IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11170 of 2007
With
SPECIAL CIVIL APPLICATION No. 9441 of 2007
With
SPECIAL CIVIL APPLICATION No. 9624 of 2007
With
SPECIAL CIVIL APPLICATION No. 14496 of 2007
To
SPECIAL CIVIL APPLICATION No. 14539 of 2007
With
SPECIAL CIVIL APPLICATION No. 9625 of 2007
With
SPECIAL CIVIL APPLICATION No. 14464 of 2007
To
SPECIAL CIVIL APPLICATION No. 14495 of 2007
With
SPECIAL CIVIL APPLICATION No. 10845 of 2007
To
SPECIAL CIVIL APPLICATION No. 10880 of 2007
With
SPECIAL CIVIL APPLICATION No. 10881 of 2007
With
SPECIAL CIVIL APPLICATION No. 14203 of 2007
With
SPECIAL CIVIL APPLICATION No. 14342 of 2007
With
SPECIAL CIVIL APPLICATION No. 14381 of 2007
With
SPECIAL CIVIL APPLICATION No. 15950 of 2007
To
SPECIAL CIVIL APPLICATION No. 15952 of 2007
With
SPECIAL CIVIL APPLICATION No. 14383 of 2007
With
SPECIAL CIVIL APPLICATION No. 15953 of 2007
To
SPECIAL CIVIL APPLICATION No. 15991 of 2007
With
SPECIAL CIVIL APPLICATION No. 10915 of 2007
With
SPECIAL CIVIL APPLICATION No. 15872 of 2007
To
SPECIAL CIVIL APPLICATION No. 15884 of 2007
With
SPECIAL CIVIL APPLICATION No. 15895 of 2007
To
SPECIAL CIVIL APPLICATION No. 15897 of 2007
With
SPECIAL CIVIL APPLICATION No. 15995 of 2007
To
SPECIAL CIVIL APPLICATION No. 16006 of 2007
With
SPECIAL CIVIL APPLICATION No. 16122 of 2007

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With
SPECIAL CIVIL APPLICATION No. 16123 of 2007
To
SPECIAL CIVIL APPLICATION No. 16129 of 2007
With
SPECIAL CIVIL APPLICATION No. 16791 of 2007
To
SPECIAL CIVIL APPLICATION No. 16793 of 2007
With
SPECIAL CIVIL APPLICATION No. 16828 of 2007
To
SPECIAL CIVIL APPLICATION No. 16831 of 2007
With
SPECIAL CIVIL APPLICATION No. 17133 of 2007
With
SPECIAL CIVIL APPLICATION No. 17135 of 2007
To
SPECIAL CIVIL APPLICATION No. 17141 of 2007
With
SPECIAL CIVIL APPLICATION No. 17242 of 2007
To
SPECIAL CIVIL APPLICATION No. 17305 of 2007
With
SPECIAL CIVIL APPLICATION No. 17882 of 2007
To
SPECIAL CIVIL APPLICATION No. 17884 of 2007
With
SPECIAL CIVIL APPLICATION No. 17946 of 2007
To
SPECIAL CIVIL APPLICATION No. 17962 of 2007
With
SPECIAL CIVIL APPLICATION No. 18136 of 2007
To
SPECIAL CIVIL APPLICATION No. 18153 of 2007
With
SPECIAL CIVIL APPLICATION No. 24339 of 2007
With
SPECIAL CIVIL APPLICATION No. 24304 of 2007
With
SPECIAL CIVIL APPLICATION No. 24272 of 2007
With
SPECIAL CIVIL APPLICATION No. 23831 of 2007
With
SPECIAL CIVIL APPLICATION No. 23700 of 2007
With
SPECIAL CIVIL APPLICATION No. 23091 of 2007
With
SPECIAL CIVIL APPLICATION No. 23045 of 2007
To
SPECIAL CIVIL APPLICATION No. 23049 of 2007
With
SPECIAL CIVIL APPLICATION No. 22857 of 2007
With
SPECIAL CIVIL APPLICATION No. 22476 of 2007
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SPECIAL CIVIL APPLICATION No. 21826 of 2007
With
SPECIAL CIVIL APPLICATION No. 21739 of 2007
With
SPECIAL CIVIL APPLICATION No. 19973 of 2007
With
SPECIAL CIVIL APPLICATION No. 19932 of 2007
With
SPECIAL CIVIL APPLICATION No. 19669 of 2007
With
SPECIAL CIVIL APPLICATION No. 19651 of 2007
With
SPECIAL CIVIL APPLICATION No. 19534 of 2007
With
SPECIAL CIVIL APPLICATION No. 22441 of 2007
With
SPECIAL CIVIL APPLICATION No. 24860 of 2007
With
SPECIAL CIVIL APPLICATION No. 25824 of 2007
With
SPECIAL CIVIL APPLICATION No. 27337 of 2007
With
SPECIAL CIVIL APPLICATION No. 27338 of 2007
To
SPECIAL CIVIL APPLICATION No. 27346 of 2007
With
SPECIAL CIVIL APPLICATION No. 25825 of 2007
To
SPECIAL CIVIL APPLICATION No. 25829 of 2007
With
SPECIAL CIVIL APPLICATION No. 28662 of 2007
With
SPECIAL CIVIL APPLICATION No. 28664 of 2007
To
SPECIAL CIVIL APPLICATION No. 28669 of 2007
With
SPECIAL CIVIL APPLICATION No. 10882 of 2007
To
SPECIAL CIVIL APPLICATION No. 10914 of 2007
With
SPECIAL CIVIL APPLICATION No. 14204 of 2007
To
SPECIAL CIVIL APPLICATION No. 14225 of 2007
With
SPECIAL CIVIL APPLICATION No. 14343 of 2007
To
SPECIAL CIVIL APPLICATION No. 14372 of 2007
With
SPECIAL CIVIL APPLICATION No. 10916 of 2007
To
SPECIAL CIVIL APPLICATION No. 10925 of 2007
With
SPECIAL CIVIL APPLICATION No. 24340 of 2007
To
SPECIAL CIVIL APPLICATION No. 24345 of 2007
With

