

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) No. 8128/2009

With

W.P.(C) No. 5082/2007

% Reserved on: 14th May, 2009.

Pronounced on: 29th May, 2009.

1. **G.P. Roy** Petitioners

Through: Mr. G.D. Gupta Sr. Advocate with Mr. Arjun Chawla
and Mr. S. Sharma,,

VERSUS

Secretary, BIFR & Anr. Respondent

Through: Mr. H.K. Gangwani, Advocate

2. **U.O.I** Petitioner

VERSUS

G.P. Roy

CORAM:-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE V.K.JAIN

1. Whether Reporters of Local newspapers may be allowed to see the Judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the Judgment should be reported in the Digest? YES

V.K.Jain, J.

1. On 01/02/02 the petitioner, who at that time was a permanent employee of Hooghly Dock & Port Engineers Ltd., a public sector undertaking and was on

deputation with Ministry of Shipping as a Director, drawing basic pay of Rs. 13825/- in the pay scale of Rs. 12000-375-16500, applied for the post of Director in BIFR, through there was no vacancy of Director in BIFR at time nor had BIFR invited applications for the post of Director. Since the vacancy available in BIFR at the time was for the post of Dy. Director, the petitioner was considered for that post and accordingly he joined as Dy. Director on 15/07/02. At the time of joining BIFR on deputation Sh. Roy informed that he was drawing pay of Rs. 13825/- in the pay scale of Rs. 1200-16500. However, he was appointed on deputation against the post of Dy. Director in the pay scale of 10000-15320. On the basis of representation made by him his pay was fixed at 13825 in the pay scale of Rs.12000-16500. On a subsequent clarification it transpired that in his parent organization the petitioner was drawing pay of Rs. 9600 in the pay scale of 7000-275-8100-300-9600. Vide order dated 04/05/05 BIFR fixed the pay of the petitioner at Rs. 10325 in the pay scale of Rs. 10000-15320 w.e.f. 15/07/02, after representation of the petitioner for upgradation in the scale of Rs.12000-375-16500 was turned down by Department of Expenditure on the ground that there was no functional justification for upgradation of the post and Mr. Roy had accepted the post of Dy. Director willingly and knowing all the facts. The case of the petitioner for pay protection was rejected in terms of para 5.2 of Government of India O.M. dated 05/01/94 which allowed such protection if the appointment to both the ex-cadre posts was in identical pay scales and deputationist had opted to draw pay in the pay scale of the ex-cadre posts on both the occasions. Since pay scale of ex-

cadre post i.e. post of Dy. Director in BIFR was lower than that of the post held by him on previous deputation his pay was to be fixed under the normal rules with reference to the pay in present cadre and the protection of last pay scale could not be allowed to him. The O.A. 1078/05 was filed through Sh. Roy challenging the fixation order dated 04/05/05. O.A. was disposed of by the Tribunal directing the respondents before it to afford opportunity to show cause to Sh. Roy and then pass a speaking order after giving opportunity of hearing to Sh. Roy. Therefore his pay was fixed at Rs. 10325 in the pay scale of Rs. 10000-15320 w.e.f. 15/07/02 by a detailed and speaking order. Being aggrieved, Sh. Roy filed O.A. No. 1789/06 claiming placement in the scale of Director i.e. Rs. 14300-400-18300. Vide order dated 15/03/07, the Tribunal set aside the order of downward revision of the pay of petitioner. The order of the Tribunal has been challenged by UOI before this Court in WP(C) No. 5082/07.

2. During pendency of the aforesaid O.A. the petitioner had filed M.A. 1980/06 seeking directions to BIFR to post him in the post of Director on the ground that at the time of initial appointment he was assured that he would be appointed as Director, once approval was received from the Government by continuance of vacant post of Director. Vide order dated 15/03/2007, Central Administrative Tribunal, while setting aside downward revision of pay of the petitioner had declined to direct his appointment as Director and held that BIFR should take steps for filling up post of the Director and the petitioner would be free to apply for that.

3. Vide order dated 22/08/08, BIFR ordered repatriation of the petitioner to his parent department. The petitioner filed O.A. 1851/08 before the Central Administrative Tribunal challenging the order of repatriation. After initially staying the operation of the order, the Tribunal vacated the stay vide its order dated 26/08/08. Thereupon another order was passed by BIFR on 14/01/09 directing repatriation of the petitioner to his parent department. O.A. No. 1851/08 was ultimately dismissed on 17/03/09. The order of the Tribunal has been challenged in writ petition No. 8128/09.

