samanta, J.*)

Harish Tandon, J.

1. I had an opportunity to peruse the judgment authored by my brother and I concur with the ultimate decisions arrived at but I thought that I should pen my perception on the issues involved in the instant writ petition concerning the Dearness Allowance attributable to the Government employees within the State.
2. The concept of Dearness Allowance and its horizon is required to be recapitulated which in my opinion, is a unique feature to combat the disparity in the living conditions and mitigating the circumstances faced by the Government employees due to cost inflation. The different countries in the world have tackled the inflation by revision of wages instead of granting the Dearness Allowance. The Dearness Allowance in our country is a relic of 1st World War to tackle the rise of costs impacted upon the living standards by not using the same terminology but in the form of an ad-hoc payment not linked with the inflation of the cost of living. During this 2nd World War, the Dearness Allowance (for short, “DA”) was introduced in the form of a grain compensation allowances to recompense the employee of the hardships suffered for the rise in the price of the foodgrains and after the independence, the then Central Government constituted the 1st Pay Commission in 1947 to examine the base structure and ascertain the actual hardship which the Central Government employees suffered because of the steep rise in the cost of living, commonly known as the inflation. The Committee was also set up on fair wages to evaluate the situation and recommend the suggestive measures which was constituted in the year 1949. In the same line the 2nd Pay Commission was constituted in the year 1959 and, thereafter, a one man independent committee was constituted to enquire the question of Dearness Allowance that may be payable to the Government

employees and the report was submitted by such one man committee in the month of July, 1966; the same was followed by an another commission i.e., the Dearness Allowance Commission to examine the principles governing the grant of DA to the Central Government employees in future and also make recommendations pertaining to the modalities and the acceptable structure or the formula to calculate the DA in future. Since thereafter, the aforesaid modalities have been adopted by constituting Pay Commission from time to time and the reports suggesting the modalities on well-structured parameter was being accepted either in entirety or with certain modifications. Ironically and historically, the observations of the various commissions and the committees the DA was made applicable to the employees who are at the subsistence level or just above it in order to enable them to sustain the cost of living. Initially, the commission and committees were taking into various factors but concentrating on the rise in the essential commodities which by passage of time and the progression in the society the concept of DA changes to engulf various factors imbibing wide range of the commodities to make the life meaningful and/or maintain the living standard as far as practicable depending upon the compelling limitations of general interests. What was the luxury at one point of time prevalent in the Indian society have become a necessity in future and what was the necessity has become a basic need in the changing society and, therefore, the concept of the DA has become more robust and all the Governments are obligated to compensate the loss in the cost of living and ensure the quality life not to be luxurious or extravagant but on mere sustenance. Initially, the DA was intended to be temporary arrangements or a transitional protection but because of the stark reality of the situation and the continuous rising of inflation impacting on the potential and efficacies of the employees in

meeting various vicissitudes of the life and, therefore, cannot be perceived to be static.

3. In federal system, the Union of State and its independence as envisioned in the Constitution, the State Government from time to time, in tune with the Central Government, constituted the Pay Commission to evaluate the inflation in the cost of living to the State Government employees by adopting a different formula which sometimes raises the disparity. The 6th Central Pay Commission recommended the Dearness Allowances to be calculated at the index average 536 **(1982=100)** since the State Governments were setting up their own Pay Commission and the State of West Bengal constituted the 5th State Pay Commission to ascertain the pay structure, scale of pay, the revised scale of pay and various allowances including the Dearness Allowances which may be extended to its employees. The report of the 5th State Pay Commission would reveal that the State Government since 1st April, 1979 has been following the principles followed by the Government of India in the matter of the calculation of the quantum of each instalment of the Dearness Allowances due to the inhibited pressure of inflation in the economy and the real value of salary fixed periodically by the pay commissions which gets continuously eroded by passage of time. The Commission thought that it is a high time where the payment of Dearness Allowances is to be extended and paid to the Government employees to protect the loss. The said commission further found that there has been a disparity in the time lag in the actual payment of the Dearness Allowances as sometimes the arrears are not included or not paid in uniform manner and recommended the State Government to clear all the backlogs of the lone instalment in tune with the sanctioned by the Government of India with effect from July 1, 2008 and to fall in line with the Central Government pattern of sanctioning two instalments of DA each year.