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SPECIAL CIVIL APPLICATION No. 24305 of 2007
To
SPECIAL CIVIL APPLICATION No. 24337 of 2007
With
SPECIAL CIVIL APPLICATION No. 23092 of 2007
To
SPECIAL CIVIL APPLICATION No. 23101 of 2007
With
SPECIAL CIVIL APPLICATION No. 22858 of 2007
To
SPECIAL CIVIL APPLICATION No. 22892 of 2007
With
SPECIAL CIVIL APPLICATION No. 22477 of 2007
To
SPECIAL CIVIL APPLICATION No. 22481 of 2007
With
SPECIAL CIVIL APPLICATION No. 21827 of 2007
With
SPECIAL CIVIL APPLICATION No. 21740 of 2007
To
SPECIAL CIVIL APPLICATION No. 21745 of 2007
With
SPECIAL CIVIL APPLICATION No. 19974 of 2007
With
SPECIAL CIVIL APPLICATION No. 19933 of 2007
To
SPECIAL CIVIL APPLICATION No. 19969 of 2007
With
SPECIAL CIVIL APPLICATION No. 19670 of 2007
To
SPECIAL CIVIL APPLICATION No. 19673 of 2007
With
SPECIAL CIVIL APPLICATION No. 19652 of 2007
To
SPECIAL CIVIL APPLICATION No. 19658 of 2007
With
SPECIAL CIVIL APPLICATION No. 19535 of 2007
To
SPECIAL CIVIL APPLICATION No. 19541 of 2007
With
SPECIAL CIVIL APPLICATION No. 19535 of 2007
To
SPECIAL CIVIL APPLICATION No. 19541 of 2007
To
SPECIAL CIVIL APPLICATION No. 19541 of 2007
With
SPECIAL CIVIL APPLICATION No. 23813 of 2007
To
SPECIAL CIVIL APPLICATION No. 23823 of 2007
With
SPECIAL CIVIL APPLICATION No. 11171 of 2007
To
SPECIAL CIVIL APPLICATION No. 11205 of 2007
With

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SPECIAL CIVIL APPLICATION No. 11461 of 2007
To
SPECIAL CIVIL APPLICATION No. 11466 of 2007
With
SPECIAL CIVIL APPLICATION No. 12094 of 2007
To
SPECIAL CIVIL APPLICATION No. 12111 of 2007
With
SPECIAL CIVIL APPLICATION No. 12117 of 2007
To
SPECIAL CIVIL APPLICATION No. 12119 of 2007
With
SPECIAL CIVIL APPLICATION No. 13272 of 2007
With
SPECIAL CIVIL APPLICATION No. 15597 of 2007
To
SPECIAL CIVIL APPLICATION No. 15631 of 2007
With
SPECIAL CIVIL APPLICATION No. 14079 of 2007
With
SPECIAL CIVIL APPLICATION No. 14384 of 2007
To
SPECIAL CIVIL APPLICATION No. 14463 of 2007
With
SPECIAL CIVIL APPLICATION No. 24790 of 2007
To
SPECIAL CIVIL APPLICATION No. 24792 of 2007
With
SPECIAL CIVIL APPLICATION No. 26154 of 2007
To
SPECIAL CIVIL APPLICATION No. 26210 of 2007
With
SPECIAL CIVIL APPLICATION No. 26327 of 2007
To
SPECIAL CIVIL APPLICATION No. 26337 of 2007
With
SPECIAL CIVIL APPLICATION No. 21608 of 2007
To
SPECIAL CIVIL APPLICATION No. 21619 of 2007
With
SPECIAL CIVIL APPLICATION No. 25825 of 2007
To
SPECIAL CIVIL APPLICATION No. 25829 of 2007
To
SPECIAL CIVIL APPLICATION No. 25829 of 2007
With
SPECIAL CIVIL APPLICATION No. 28449 of 2007
To
SPECIAL CIVIL APPLICATION No. 28454 of 2007
With
SPECIAL CIVIL APPLICATION No. 24821 of 2007
To
SPECIAL CIVIL APPLICATION No. 24842 of 2007
With

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SPECIAL CIVIL APPLICATION No. 24860 of 2007
With
SPECIAL CIVIL APPLICATION No. 24896 of 2007
To
SPECIAL CIVIL APPLICATION No. 24899 of 2007
With
SPECIAL CIVIL APPLICATION No. 24949 of 2007
With
SPECIAL CIVIL APPLICATION No. 25474 of 2007
To
SPECIAL CIVIL APPLICATION No. 25486 of 2007
With
SPECIAL CIVIL APPLICATION No. 25824 of 2007
With
SPECIAL CIVIL APPLICATION No. 26153 of 2007
With
SPECIAL CIVIL APPLICATION No. 30733 of 2007
To
SPECIAL CIVIL APPLICATION No. 30750 of 2007
With
SPECIAL CIVIL APPLICATION No. 9059 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

CHITRA M. PRAKASHKER & 35 - Petitioner(s)
Versus
STATE OF GUJARAT - Respondent(s)

==========

Appearance :
MR SJ GAEKWAD for Petitioner(s) : 1 – 36.