4. Deputation is a tripartite agreement between the deputationist, lending department and the borrowing department and cannot be extended unless all the three are agreeable to it. Government of India, Department of P&T has from time to time issued guidelines governing deputation of central employees to ex-cadre post under Central/State Government and on foreign service to Central/State PSUs/Autonomous bodies. Since the guidelines are binding upon Government departments as well as on PSUs/Autonomous Bodies, any deputation including its extension has to conform to these guidelines. The latest guidelines governing deputation have been issued vide O.M. No. 2/29/91-Estt.(Pay II) dated 25th February, 2009 which *inter alia* stipulate as under :

Tenure of deputation/foreign service

The period of deputation/foreign service shall be as per the Recruitment Rule of the ex-cadre post or 3 years in case no tenure regulations exist for the ex-cadre post.

In case where the period of deputation/foreign service prescribed in the RRs of the ex-cadre post is 3 years or less, the Administrative Ministry/borrowing Organisations may grant extension upto the 4th year after obtaining orders of their Secretary (in the Central Government)/Chief Secretary (in the State Government)/equivalent officer (in respect of other cases) and for the fifth year with the approval of the Minister of the borrowing Ministry/Department and in respect of other organizations, with the approval of the Minister of Ministry/Department with which they are administratively concerned.

The borrowing Ministries /Departments / Organizations may extend the period of deputation upto the fifth year where absolutely necessary in public interest, subject to the following conditions:

- (i) where such extension is granted, it will be subject to the condition that no deputation(duty) allowance will be allowed beyond the forth year, if the official concerned has opted to draw deputation(duty)allowance.
- (ii) the extension would be subject to the prior approval of the lending organization, the consent of the official concerned and wherever necessary, the approval of the UPSC/State Public Service Commission and Appointment Committee of Cabinet (ACC)
- (iii) if the borrowing organization wishes to retain an officer beyond the prescribed tenure, it shall initiate action for seeking concurrence of lending organization, individual concerned etc. Six months before the date of expiry of tenure. In no case it should retain an official beyond the sanctioned term unless approval of the competent authority to grant further extension has been obtained.

No further extension shall be considered.

5. It is not in dispute that BIFR, as an Institution, has decided to repatriate the petitioner to his parent department and pursuant thereto issued repatriation orders twice, firstly, on 22/08/08 and secondly on 14/01/09. It was contended by the learned counsel for the petitioner that as stated in the letter dated 25/09/08, written by the Chairmen of BIFR to Secretary, Ministry of Shipping, Road Transport and Highways, the order of repatriation of the petitioner was passed because of non-receipt of NOC from his parent department, but, since his parent department is now agreeable to his continuance in BIFR, he should not be repatriated. We find no merits in this contention. It is for BIFR, as an Institution, to decide after taking approval, if required from the Government, whether or not to extend the period of deputation of the petitioner with it. Irrespective of the above referred letter, the fact remains that BIFR has not extended the period of deputation of the petitioner. In any case, since the guidelines issued by the department of DO&PT are binding upon everyone including BIFR, parent office of the petitioner as well as on the controlling Ministry of BIFR, the period of deputation cannot be extended unless it confirms to the instructions issued by Government of India and the requisite approval in this regard is obtained from the competent authority.

6. A perusal of the guidelines on deputation, as extracted above, would show that the normal period of deputation is up to three years, though it is permissible to extend it upto 4th year after obtaining order of the concerned Secretary and upto 5th year with the approval of Minister of borrowing Ministry/Department. It is an admitted fact that the petitioner joined BIFR on 15/07/02 he has, therefore spent almost seven years in this organization. Therefore, it is not permissible either for BIFR or for its controlling Ministry to grant further extension of the term of deputation of the petitioner.

7. It was next contended by the learned counsel for the petitioner that at one point of time the petitioner wanted pre-mature repatriation to his parent department but BIFR did not relieve him and therefore he should not be repatriated now. We do not find any force in this contention. Had the petitioner insisted on repatriation, it would not have been possible for BIFR to retain him without his consent. In any case, even if the at one point of time BIFR was not inclined to pre-maturely relieve him to join his parent department that does not and cannot come in the way of BIFR repatriating him at a later date. This is more so, when no prejudice is shown to have been caused to the petitioner on account of BIFR allegedly declining to pre-maturely repatriate him in the year 2003-04.