4. On the basis of the said recommendation, the State Government promulgated West Bengal Services (Revision of Pay & Allowance) Rules, 2009 under proviso to Article 309 of the Constitution of India and, therefore, brings the same in reality in the form of the statutory document. The said Rule would evince that it was made effective from 1st Day of January, 2006 expanding its horizon to all persons appointed to Civil Services and post under the rule making control of the State Government except certain categories of services indicated in Rule 2 thereof. The said Rule being somewhat exhaustive encompassing the change in the grade pay, revised pay structure, basic pay in revised pay structure and other allied benefits, apart from the allowances including the DA. Rule 3 (C) of the said rules defining the existing emoluments includes the DA appropriate to the basic pay plus the dearness pay at index average 536 **(1982=100)**. While dealing with the fixation of initial pay and revised pay structure under Rule 7, the proviso to Clause (b) thereof gives manifest intention as to the index average of 536 **(1982=100)**. However, Rule 12 which starts with the non-obstante clause postulates that the arrears of the DA between the period from 1st January, 2006 to 31st March, 2008 shall not be paid to a Government employee but the Government employees shall be entitled to the arrears on and from 1st April, 2008 to 31st March, 2009 in three consecutive yearly instalments in cash for the year 2009-10. The aforesaid rule was published in the *Calcutta Gazette: Extraordinary* on February 23, 2009. Simultaneously, the memorandum no. 1691-F was issued by the Finance Department, Government of West Bengal through its principal secretary as clarificatory memorandum to the said rule concerning the allied matters dealt with by the 5th Pay Commission. Paragraph 2 thereof exposes the intention of the Government to accept the recommendation of the said Commission concerning the running pay bands and the grade pay leading to its scale of pay

without any modifications; in other words, the same was accepted without any modifications and *in toto*. Paragraph 10 thereof which is of a seminal importance in the instant writ petition relates to a DA and exposes the manifest intention of the Government in this regard. Under the said paragraph, the DA was admissible to all Government employees which they are entitled from time to time, since 1st January, 2006 to be relatable to the pay in the revised pay structure and on the basis of another Government order issued by the Finance Department vide memo no. 1692-F dated 23rd February, 2009. Under the memo no. 1692-F dated 23rd February, 2009 the Government decided to pay the DA with effect from 1st April, 2008 at the rate indicated therein. However, the clarification was also given in Paragraph 5 providing the meaning of the term “basic pay” for the purpose of the DA to mean the pay drawn in the revised pay band including the pay band and non-practicing allowances (NPA), were admissible but shall not include any other type of pay. This anomaly raises a concern with the several State Government Employees’ Organisations and the representations were made to the State Government highlighting the disparity not only on the rate of the dearness allowances but its timely payments.

5. Ultimately, the tribunal application under Section 19 of the Administrative Tribunal Act, 1985 being OA no. 1154 of 2016 was filed by the Respondent no. 1 for the 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.”***

6. The said tribunal application was dismissed upon returning the findings that the payment of dearness allowances falls within the absolute prerogative of the discretionary domain of the State Government and, therefore, no right has accrued into the employee to claim DA. It was further observed that despite the partial acceptance of the recommendation of the 5th Pay Commission, it does not confer any right on the State employees to bring an action for enforcement thereof. Lastly it was observed that the DA paid to the employees of the State Government posted at Banga Bhavan, New Delhi and Youth Hostel at Chennai including the employees of the West Bengal State