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MR KAMAL TRIVEDI, ADVOCATE GENERAL WITH MS SANGEETA VISHEN, AGP, for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1,
==========

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 09/01/2008

COMMON ORAL JUDGMENT

1. All in-service doctors, whose services are governed by various statutory Rules framed by the Government in exercise of the power under Article 309 of the Constitution, including that of **Gujarat Civil Services (Conduct) Rules, 1971** (hereinafter referred to as the "**Conduct Rules**" for the sake of convenience), **Gujarat Civil Services (General Conditions of Services) Rules, 2002** (hereinafter referred to as the "**General Rules**" for the sake of convenience), and **Gujarat Civil Services (Pension) Rules, 2002** ((hereinafter referred to as the "**Pension Rules**" for the sake of convenience), have preferred all the petitions for challenging the policy of the State Government vide Resolution dated 29.3.2007 for discontinuing **Non-Practicing Allowance** (hereinafter referred to as "**NPA**" for the sake of

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convenience) and for permitting them for private practice after office hours. As the policy of the Government also provides for giving option to in-service doctors, who have completed 15 years of service for continuing with the NPA and/or for permission for private practice and as such options are not given to the petitioners, the said policy of the State Government is also challenged on the ground as the same being discriminatory amongst in-service doctors, who are similarly situated. The aforesaid appears to be, in substance, the challenges to be considered by this Court in the present group of petitions. As the facts are more or less inter-connected and common and in any event, the challenges are common, they are being considered by this common judgement.

2. With the consent of the learned Counsel appearing for both the sides, the contents and record of the Civil Application No.5869 of 2007 preferred by the State Government are treated as the stand and the contentions of the State Government for maintaining the policy, which is impugned in the

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petitions. The relevant facts of the case for appreciating the aforesaid challenge appear to be as under.

3. In the year 1965, the State Government vide Resolution dated 27.10.1965, with a view to attract adequately qualified medical persons to Government service and with a view to stop private practice in respect of new entrant, decided to upgrade the post, to give advance increments to new-comers and also decided to give allowance for the loss of private practice as per the details given in the accompanying statement. The details of such allowances for loss of private practice are not much relevant for the purpose of deciding the present petitions, but suffice it to state that a policy decision was taken to introduce the payment of allowances for loss of private practice. In the same manner, such policy continued with the modification in the quantum of the amount vide Resolution dated 12.7.1970 of the State Government. The same position continued further with the modification for the rates and there was one additional

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development in the payment of the allowances for loss of private practice (popularly known as "NPA") and the same was that it was linked up with the pay of the doctors concerned. The said policy continued further with the additional change that NPA was indirectly merged with the basic pay in computing T.A., D.A., etc.

4. In the year 1987, in the Rules framed by the Government namely; **Gujarat Civil Services (Revision of Pay) Rules, 1987** (hereinafter referred to as the "**Pay Rules of 1987**" for the sake of convenience), the non-practising allowance was given a statutory recognition for the purpose of inclusion thereof in the revision of pay-scale and the consequential benefits thereof. The same continued further even in the year 1998 when the Government framed the Rules for revision of pay-scale namely; **Gujarat Civil Services (Revision of Pay) Rules, 1998** (hereinafter referred to as the "**Pay Rules of 1998**). It may be recorded that such entitlement of NPA was also extended by the State Government to the other medical services namely; ESI –

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Ayurved - Homeopathy Doctors etc., who were working in respective posts in the State Government. The aforesaid position for payment of NPA continued from 1965 to 2005, roughly for about 40 years.

5. In the year 2006, the State Government vide Resolution dated 20.11.2006 decided to discontinue payment of NPA to all in-service doctors (irrespective of their length of service) from 1.12.2006 and it was also resolved to permit such doctors for private practice after duty hours with the restrictions of not to utilize the medicines, place of dispensary, etc., for their private practice, etc. It appears that various writ petitions were filed challenging the aforesaid decision of the State Government for discontinuation of NPA and for permitting private practice by in-service doctors, including Special Civil Application No.24845 of 2006 and allied matters. In the said petition, this Court had initially issued notice and the interim stay order was also granted. Therefore, the said petitions were disposed of by this Court, since

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the State Government, through the learned Advocate General, had declared before the Court to resolve the issue with deliberations and to give opportunity of hearing to the Associations of doctors concerned and it was also agreed that if required, the State Government shall reconsider the matter and until the same, the operation of the Government Resolution dated 20.1.2006 for giving effect from 1.12.2006 shall remain suspended. Based on the aforesaid declaration made before this Court, the State Government vide Resolution dated 14.12.2006 suspended the implementation of the Resolution. It appears that thereafter the State Government, after considering the representation made on behalf of the Association of various Medical Officers, passed another Resolution dated 29.3.2007 (impugned herein), whereby it has continued with the policy of Non-payment of NPA to all in-service doctors, but with the modification that if the doctor has completed 15 years or more years of service in the Government Service, then he will have an option to opt for

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NPA, or not to opt for NPA and for permission for private practice. It is under these circumstances, all the petitioners have approached this Court by preferring the present petitions.

6. I have heard the learned Counsels appearing for the respective petitioners, and the concerned respondents including Mr.Shelat, learned Sr. Counsel appearing with the Advocates on record for the petitioners and Mr.Kamal Trivedi, learned Advocate General with Ms.Sangeeta Vishen, learned AGP for the State Authorities in all the petitions for final disposal.