8. It was next contended by the learned counsel for the petitioner that as stated in the letter dated 08/12/08 sent by CMO of Hooghly Dock & Port Engineers Ltd. to the Secretary (Shipping), the parent office of the petitioner does not want him any more and as is evident from the letter dated 08/12/08 his repatriation would

create unnecessary hindrance and interruption in the parent department and would adversely influence and affect it. We are of the view that the respondent cannot be directed to extend deputation of the petitioner and that too beyond the maximum period prescribed under the guidelines issued by DO&PT merely because his parent organization wants him to continue on deputation. There can be a number of reasons for the parent organization of the petitioner wanting him to continue on deputation and we need not to go into them as legally, the parent organization is under an obligation not only to pay salary of the petitioner but also give him a posting on his repatriation.

9. It was also contended by the leaned counsel for the petitioner that at the time when the petitioner joined BIFR, he was given a clear assurance that he would be adjusted/appointed against one vacant post of Director, as he fulfilled the prescribed norms for appointment to the post of Director. In support of his contention, he relied upon a office note dated 12/07/04 recorded by the Secretary of BIFR in a file, noting therein, that the petitioner has been persuaded to join BIFR against the vacant post of Dy. Director in the scale of 10000-325-15200 with an understanding that in due course when sanction is received from the Government for continuance of the post of Director, he would be adjusted against one of the said posts. This note in our view is of no help to the petitioner for two reasons, firstly, as further recorded in the this very note the Government did not agree to further continuance of the vacant post of Director in BIFR due to repeal of SICA and secondly because there was no assurance conveyed to the petitioner

to permanently absorb him in BIFR. If the petitioner did not want to continue as Dy. Director, nothing prevented him from going back to his parent organization, but, he cannot seek either absorption or his further continuance in BIFR without BIFR deciding to extend his deputation. Moreover, as held by the Hon'ble Supreme Court in **Vashisht v/s State of Punjab 1963 SC 395**, noting in a office file would not confer any right upon a person. The petitioner cannot claim extension of his deputation without bringing his case within the ambit of guidelines issued by DO&PT governing deputation of government servants. The eligibility of the petitioner for appointment as Director in BIFR has no bearing on his repatriation to his parent organization and therefore has no consequences.

10. In **Kunal Nanda v/s Union of India and Anr. (2000) 5 SCC 362**, the appellant, a member of CRPF joined the service of CBI on deputation as Assistant Sub-Inspector and his deputation was extended from time to time. His borrowing department expressed inclination to permanently absorb him and lending department also conveyed its clearance thereto. However, for certain reasons, the proposed absorption did not materialise and the petitioner was repatriated to his parent department as the total period of deputation could not have been for more than five years. The petitioner filed a petition before the Central Administrative Tribunal seeking absorption in CBI. The Tribunal as well as the Hon'ble High Court held that the CBI could not compelled to absorb him. The Hon'ble Supreme Court, while examining legal position of the subject matter, held as under:-

“On the legal submission also made there are no merits whatsoever. It is well settled that unless the claim of the deputationist for a permanent absorption in the department where he works on deputation is based upon any statutory rule, regulation or order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation.”

11. In *Mahesh Kumar Parmar V/s S.I.G. of police (2002) 9 SCC, 455*, the Hon’ble Supreme Court observed that “unless rules contemplate permanent absorption of employees on deputation no mandamus can be issued”. In the present case the petitioner is not even claiming absorption. This is not a case where Rules of BIFR provide for permanent absorption and under those rules he is eligible to be considered for permanent absorption. The petitioner therefore has no legal right to continue on deputation with BIFR. We therefore find no ground to interfere with the order of Tribunal in this regard. The petitioner has also sought direction to the respondent to fill up regular post of Director and place/consider him against that post. In our opinion no directions can be given by this Court to the respondents to fill up the post of Director. Even if there are vacant posts of Director as claimed by the petitioner, he has no right to seek directions to the respondent to fill them up. As right noted by the Tribunal, it is

the prerogative of the respondent to decide whether to fill up those posts and if so, at what time. It goes without saying that if and when steps are taken by the respondent to fill up the post of Director in BIFR, the petitioner would be entitled to apply for the same and he along with other eligible candidates has to be considered in accordance with relevant rules and regulations.