- Electricity Development Corporation is not the discriminatory one. It is pertinent to record that the plea was also taken by the Respondent no. 1 in the said tribunal application that the moment the DA is paid to a Government employee at par with the rate of the DA admissible to the Central Government employees, to the State Government Employees posted at Banga Bhavan, New Delhi and Youth Hostel at Chennai and the West Bengal State Electricity Development Corporation, the same should be also extended to these employees of the State Government posted within the State of West Bengal.
7. The said order dated Feb 16, 2017 was assailed before the Division Bench in WPST 45 of 2017 wherein the three points were formulated. Firstly, whether the claim of the State Government employees for Dearness Allowances is a legally enforceable right in terms of ROPA Rules, 2009 read with the other Government orders issued correspondingly; secondly, whether the claim of the employee to get the Dearness Allowance at the same rate that of the employees of the Central Government; thirdly, whether the rate of dearness allowance equivalent to the rate of Central Government employee paid to the State Government employees posted at Banga Bhavan, New Delhi and Youth Hostel at Chennai is discriminatory.
 8. The Division Bench answered the first point in favour of the respondent no. 1. In other words, the Division Bench held that the claim of the employee serving under the State of West Bengal for Dearness Allowance is based on a legally enforceable right to the extent of the recommendation of the 5th Pay Commission accepted by the Government of West Bengal by promulgating the ROPA Rules, 2009 and the clarificatory memorandum issued simultaneously. However, the other two questions were not answered and the matter was remitted to the Tribunal to decide the same. The State Government filed an application for review against the said order which was ultimately dismissed.

9. Thus, the point as to the legally enforceable right having created upon the State Government employees over the claim of DA attained finality and in absence of any further challenge to the higher forum, such point cannot be reagitated and/or reopened in the instant proceeding.
10. However, the Tribunal on limited remand answered the aforesaid two points in the following:

“38.The function of the pleadings is only to state the material facts and it is for the Court or Tribunal to determine the legal result of those facts and to mould the relief in accordance with that result, as decided by the Federal Court in “Messers Moolji jaitha and Co. v. Khandesh Spinning and Wearing Mills Co. Ltd.” Reported in AIR 1950 FC 83: 1950 SCC online FC3. Accordingly, we would like to give the following directions on the basis of the findings made by us. The respondent No.1, Chief Secretary to the Government of West Bengal is directed to evolve norms/principles within a period of three months from the date of this order for release of DA on the basic pay of the State Government employees fixed in terms of ROPA Rules, 2009 by taking into consideration inflation on the basis of AICPI number (1982=100), so that DA can be paid to the State Government employees at least twice in a year till the date of giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal for its employees. The respondent No. 1 is directed to implement the norms/principles evolved as per direction of the Tribunal within a period of six months from the date of the order. The respondent no.1 is further directed to make payment of arrears of DA on the basic pay to the State Government

employees by taking into account level of inflation on the basis of AICPI number (1982=100) by following the norms/principles evolved as per direction of the Tribunal within a period of one year from the date of this order or before giving effect to the recommendation of 6th Pay Commission set up by the Government of West Bengal, whichever is earlier. The respondent No.1 is at liberty to decide the mode and manner of payment of arrears of DA to the State Government employees within the period of time fixed by us. The respondent No.1 is also directed not to give any effect to the office orders/memorandums issued for payment of DA to the State Government employees posted in New Delhi and Chennai at a rate payable to the employees of the Central Government but the respondent No.1 will not make any recovery for excess payment of salary to those State Government employees. The respondent No.1 is at liberty to give incentive to the State Government employees working in New Delhi and Chennai by payment of special allowance or any other allowances as the State Government may deem fit and proper. With the above directions, the original application stands disposed of.”

- 11.To summarise the findings made by the Tribunal in the impugned judgment, it is discerned that the direction was passed upon the Chief Secretary to the Government of West Bengal to evolve norms/principles within a specified time for release of DA on the basic pay of the State Government employees fixed under ROPA Rules, 2009 and such DA shall be paid at least twice in a year till the acceptance and/or giving effect to the recommendation of the 6th Pay Commission set up by the Government of West Bengal. The Said Chief Secretary was further directed to implement the norms/principles in

terms of the order of the Tribunal within Six months from the date of the said order and to make the payments of the arrears DA within one year from the date of order or before giving effect to the recommendation of the 6th Pay Commission set up by the State Government and directed to revise the DA of the employees posted outside the West Bengal in commensurate with the rate of the DA payable to the employees posted within the State of West Bengal and in the event any excess payment is made, the same should not be realised/recovered from the said employees. However, the liberty was also granted to the Chief Secretary to take a decision upon extending the incentives to such employees by way of special allowances or any other allowances as the Government may deem fit and proper.