7. It was submitted on behalf of the petitioners that the policy of the State Government to discontinue with NPA is in contravention to the statutory Rules inasmuch as NPA is treated as part of the pay and discontinuation thereof is not permitted by the Government Resolution, which is an executive instruction. It was also submitted that such position has continued for about 40 years coupled with the circumstances that it has also been given statutory recognition

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in the Rules framed by the State Government for Pay Rules of 1987 and 1998. Therefore, even if the first contention of the petitioners cannot be accepted that the executive instruction or the policy of the Government would not prevail over the statutory rules, it was alternatively submitted that for discontinuing the policy, which is in operation for about 40 years, there should be proper inspection and material before the State Government to change such policy and not only that, but all such details, even if they are there, should be with overwhelming public interest for nullifying the principles of legitimate expectation. It is, therefore, submitted that the policy of the State Government of discontinuing NPA is in contravention to the statutory rules, arbitrary, and violative of Article 14 of the Constitution of India. It was also alternatively submitted that even if such policy is to stand the test of Article 14 of the Constitution, if this Court is not inclined to accept the contention of the petitioners that the policy is bad in law, then also there is

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absolutely no justification on the part of the State Government to create a class amongst a homogeneous class of in-service doctors on the ground of length of service of 15 years and thereby not to give option to the petitioners, who have not completed 15 years of service. It was submitted that the ground stated for classification has no object to be achieved by the change of the policy and, therefore, the same is arbitrary, discriminatory and violative of the Constitution of India. Therefore, in any case, if the policy is not found as illegal by this Court, the part of the policy for creating two classes may be declared as illegal and the petitioners be given the same treatment for option of NPA and/or private practice at par with the other doctors, who have completed 15 years of service. The learned Counsel appearing for the petitioners have relied upon various decisions of the Apex Court for the scope of judicial review for examining the legality and validity of the policy of the State Government or for examining the classification made by the Government, which

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may meet with the test of Articles 14 and 16 of the Constitution of India.

8. Whereas, on behalf of the State Government, the learned Advocate General contended that NPA is based on condition of not permitting private practice. It is one type of allowance and cannot be termed at par with the basic pay. He submitted that if the State is permitting private practice by the present policy, the in-service doctors, cannot assert as of right that the NPA must be paid to them. He submitted that it was experienced that in the rural area, services of doctors are not available and the Government was finding difficulty in getting services of doctors with super-speciality and, therefore, based on the recommendation of the Central Government the State Government has come out with the change of policy. It was submitted that the Government has right to change the policy by changing the service condition and the policy if made to meet with the change of circumstances, the same cannot be termed as arbitrary. It was also submitted that this Court, in exercise of judicial review,

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would not sit in appeal over the wisdom of the State Government to change any policy, unless the policy is in contravention to law or Constitution. It was submitted that there is a rational behind the change in the policy. Further, there is also a rational in making the classification of the in-service doctors on the basis of completion of 15 years of service and the said rational is that the pension would be affected if the NPA is discontinued for all of them. Further, they are generally in the administrative field and they have lost contact for private practice. It was submitted that the Government has the power to classify the group in the present circumstances, based on the length of service and such classification is with an object to achieve service. Therefore, it was submitted that the policy cannot be said as illegal or arbitrary or unconstitutional. The learned Advocate General has also relied upon various decisions of the Apex Court for showing the scope of judicial review in the matter where the Court has to examine the policy framed by the

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Government.

9. In order to consider the scope of judicial review, it would be worthwhile to refer the decision of the Apex Court in case of **Balco Employees' Union (Regd.) vs. Union of India & Ors, reported in 2002(2) SCC, 333.** In the said decision, the Apex Court, after taking into consideration its various earlier decisions, while examining the validity of the decision of the Government of India had decided to make disinvestment by way of a policy in its one of the undertakings namely; Balco, inter alia, observed at para 46 as under:-

> ***"46. ... it is neither within the domain of the courts nor the scope of the judicial review to embark upon an inquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.***

10. In the very decision, the Apex Court, after taking into consideration its earlier decisions, has concluded at paragraphs 92 and 93 as under:-

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> ***"92. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court.***
>
> ***93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution."***

11.It is by now well settled for the scope of judicial review by this Court for examining the policy of the State Government and it can broadly be classified as under:-

(a)The policy will be struck down by the Court, if the same is in contravention to any Article of the Constitution.

(b)The policy would be struck down by the Court, if the same is in contravention to any statutory provisions.

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(c)Change in policy by executive instruction is not permitted, if the basic policy is statutorily recognized.

(d)The Court would not sit in appeal over the wisdom of the Government in formulating or changing the policy from time to time.

12.The examination of the policy shows that for all doctors, who are government servants, their NPA is to be discontinued and private medical practice is permitted other than the specified duty hours of 9 O'clock morning to 5.30 p.m. in the evening, inclusive of recess or other shift, which may be assigned to such doctors. The necessary consequences of the aforesaid policy would be that such doctors shall be accountable during the period of private practice for their work only during the period for which the duty is assigned to them and for the remaining period they would be entitled for their private medical practice and consequently would not be accountable. Further, as private medical practice is permitted they would be entitled to profess in

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the field of medicine and to earn remuneration during the said period.