12. A perusal of the letter dated 10/07/02 whereby Sh. G.P. Roy was appointed to the post of Dy. Director in the BIFR on reverse deputation basis shows that he was selected for appointment as Dy. Director in the pay scale of 10000-15320 and the tenure of deputation as well as other terms and conditions were to be governed by DO&PT O.M. dated 05/01/94 as amended from time to time. Vide joining report dated 15/07/02 Sh. Roy disclosed that his basic pay was in the scale of Rs. 12000-16500 and that he was appointed as Dy. Director in the pay scale of 10000-325-15320. On the representations made by the petitioner seeking protection of his last drawn pay of Rs. 13875 in the pay scale of Rs. 1200-16500, Mr. Roy was allowed to draw salary of basic pay of Rs. 13875.

A perusal of the note dated 05/08/03 of Sh. Vinay Vashisht, Secretary BIFR shows that at the time of joining BIFR Sh. Roy had accepted to draw pay in the pay scale of pay attached to Dy. Director, to be fixed as per last pay details basic pay of Rs. 13875 per month (in the pay scale of Rs. 12000-16500). It also shows that BIFR had recommended protection of the last pay drawn by Sh. Roy as Director in Ministry of Shipping in the pay scale of Rs. 1200-16500. Similar recommendation was made vide note dated 12/07/04. Since the DO&PT did not

agree to protection of last drawn pay of Sh. Roy a proposal was also sent to BIFR for upgradation of one post of Dy. Director to the grade of Dy. Secretary as personal to Mr. G.P. Roy w.e.f. 15/07/02 till Sh. Roy was repatriated to his parent office. This recommendation has been made vide note dated 14/02/05 sent by Secretary BIFR, Department of Expenditure. This, however, was not agreed to by the Government.

13. Keeping in view the fact that (i) Sh. G.P. Roy on appointment in BIFR, had opted to draw pay in the scale attached to the post of Dy. Director to be fixed as per his last drawn pay of Rs. 13875 (1200-16500), and admittedly BIFR had been paying him accordingly and (ii) at the time of joining BIFR Sh. Roy was already working in the pay scale of Rs. 12000-16500 and had he been told that he would not be allowed protection of his last drawn pay, he might not have joined BIFR and might have continued as Director in the Ministry in the pay scale of 12000-16500, do not deem it appropriate to interfere with the order of Tribunal in exercise of our extraordinary jurisdiction under Article 226 of the Constitution, to the extent it relates to the salary paid to him prior to issue of order dated 4th May 2005. We would like to add that there has been no misrepresentation on the post of Mr. G.P. Roy as he did not claim that he was drawing basic pay of Rs. 13875 in the pay scale of Rs. 12000-16500 in his parent office and it was very much known to BIFR at the time of appointment of Sh. Roy that he was on deputation from Hooghly Dock & Port Engineers Ltd. to the Ministry and, therefore, his last drawn

pay was in the post of Director in the Ministry and not the pay in his parent department.

14. Once the order dated 04.05.05 was issued fixing the pay of the petitioner at Rs. 10325/- in the pay scale of Rs. 10000-325-15320 in terms of Government of India O.M. dated 05.01.1994, the petitioner came to know that BIFR was not agreeable to permit him to continue drawing basic pay of Rs. 13,875/- in the Pay Scale of Rs. 12,000-16,500/-. If he did not want to continue on that pay, it was open to him to insist upon repatriation to his present cadre. However, instead of doing that the petitioner chose to contest the decision of BIFR before the Central Administrative Tribunal and he continued to draw salary in the pay scale of Rs. 12,000 – 16,500/- on the basis of the order of the Tribunal. Since we have come to the conclusion that in view of O.M. dated 05.01.1994, the petitioner was not entitled to draw pay in the Pay Scale of Rs.12,000-16,500/-, we are of the view that he cannot be allowed to retain benefit of excess payment made to him after 04.05.2005. The respondents in the W.P.(C) NO. 8128/2009, would therefore be entitled to recover the excess payment made by them to the petitioner for the period subsequent to 04.05.2005. As noted earlier, the order of appointment of Shri Roy in BIFR stipulated that his pay would be fixed in terms of OM dated 05.01.1994. Hence, he was not entitled to a pay higher than that which came to be fixed vide order dated 4.5.05, in terms of the aforesaid OM. This is not his case that under OM dated 05.01.1994, his pay was required to be fixed at more than what it has been fixed as per of dated 4.5.1995.

15. For the reasons given above, we dismiss Writ Petition No. 8128/2009 filed by Sh. G.P. Roy and partly allow Writ Petition No. 5082/2007 filed by Union of India to the extent indicated in the preceding paragraph.

(V.K. JAIN)

JUDGE

(A.K. SIKRI)

JUDGE

May 29, 2009.

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