12. Such being the factual matrix discerned from the record, the learned Advocate General submits that the concept of ascertaining the rate of the DA being variable and depends upon the various factors including the consumer price index at the relevant place of his posting cannot be brought within the straight jacket formula. In other words, it is submitted that the DA depends upon the place of posting or where the employee is posted in a particular place the inflation as to the cost of living at such place and therefore, the uniform standard of ascertaining the cost of inflation on an all India basis may result into a chaos and relied upon a judgment of the Supreme Court in the case of ***Workmen Employed By M/s Indian Oxygen Ltd. Vs. M/s. Indian Oxygen Ltd., reported in (1985) 3SCC 177***. According to Mr. Advocate General, the DA is linked to the cost of living index of a particular centre or place having a local flavour and therefore, in a major city the same would be different than in any other remote places. According to Mr. Advocate General since the DA is linked to the cost of living index available at the centre and it is not imperative on the part of the State Government to adopt the rate of the Central Government determined on all India basis. Mr. Advocate General

further relies upon a judgment of the Supreme Court in case of ***Indian General Navigation and Railway Co., Ltd. Calcutta and Anr. Vs. Workmen and Anr., Reported in AIR 1960 SC 1286*** in support of his contention that the principle behind the ascertainment of the DA is linked with the cost of living index at the place of posting or where their families are living and/or residing and therefore, the rate of DA ascertained by the Central Government may not be the said safe factor. Mr. Advocate General is very much vocal in his submission that the DA cannot be claimed as a matter of right as it largely depends upon the ability and the financial position of the State and for such reason every State follows their own rate of DA payable to its employees and may in some cases adopt the rate of the DA of the Central Government but there is no obligation on the part of the State Government to accept the said rate and placed reliance upon a judgment of the ***Supreme Court in Tamil Nadu Electricity Board vs. TNEB- Thozhilalar Aykkiya Sangam, reported in (2019) 15 SCC 235***. Mr. Advocate General further submits that since the rate of DA is variable in nature depending largely upon the place of posting, there is no incongruity in the decision of the State Government in giving the DA at the rate equivalent to the DA of the Central Government employees to its employees posted at New Delhi, Chennai and other organisations. As per the learned Advocate General, such policy decision of the State Government is non-discriminatory and based upon rationality, reasonability and there is an intelligible differentia amongst the same class.

13. Mr. Bikash Ranjan Bhattacharya, learned Senior Advocate appearing for the Respondent no. 1 submits that the moment the Government accept the recommendation of the 5th Pay Commission by promulgating the Rule in exercise of the power conferred under Article 309 of the Constitution of India, it cannot retract therefrom and deny the legitimate claim emanates from the said statutory rules. It is

further submitted that the earlier Division Bench has held that the said respondent has a legally enforceable right to claim the DA under ROPA Rules, 2009 and therefore, the State Government cannot take a contrary stand thereto. According to Mr. Bhattacharya, if the modalities and the basic factors emanates from the said ROPA Rules, 2009 is evident and patent and require to be adhered to, the contention of the learned Advocate General that the dearness allowance is variable and largely dependent upon the place of the posting is untenable. It is further submitted that mere a plea relating to inability or incapability to pay dearness allowance determined under the structured formula is an unacceptable defence and in fact, the same argument was advanced in case of **West Bengal State Electricity Transmission Company Ltd. &Ors. vs. West Bengal State Electricity Board Engineers' Association &Ors. (MAT 109 of 2020)** decided on 11.3.2020, but does not found favour. The said judgment was assailed before the Supreme Court in the Special Leave to Appeal (C) No. 2947 of 2022 which was dismissed on 4th March, 2022. Thus, it is contended that the moment the Government accepted the recommendation of the pay commission by framing the Rules under Article 309 of the Constitution of India, it cannot take a rebound and deny the payment of the DA under any pretext including the financial crunch.

- 14.Mr. Kallol Basu, learned Advocate appearing for the aided respondents adopts and reiterates the stand of Mr. Bhattacharya by submitting that the State Government cannot take a plea of fixing rate of DA by taking the cost price index at a particular place in view of the definition of the existing emoluments under ROPA Rules, 2009. He, thus, submits that there is no illegality or infirmity in the impugned order and therefore, the writ petition filed by the State needs to be dismissed.