13.It is an admitted position that all the in-service doctors, including the petitioners herein are governed by General Rules of 2002. Rule 34 of such Rules reads as under:-

> *"**34. Whole time of a Government employee to be at the disposal of Government:** Unless in any case it be otherwise distinctly provided, the whole time of a Government employee is at the disposal of Government and he may be employed in any manner required by the proper authority, without a claim for additional remuneration, whether the services required of him are such as would ordinarily be remunerated from the Consolidated Fund of India or of a State or from the funds of a body incorporated or not, which is wholly or substantially owned or controlled by the Government."*

14.Therefore, as per the aforesaid Rules, unless, in any case, it be otherwise distinctly provided, the Government employees for whole time, shall be at the disposal of the Government. Whole time would mean 24 hours and would not mean for only duty hours, for which the work is assigned to such Government servants. Further, as per the language of Rule 34, if any relaxation is to be permitted, it has to be as per the express

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language of any other provisions of the Rules. It is not the case of the State Government that General Rules, 2002 are amended and thereafter the policy decision is taken, whereas it is the case of the State Government that after the policy, the Rules may be amended. Therefore, by virtue of Rule 34 when in-service doctors as per the statutory rules are at the disposal of the State Government for the whole time (24 hours), the policy of the State Government for permitting private medical practice after the duty hours would not only run counter to the express language of Rule 34, more particularly when there is no statutory exercise for relaxation by the State Government, but would also result into lowering down the accountability of such government servant, only for a period during which, he is expect to work in the dispensary as against whole time at the disposal of the Government. It may be recorded that had it been a case where the Government came out with the new policy of new doctors, who are to be taken in service in a separate cadre, who are governed by

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separate Rules, the matter would have been different, but in the present case, the policy is changed for permitting private practice during the period other than the duty hours assigned as against the express Rules for whole time government employee at the disposal of the Government. To say in other words, the services of such doctors are available for 24 hours at the disposal of the government, as per Rule 34, whereas by the present policy, it is restricted to only duty hours assigned to such doctors, if not 1/3rd, but would be less than 1/2nd to the extent of not only restricting the services of such doctors, but would also result into lowering down the accountability of such doctors.

15. Hence, the impugned policy of the Government for permitting private practice during the period of other than duty hours can be said contrary to the express language of Rule 34 of the General Rules and can also be said as reducing the accountability of all in-service doctors, who are governed by Rule 34 of the General Rules.

16. The Conduct Rules, inter alia, provides for

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various Code of Conduct to be observed by Government Servants while on duty. Rule 15 of the Conduct Rules reads as under:-

"15. Private trade or employment:-

(1)subject to the provisions of sub-rule (2), no Government servant shall, except with the previous sanction of the Government-

(a) engage directly or indirectly in any trade or business, or

(b) negotiate for, or undertake, any other employment, or

(c) hold an elective office, canvass for a candidate or candidates for an elective office, in any body whether incorporated or not, or

(d) canvass in support of any business of insurance agency, commission agency etc. owned or managed by any member of his family, or

(e) take part except in the discharge of his official duties, in the registration, promotion or management of any bank or othe company registered, or required to be registered, under the Companies Act, 1956 (1 of 1959) or any other law for the time being in force or of any co-operative society for commercial purposes

(2)A Government servant may, without the previous sanction of the Government,-

(a)undertake honorary work of a social

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or charitable nature, or

(b)undertake honorary work of a social or charitable nature, or

(c)participate in sports activities as an ameteur, or

(d)take part in the registration, promotion or management (not involving the holding of an elective office) of a literacy, scientific or charitable society or of a club or similar organization, the aims or objects of which relate to promotion of sports, cultural or creation activities registered under the Societies Registration Act, 1860 (21 of 1860) or any other law for the time being in force, or

(e)take part in the registration, promotion or management (act involving the holding of elective office) of a co-operative society substantially for the benefit of the Government servants registered under the Gujarat Co-operative Societies Act, 1961 (Guj.X of 1962) or any other Law for the time being in force:

Provided that-

(i)He shall discontinue taking part in such activities if so directed by the Government;

(ii)in a case falling under clause (d) or clause (e) of this sub-rule, his official duties shall not suffer thereby and he shall, within a period of one month of his taking part in such activity, report to the Government giving details of the nature of his participation

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(iii)every Government servant shall report to the Government if any member of his family is engaged in a trade or business or owns or manages an insurance agency or commission agency.

(iv)Unless otherwise provided by general of special of the Government, no Government servant shall accept any fee for any work done by him for any private or public body or any private person without the sanction of the prescribed authority."

17.The aforesaid Rule expressly prohibits private trade or employment by the Government servant, except with the previous sanction of the State Government. The Conduct Rules are for not only maintaining the discipline of the Government Servants, but are for observing the excellent Code of Conduct by the Government Servants. It may be that in a given case, in view of the peculiar facts and circumstances, the Government may grant sanction to the Government Servants, but such relaxation, cannot be read as enabling the Government to permit trade and employment by all Government Servants working in a particular branch of department. If private trade and employment are generally permitted amongst Government Servants, it would not only result

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into lowering down the accountability of the duty, which is assigned to such Government Servants, but may also result into permitting conduct, which otherwise if not observed, would result into misconduct and may attract other disciplinary action against such Government Servants. Therefore, such powers of grant of sanction under Rule 15 is to be read only in exceptional circumstances and in individual cases, where such engagement of the Government servants does not come in conflict with the duty assigned to the said Government Servants. Since it is not the case of the State Government that separate sanction is to be granted to each doctor for permitting private practice in exercise of power under Rule 15 of the Conduct rules, no further discussion may be required, but it deserves to be observed that with a view to not only maintain the accountability, but to maintain the efficiency, while granting permission, the relevant circumstances may be that the engagement of such Government Servants does not come in conflict with the duty to be discharged by such

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Government Servants. There would hardly be any difference between discharging duty in dispensary and hospital and the doctor discharging duty outside the hospital while professing as medical professional, except on the aspects of remuneration. Had it been a case where the Government came out with the new policy of taking services of the doctors, who are governed by separate cadre and separate Rules, the matter may stand on different footing. Further, when it is an admitted position that all in-service doctors are governed by the Conduct Rules, such change of policy for permitting private practice may run counter to language and spirit of Rule 15 of Conduct Rules. It may also be resulted into lowering down the accountability and efficiency of such Government Servants.

18. It is an admitted position that whenever the pension of in-service doctors is to be fixed, NPA is to be considered for the purpose of fixation of pension as per the Pension Rules. Even in the impugned policy of the State Government, the distinction is made for creating a separate class

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of the in-service doctors, who have completed 15 years or more service, on the ground that if NPA is discontinued of such doctors who have completed 15 years of service, it may result into adversely affecting their pension and other retiral benefits. Therefore, if NPA is to be considered for fixation of pension as per the Pension Rules, discontinuation or abolition of NPA would run counter to statutory Rules for fixation of pension. As observed earlier, had it been a case where the State Government has come out with new policy of recruiting new doctors by separate cadre and by separate conditions or Rules, it may stand on a different footing, but in the present case, when it is an admitted position that discontinuation of NPA would have direct repercussion on the on the fixation of pension of all in-service doctors, such change in policy would contravene the statutory provisions of Rules for fixation of pension of such Government Servants.

19. Apart from the above, various recruitment rules expressly provide ban of private practice and

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they are as under:-

(a)The Physician Class-I Employees' State Insurance Scheme Recruitment Rules, 1983, inter alia, provides for Rule 8, which reads as under:-

> **"The selected candidate shall be a full-time Government Servant and shall not undertake any private practice of any kind."**

(b)Medical Officers (Gujarat Medical Service) Class-II Recruitment Rules, 1977, inter alia, provides Rule 7 as under:-

> **"The selected candidate shall be a full-time Government Servant and shall be debarred from private practice of any kind".**

(c)The District Family Planning Medical Officers' Recruitment Rules, 1967, inter alia, provides for Rule 8, which reads as under:-

> **"Appointment will be full-time and no private practice will be allowed."**

(d)The Gujarat Insurance Medical Officers – Class-II (Alopathy) Employees' State Insurance Scheme Recruitment Rules, 1981, inter alia, provides for Rule 8, which reads as under:-

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"The selected candidate shall not undertake private practice."

20. It is an admitted position that there is no amendment made prior to the policy in the aforesaid recruitment rules deleting the aforesaid prohibition against private practice. All petitioners have entered service based on the aforesaid recruitment rules since they are all those who have not completed 15 years period in service. The stand of the State Government is that the recruitment rules shall be amended after getting concurrence of Gujarat Public Service Commission. The fact remains that rules are uptil now not amended and even if amended, may be for prospective effect. Therefore, the policy runs counter to aforesaid existing recruitment rules.

21. In view of the above, the policy of the State Government of permitting private practice can be said as in contravention to Rule 34 of the General Rules, Rule 15 of the Conduct Rules, Pension Rules and the aforesaid Recruitment Rules.

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22.The ground of challenge for discrimination within the policy framed by the Government deserves consideration.

23.Before the aforesaid aspect is examined further, it would be worthwhile to extract certain observations made by the Apex Court in the case of ***Rameshwar Prasad & Ors. V. Union of India and Anr. reported at JT 2006(1) SC 457***, wherein the Apex Court had an occasion to examine the action or dissolution of the Legislative Assembly of State of Bihar. In the said decision, the Apex Court (speaking through Mr. Justice Arijit Pasayat) observed at para 239 to 242 as under:

> ***"239. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person person could ever dream that it may law within the powers of the authority.***
>
> ***240. It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of***

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a statutory functionary, there is an implicit obligation to the apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. (See, Smt, Shalini Soni and Ors. Vs. Union of India & Ors.)"

241. The Wednesbury principle is often misunderstood to mean that any administrative decision which is regarded by the court to be unreasonable must be struck down. The correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable in the Wednesbury sense if(i) it is based on wholly irrelevant material or wholly irrelevant consideration, (ii) it has ignored a very relevant material which it should have taken into consideration, or(iii) it is so absurd that no sensible person could ever have reached to it.

242. As observed by Lord Diplock in CCSU's case (supra) a decision will be said to suffer from Wednesbury unreasonableness if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"

24.It is an admitted position that all in-service Doctors are governed by the very set of Rules and statutory provisions including that of the respective recruitment rules, relevant rules providing for condition of service, pay rules, general rules and conduct rules, etc.