15. The facts emerged from the pleadings of the parties and the arguments so advanced before us have squeezed the zone of consideration in the limited sphere. Initially, the plea was taken by the State that DA is not legally enforceable right and therefore, the State Government employees are not entitled to any relief consequent thereupon and the writ petition was dismissed on February 16, 2017 by the Tribunal but the Division Bench while considering the writ petition filed against the said order of the Tribunal held in unequivocal term that the same is the legally enforceable right but declined to interfere with other two points, namely, (i) whether the claim of the employees serving under the Government of West Bengal for dearness allowance at a rate equivalent to 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 Government with their counterparts serving at Banga Bhavan in New Delhi and Youth Hostel in Chennai, are require to be decided upon disclosure of the further materials. An application for review was filed against the order of the Division Bench passed in WPST No. 45 of 2017 which was later on dismissed. There was no further challenge to the said order of the Division Bench and therefore, it can be reasonably inferred that the said order attained finality. As a logical corollary, the main thrust on a plea of legally enforceable right relating to the claim of DA has been set at rest and it cannot be reopened in the instant proceeding. After the remand on the aforesaid two points, the Tribunal has answered the same and rejected the contention that the statutory rules or the administrative directions mandates the State Government employees to get DA at the rate payable to its employees by the Central Government. However, the Tribunal held that the claim of DA being legally enforceable right, the State Government employees are entitled to get DA on the basic pay at the rate to be calculated on the basis of all-India Consumer

Price Index (AICPI) number published from time to time taking the base year **(1982=100)** and therefore, it is the bounden duty of the State Government to evolve norms/principles on payment of DA to its employees by calculating the same on the basis of AICPI on the basic pay fixed in terms of the ROPA Rules, 2009 till the date of giving the effect to the recommendation of 6th Pay Commission set up by the State of West Bengal. It was further held that the State Government is bound to pay the arrears of DA upon fixation of the rate in terms of the aforesaid directions either in cash or giving direction for depositing the same in General Provident Fund (for short, "GPF") with suitable restrictions in withdrawal of the same within the specified time. So far as the point of discrimination is concerned, the Tribunal held that there cannot be the classification within the class and all the State Government employees constitute a homogeneous class and therefore, the payment of DA at different rate (in this case at the rate declared by the Central Government) is discriminatory and is violative of Article 14 of the Constitution of India. Such being the position as stood as on this date, there is no hesitation to hold that it is not obligatory or imperative on the part of the State Government to pay the DA to its employee at the rate of DA paid to the Central Government employee. The question is still begging an answer what would be the modalities and/or norms to be adopted by the State Government in ascertaining the rate of DA to its employee?

16. According to the learned Advocate General, the adjudication and/or ascertainment of DA cannot be brought within the straight-jacket formula as it depends upon the place of posting and therefore, it is variable in nature with an avowed object to neutralise the high cost of living because of the inflation at a place where he is posted or his family is residing and therefore, it is within the exclusive domain of the State Government to declare the DA at the rate prevalent at the respective locality and not on the standard formula. The judgment of

India General Navigation and Railway Co. Ltd., Calcutta & Anr. (supra) appears to have been misunderstood in this regard. In the said report, the employer was a steamer company having its head office at Calcutta and the dispute arose with its worker primarily on two grounds, namely, (i) the dearness allowance for the steamer and flat clerks and (ii) the working hours for ghat employees on Saturdays. Initially, Bengal Chambers of Commerce was entrusted the task of ascertaining the rate of DA to the staff posted at the head office and at the Calcutta ghats and recommended that the steamer clerks and flat should be paid the same rate of DA. The company took a plea that there is a fallacy in the said recommendation to grant the rate of DA to those clerks at such rate in a uniformed manner but must be allowed at the rate prevalent at the locality whether the workman is posted. The Apex Court held that the concept of DA largely depends upon the place of posting of the employee but did not accept such contention on the special fact that those clerks were entrusted to work on flats and steamers while plying on the river cannot be said to have a definite place of posting and therefore, held that the expression “place of posting” should mean that the employee should get DA where their families are residing which would be considered to be a place of posting of such employees for all practical purposes in these words:

“5. So far as the principle is concerned there is no doubt that dearness allowance depends upon the place of posting of an employee. The difficulty, however, of applying this principle in the case of these clerks is that they have no definite place of posting; they are flat and steamer clerks and their main duty is to work on flats and steamers while they are plying on the river. In such a case the principle that dearness allowance should be governed by the place of posting can

only mean that the employees should get dearness allowance where their families (i.e. wife and children) are residing, for that would be the place of posting of such employees for all practical purposes. The Tribunal's view therefore that these clerks should be paid this rate of dearness allowance would be justified on the presumption made by it that the families of these clerks must necessarily be living in Calcutta when they were on duty on a flat or steamer. There is, however, no proof of this on the record and it cannot necessarily be assumed that every such clerk must be keeping his family in Greater Calcutta. As we have pointed out above, this rate of dearness allowance is not meant to apply to those who reside outside Greater Calcutta. Though therefore the Tribunal is right in awarding this rate of dearness allowance to these clerks, it went wrong in assuming that every one of these clerks was residing in Greater Calcutta."

17. In ***Workmen Employed By M/s. Indian Oxygen Ltd. (supra)*** the question which fell for consideration whether the variable DA payable by the employer to its workmen should be revised by linking with the Consumer Price Index for industrial workers at Kanpur as computed by Labour Bureau, Simla and if the answer is affirmative than at what rate. In the said case, the company has a Pan India Establishments and there appears to be two rival unions at its industrial undertaking at Kanpur. The company subsequently intended to uniformly grant the DA to its employees posted at all its industrial establishments throughout the country which raises a dissent amongst the employees of the industrial undertaking at Kanpur. It was the stand of the dissenting union that the workman employed in the company and the major cities are getting a higher DA in comparison to Kanpur Unit and therefore, the working out of the rate of DA taking into

account the consumer price index for Delhi prepared by the Labour Bureau, Simla cannot be uniformly applied while revising the rate of the DA for the workman employed in at Kanpur Unit. The Apex Court held that the DA is directly relatable to the erosion of real wages for the constant upward rise in the prices of the basic necessities and is somewhat depended upon the inflationary inputs which resulted in short fall in the purchasing power of the rupee. It is further held that the DA linked with the price rise with an avowed object recompense loss in real wages on account of the steep price rise. It was, thus, held that the company has been misled to adopt the equitable principle of introducing uniform rate of the DA linked with the all-India average consumer price index prepared by the Labour Bureau, Simla.

18. The aforesaid two judgments relate to an industrial dispute and the nature of the DA which is an integral part of the wages awarded to its workman at the several units at different places. There was no statutory rules governing the field of the DA and was largely depended upon the policy decision of the company. The company which has a Pan India Establishments intended to grant the DA on uniform rate taking into account the inflation at a particular place which has not been accepted to be the safe mode. Even the Apex Court has held that all the workmen of the company are entitled to an uniform rate of wages depending upon the nature of the duties and responsibilities entrusted upon them but so far as the rate of DA is concerned it varies from place to place and it would not be safe to ascertain the rate of DA based upon cost price index at a particular place as it is variable in nature. The aforesaid judgments in our opinion cannot come in aid to the State Government as they are guided, controlled, regulated and bound by the statutory provisions. It is one thing to say that the policy decision is within the realm of the State and the courts should seldom interfere therewith but it is completely different

when the statutory rules provides and regulates the functioning of the State Government and therefore, any departure therefrom has to be within the strict boundaries thereof. Previously, the Bengal Chambers of Commerce was entrusted to ascertain the rate of inflation and recommended the said rate of DA to the workmen of the industrial undertaking within the region but the same has been done away with and the onerous duties have been entrusted upon the Labour Bureau, Simla. The concept of DA to neutralise the real wages of the workmen at a particular industrial establishments may be variable but the same analogy in our opinion may not be adopted in relation to Government employees be it of the State or the Central. In recent past, the Central Government has granted the DA to all its employees uniformly irrespective of their place of posting. The concept of variability in the DA has radically changed and the uniformity appears to be the hallmark thereof. In fact, the State Government on accepting the recommendation of the 5th Pay Commission framed ROPA Rules, 2009 under Article 309 of the Constitution of India and expressly excluded the categories of the persons from the purview under Rule 2 thereof. The said rule manifestly exposes the lucid and explicit intention of the Government in a doctrine of the recommendation of the 5th Pay Commission and while defining “existing emoluments” under Clause 3(C) thereof. The method of ascertaining the DA has been clearly spelt out to be based upon at the index average 536 **(1982=100)**. It is logically inferred from the aforesaid stand of the State that the rate of DA declared by the Central Government though at the index average 536 **(1982=100)** cannot be extended to the State Government employee because of the variability in the living cost price within the State but the State Government cannot deny the applicability of the index average 536 **(1982=100)** under the said statutory rules. On the same day when the said rule was published in the official gazette, the Memorandum