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25.Article 16 of the Constitution provides for equal treatment by the State in the matter of public employment. Similarly, Article 14 of the Constitution provides for equality before law to all concerned. However, a separate treatment by a reasonable classification is not prohibited under Article 14 of the Constitution. In the case of ***Deepak Sibbal Vs. Punjab University and Ors. reported at 1989 (2) SCC 145***, the Apex Court had an occasion to consider the classification made for admission to the evening classes of three year LLB degree course. The Rule provided for admission of regular employees of Government/Semi-Government institution and did not provide for admission for private/public establishment. The basis of the classification was the possibility of production of bogus certificates of employment from private employers imparting legal education to the employees of the Government in public interest, continuity of service of three years period and elimination of the wastage of seats. The Apex Court in the said decision inter alia observed at para 9 as under:

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> ***"It is by now well settled that Article 14 forbids class legislation, but does not forbid reasonable classification. Whether a classification is a permissible classification under Article 14 or not, two conditions must be satisfied, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question."***

26. In the case of ***MP Singh & Ors. Vs. Union of India & Ors., reported at AIR 1987 SC 485***, while considering the question of classification of the officers in two groups, i.e. direct recruit and officers taken from various State cadre, for paying the special pay, it was inter alia observed by the Apex Court at para 5 as under:

> ***"It is well settled by several decisions of this Court that in order to pass the test of permissible classification of persons belonging to the same class into groups for the purpose of differential treatment two conditions must be fulfilled, namely, that the classification must be founded on an intelligible differentia which distinguishes persons who are grouped together from others left out of the group and that differential must have rational relation to the object sought to be achieved by the law which brings about discrimination between the two groups."***

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27.Ultimately, it was found by the Apex Court that the classification is not meeting with the condition of Articles 14 and 16 of the Constitution since it does not bear any rational relation to the object of the classification.

28.It is true that in the present case, there is no legislation or statute made for creation of two classes. However, the impugned policy of the State Government does provide for creation of two classes amongst all in-service Doctors; one being for those who have completed 15 years and more service in the Government and the another being for those who have not completed 15 years of service in the Government.

29.Therefore, two things will be required to be examined for testing the policy of the Government creating a separate classification of the employees who are petitioners herein, viz. who have not completed 15 years service and such test would be; (1) whether such classification is reasonable and the (2) whether, it has any intelligible differentia to achieve the objects

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of such policy.

30.It deserves to be recorded that all in-service Doctors irrespective of their length of service at the time of entry in service of the Government must have opted for a particular volition of their life. A person completing medical education, if is interested in treating the patients, may opt for either opening his own dispensary, clinic or a hospital, as the case may be. But, due to the financial constraint or otherwise, he may opt for joining Government dispensary, clinic, hospital, etc. One might also opt for joining Government clinic, dispensary, hospital, etc. with a view to serve the needy class with a limited reasonable remuneration. If a Doctor who has completed study is desirous to advocate himself in the field of education, he might join the service in the field of academic that of tutor, lecturer, professor, reader, etc. If one is desirous to render service to the patients belonging to the labour class or downward class of the society, he might also join the field of medical service in a manner, which

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might concentrate service on a particular class of society like ESI, etc. At the time when one has joined the service, he might legitimately accept a remuneration to be received by him coupled with the revision from time to time, based on the position prevailing at the time of entry in service. Such legitimate expectation would also continue for the revision of the pay-scale and the retiral benefits and also other conditions of service. Though strictly, the conditions of service may not be asserted as of right unless given statutory recognition, the Government servant would have the legitimate expectation of preservation of conditions of service so long as he continues to discharge his duty honestly and efficiently and in accordance with law. Such may fall in the category of principles of legitimate expectations. If the State is to act fairly, the doctrine based on the principles of legitimate expectation should be allowed to operate. The reference may be made to the decision of the Apex Court in the case of ***Confederation of Ex-Servicemen Association Vs.***

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Union of India reported at 2006 SC 2945 and more particularly the observations made at paras 34 & 35:

"34. The expression 'legitimate expectation' appears to have been originated by Lord Denning, M.R. in the leading decision of Schmidt v. Secretary of State, [(1969) 1 All ER:(1969) 2 WLR 337: (1969) 2 Ch D 149]. In Attorney General of Hong Kong V. Ng Yeun Shiu, [(1983) 2 All ER 346: (1983) 2 AC 629], Lord Fraser referring to Schmidt sated:

> ***"The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry. (Emphasis supplied)***
>
> ***35. In such cases, therefore, the Court may not insist an administrative authority to act judicially but may still insist it to act fairly. The doctrine is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time even in absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised"***

31. However, thereby, it cannot be said that the State cannot alter the conditions of service, if in the given facts and circumstances, it is so warranted either for overwhelming public interest

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or for gearing up the efficiency and increasing the accountability in the field of employment in the Government. Nothing can be considered and treated as static which leaves no room for advancement or for achieving the public interest or for raising the efficiency and increasing the accountability. Therefore, if the policy of the Government for prohibiting the private practice of the in-service Doctors have continued for about 45 years, and if in the matter of payment of NPA, all in-service Doctors are given the same treatment subject to the variation of the rights and scale as per the relevant rules and policy, the petitioners who are in-service Doctors, but not completed 15 years of service, can legitimately expect the same treatment as are being given to all other in-service Doctors who have completed 15 years of service.

32. As observed earlier, the doctrine of legitimate expectation can be invoked only in ordinary and normal circumstances, but such doctrine cannot be invoked if the Government has made departure therefrom in view of the overwhelming public

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interest.

33. If the object of the policy are considered as is apparent from the impugned resolution, it is mentioned that out of the experience, it is observed by the State Government that if the eligible medical graduates/post graduates or super specialties are permitted private practice, their services will be available in the field of medical to the State Government. The same was the object as mentioned in the resolution dated 20.11.2006 when the policy was introduced for the first time by the said resolution. In the very resolution of 20.11.2006, it is also mentioned that the services of in-service Doctors can be made available to the citizens of the State and more particularly the citizens staying in the rural and distantly located border area. Therefore, two objects are the basis for introducing the policy; one is for making the services of the Doctors with specialty available in the Government hospital by permitting them private practice and the another is for making their services available to the citizens staying

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within the State and more particularly in the rural area. If the classification made by the Government of two groups on the ground of length of service is considered, it has no nexus with the aforesaid objects to be achieved by the policy. No data is on record to show that Doctors having less than 15 years of service are only working in the rural area. The first object if considered, is to encourage new Doctors to join the service by permitting them to private practise so as to enable the Government to have their services in the health administration. Such object is directly related to new Doctors whose services are to be made available and it would not apply to the Doctors who are already in service and whose services are already made available to the Government. Therefore, subject object cannot be connected with all in-service Doctors who are in service or in any case with their length of service, may be 15 years or otherwise. The second object for making the medical facilities available to the citizens in the rural area by permitting private practise, if

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considered, there has to be material before the State Government about a particular number of Doctors who are working in the rural area and not completed 15 years of service. Neither such datas are available on record showing that Doctors who have not completed 15 years of service are more working in the rural area where the medical facilities are required nor there is any study undertaken for such purpose. The medical services being rendered by the State is through out the State and the services are transferable throughout the State. If the administration requires, the posting of any Doctor can be made at the place where the post is available, may be for the urban area or may be in the rural area. Therefore, when the clinics, dispensaries and the hospitals of the State are located throughout the State, it would not be possible to consider that only those Doctors who have not completed 15 years of services are posted in the rural area or interior distant area and those who have not completed 15 years of services are posted in the urban area. Further

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on the contrary, it would be appropriate to consider that irrespective of the length of service of the Doctors, in-service Doctors are posted as per the requirement by the administration irrespective of the urban area or rural area. Therefore, under these circumstances, it cannot be said that creation of the class based on non-completion of 15 years of service by the Government under the policy has any nexus to second object to be achieved.

34. In view of the aforesaid, it can be said that though the Government may have power to alter the service conditions of the petitioners who are in-service Doctors not completed 15 years of service by depriving them from the principles of legitimate expectation, in view of the public interest for the object of the policy, such classification has no intelligible differentia for achieving the object of the policy.

35. Even on the aspects of reasonable classification of the petitioners on the basis of their length of services of less than 15 years, if the matter

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is considered and examined, it appears that the rationale mentioned in the Government Resolution is that in-service Doctors who have completed 15 years of service are out of contact in the filed of private practice and that they are more discharging administrative duties and therefore, pensionary benefit may be adversely affected, if the option is not given since they may reach to the age of superannuation in the near future.

36. As observed earlier, in-service Doctors who have not completed 15 years of services, have also an option to retire after completion of 10 years of service. Therefore, such class would also be adversely affected if there pension is lowered down on account of discontinuation of NPA. No data is available in the resolution nor on record to show that a particular number of Doctors who have completed 15 years of services are discharging administrative duty as against those who have not completed 15 years of service. Such cannot be accepted at its face value, more particularly when the service of all Government Doctors are transferable throughout the State and

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as per the exigencies required by the administration. There is no rationale for considering that those Doctors who have not completed 15 years of service are having contacts for private practice, whereas those Doctors who have completed 15 years of service have lost contact of private practice. Whether one is competent enough or is having capacity for private practice can hardly be decided on the basis of the length of service in the Government. If the object is to see that more medical services are available to the citizens at large by permitting private practice, the services of seasoned and experienced Doctors who have completed more length of service may be called for.

37. Under the circumstances, keeping in view the object to be attained by the policy, the classification can be said as based on irrelevant circumstances, which are not germane to the object to be achieved of the policy. Hence, the classification can be said as unreasonable and there is no intelligible differentia for

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achieving the object of the policy.

38. In view of the aforesaid observations and discussions, the impugned Resolution of the State Government providing for permitting private practice to all in-service Doctors is in contravention to Rule 34 of the General Rules, Rule 15 of the Conduct Rules, Pension Rules, and the aforesaid Recruitment Rules, and hence, ultra vires to the powers of the State Government and therefore, void. Further, the classification made within the policy based on the length of service of all in-service Doctors is discriminatory, and does not meet with the test of reasonable intelligible differentia for achieving the objects of the Policy and unreasonable and therefore, violative of Articles 14 & 16 of the Constitution of India.

39. Hence, the impugned Resolution dated 29.03.2007 is quashed and set aside.

40. In Special Civil Application Nos. 28449 and 24896 to 24899 of 2007, the petitioners are the persons who have been selected as per the prevailing

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rules. It is not the case of the State Government that they are appointed on a separate Cadre by separate Recruitment Rules etc. Therefore, if the policy and the Govt. Resolution are quashed and set aside, the consequence in accordance with law shall also follow in their cases.

41.Similarly, in case of in-service Doctors who are appointed by the Corporation, the contention of the Corporation is that in view of the impugned resolution of the State Government and the policy of permitting private practice, such is adopted by the Corporation. Therefore, the same consequence would follow inasmuch as since the policy of the State Government and the impugned resolutions are quashed and set aside, the service conditions of all in-service Doctors working with the Corporation, would remain the same as it existed prior to the impugned policy. Such will be the situation in the case of all petitioners working in the respective field, may be with the Government or ESI, etc. as per their respective position in the concerned department,

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hospital, clinic, hospital, as the case may be.

42. Petitions are allowed to the aforesaid extent. Rule made absolute accordingly. No order as to costs.

(JAYANT PATEL, J.)

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