1690-F dated 23rd February, 2009 was issued by the Special Secretary, Government of West Bengal indicating the conscious decision of the Government relating to the release of the DA admissible to the Government employees in the revised pay structure but the DA between the period from 1st January, 2006 to 31st March, 2008 was decided not to be paid to such employees. Consequent upon the said Memorandum, the clarification was made vide Memo No. 1691-F dated 23rd February, 2009 wherein the DA which the State Government employees were entitled from time to time since 1st January, 2006 was to be paid in terms of the said Memo No. 1692-F dated 23rd February, 2009. The subsequent memorandum clarifying the stand of the Government leaves no ambiguity that it is imperative on the part of the State to pay the DA to its employees on and from 1st April, 2008 at the rate calculated on the basis of the index average 536 **(1982=100)**. There cannot be any departure from the provisions of the statutory rules nor the State Governments can act contrary thereto taking shelter under the incapability and/or incapacity to meet such requirement. In fact, the Tribunal also held that it would not be proper to direct the State Government to pay the DA at the rate of the Central Government but in view of the discussions made hereinabove, there is no infirmity in the direction passed by the Tribunal for evolving the norms/principles in fixing the DA on the basis of the AICPI 536 **(1982=100)**. It appears from the materials on record that after accepting the recommendation of the 5th Pay Commission and upon the promulgation of the ROPA Rules, 2009, the DA was released twice in a year though in erratic manner. The Central Government on the basis of the 6th Pay Commission have decided to pay the DA twice in a year which was continued to be accepted by the State Government and implemented for a brief period but later on there has been a disparity. The moment the State Government has adopted the manner in which the DA is to be

ascertained and paid to the employees twice in a year, in absence of any valid reasons or compelling circumstances, the abrupt disruption cannot be countenanced and therefore, we do not find any fault in the order of the Tribunal in this regard.

19. So far as the second point is concerned the tribunal has found all the State Government employees irrespective of their place of posting are to be treated uniformly and there cannot be any discrimination in granting the DA at different rates to the State Government employees posted at Delhi or Chennai. The Division Bench in an earlier round of litigation have held that the claim of DA is a legally enforceable right. The moment it is declared that the DA is a legal right the payment in uniform rate would avoid any kind of discrimination. As indicated above, there has been a paradigm shift between the period prior to 2009 and after as the Bengal Chambers of Commerce who was initially entrusted to deal with such situation was done away with and an uniform base index of 536 **(1982=100)** was adopted and implemented. Under the ROPA Rules, 2009 the rate of DA to the State Government employees is determined on the basis of AICPI and applicable to all the State Government employees and therefore, the moment they constitute a homogeneous class and in absence of any special or compelling factors differentiating them or in absence of any intelligible differentia, the class differentiation offends Article 14 of the Constitution of India. There cannot be any categorisation of the State Government employees on the basis of their posting at different locations as it would amount to a classification within the homogeneous class. We are not unmindful of the proposition of law that the classification within the class can be accepted provided, it is based upon the rationale and there is an intelligible differentia distinguishing one group of person from other. There must be a rational and reasonable nexus with the avowed object sought to be achieved by such classification. The moment the AICPI is the base

factor to ascertain the DA it imbibed within itself all such eventualities undertaken by the Labour Bureau, Simla and therefore, the moment the rate of DA is ascertained based upon such factor, the discrimination in payment of different rates of DA to the employees posted at New Delhi or Chennai and the employees within the State offends Article 14 of the Constitution of India. It is within the domain of the State Government to provide special or other allowances to such employees because of the vagarious of the posting at the distinct place from the State but we do not find any justification in differential payment of the DA to such employees.

20. In view of the findings recorded hereinabove. We do not find any infirmity or illegality in the impugned order and therefore, the writ petition deserves dismissal which is accordingly dismissed.
21. Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

(Harish Tandon, J.)