

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

+ W.P.(C) 8126/2011

% Judgment reserved on: 31st July, 2012
Judgment delivered on: 09th October, 2012

SAROJ BALA Petitioner
Through: Ms. Maninder Acharya, Adv.

Versus

UOI AND ORS Respondents
Through: Mr.A.S.Chandhiok, ASG with
Mr. Neeraj Chaudhari, CGSC,
Mr. Gurpreet S. Parwawda and
Mr.Ravjyot Singh, Advocates for
Respondents No. 1, 2, 3 and 5.
Mr.Inderjeet Sidhu, Advocate for
Respondent No.4.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the instant petition, petitioner seeks for quashing and setting aside of appointment of Sh. Nirmal Singh, respondent no. 4 as Member / Acting Chairman of BIFR as well as orders of even date 31.10.2011 whereby, Sh. Nirmal Singh has been appointed as Member / Acting Chairman in BIFR till 09.01.2013 (on attainment of the age of 65 years) and was also allowed to assume charge as Member of BIFR in modification of the order assuming charge dated 03.11.2008.

2. The Sick Industrial Companies (Special Provisions) Act, 1985

(hereinafter referred to as SICA) was notified on 08.01.1986 for revival of Sick Companies owning industrial undertakings. The Central Government under Section 4 of the SICA established a Board to be known as Board for Industrial and Financial Reconstruction (hereinafter referred to as BIFR). The constitution of Board consists of a Chairman and not less than 2 and not more than 14 other members to be appointed by Central Government.

3. Section 6 of SICA in so far as relevant to the issue is reproduced as under:-

“(2) The Chairman and every other Member shall hold office for such period not exceeding five years, as may be specified by the Central Government in the order of his appointment, but shall be eligible for reappointment.

Provide that no person shall hold office as the Chairman or other member after he has attained the age of sixty-five years.”

4. The methodology of appointment of member in SICA and the procedure laid down is as prescribed under the guidelines issued by Cabinet Secretariat and involved transaction of Business Rules, 1961.

5. The Appointment Committee of the Cabinet (hereinafter referred to as ACC) is the approving authority. The appointment is routed through Secretary, Financial Services to the Establishment Officer of the DOPT and lastly through Cabinet Secretary to the ACC.

6. The appointment and re-appointment of a member in BIFR cannot be made without following the above procedure and also without approval of the ACC.

7. Respondent no. 4 Sh. Nirmal Singh was appointed as Member of BIFR after completion of all formalities as prescribed under the statute vide notification dated 20.10.2008.

8. The Central Government specified the period of appointment of Sh. Nirmal Singh for a period of 3 years w.e.f the date of assumption of charge. Accordingly, he assumed the charge of the Office of Member, BIFR w.e.f forenoon of 31.10.2008. The petitioner was also appointed as Member of BIFR by the Central Government specifying the period as 3 years on 05.11.2009.

9. The case of the petitioner is that whenever a member was appointed in BIFR in the past, the Central Government as a consistent policy specified the period of tenure of member as 3 years without any exception.

10. Respondent no. 4 being the senior-most member in BIFR, the Central Government on the basis of relevant consistent practice under Section 6 (5) of SICA authorized him to act as a Chairman of BIFR w.e.f 12.07.2010 vide order dated 09.07.2010. Respondent no. 4 completed his tenure of 3 years on 13.10.2011 as specified by the Central Government.

11. The Central Government in derogation of SICA and without any jurisdiction, without seeking approval of ACC while exercising jurisdiction under Section 6 (2) of the SICA, approved the extension of tenure of respondent no. 4 as Member / Acting Chairman in BIFR w.e.f 31.10.2011 to 29.04.2012 vide Notification dated 06.09.2011 as under:-

“In exercise of the powers conferred by sub-section (2) of Section 4 read with sub-section (2) of section 6 of the Sick

Industrial Companies (Special Provisions) Act, 1985, the Central Government hereby approves the extension of the tenure of Shri Nimal Singh as Member / Acting Chairman in BIFR from 31.10.2011 to 29.04.2012 or upto the age of attaining 65 years or till the abolition of BIFR or until further orders, whichever event occurs the earliest”.

12. The petitioner being aggrieved with the aforesaid Notification made representation to the Secretary, Financial Services and to the Establishment Officer against the order extending the tenure of respondent no. 4 and his functioning as a Chairman of BIFR clearly pointing out that such extension was legally not permissible and same was based on incorrect facts and unsustainable assumption and was also in violation of the established procedure.

13. It is also pointed out in the said representation that SICA does not contain any provision of extension. There is only a provision of appointment, which can only be done with the approval of ACC. Besides, the assumption made for granting extension that BIFR would get abolished within six months as Company Law Bill would get passed in the Monsoon Session Parliament was also shown to be untrue as the Bill has not even been introduced in the Parliament till date.

14. By this representation, the petitioner drawn the attention to the communication dated 03.03.2011 sent by both the other members of BIFR alleging serious irregularities and improprieties including gender bias.

15. Thereafter, the Department realising that order extending the tenure of respondent no. 4 was beyond the purview of Section 6 (ii) of SICA and also taking cognizance of the contentions put forth by the petitioner in her

representations, withdrew the order dated 16.09.2011 extending the tenure of respondent no. 4 as under:-

“Notification No. 20(1)/2004-IF-II dated 6th September, 2011, issued by the Department, notifying the extension of tenure of Shri Nirmal Singh as Member / Acting Chairman in BIFR w.e.f 31.10.2011 to 29.04.2012 or upto the age of attaining 65 years or till the abolition of BIFR or until further orders, is hereby withdrawn.”

16. It is stated by Id. Counsel for the petitioner that as the Central Government had already specified the period of appointment of respondent no. 4 for a period of 3 years w.e.f 31.10.2008, his tenure in the service had come to an end on 31.10.2011. As this date was falling on Sunday, respondent no. 4 stood retired by implication on 29.10.2011. From this date onwards, respondent no. 4 had on severance of his status as member of BIFR had become *functus officio*. As only one Bench could be constituted in BIFR by the Chairman, if one is appointed as acting Chairman as per Section 12(2) of SICA in the light of decision of this Court, the petitioner wrote to the Secretary, BIFR to immediately get in touch with the Department of Financial Services to get authorization of a member to act as Chairman, so that the Bench could discharge normal duties. The Secretary postponed the cases fixed for hearing on 31.10.2011 and 01.11.2011 and also uploaded the postponement on the BIFR Website.

17. Thereafter, the proposal to extend the tenure of respondent no. 4 as a member / Chairman for a period of 6 months w.e.f 31.10.2011 initiated by the Department of Financial Services was routed through Department of Personnel and Training and was sent to Cabinet Secretary for seeking

approval of ACC. Apparently, the Cabinet Secretary did not move the proposal for approval, but conveyed the observation that ACC in 2008 approved the appointment of Sh. Nirmal Singh, respondent no. 4 till he attains the age of 65 years or till the abolition of BIFR or until further orders, whichever event occurs the earliest.

18. Ld. Counsel appearing on behalf of the petitioner submits that in this background, the question of extension of tenure of respondent no. 4 beyond 31.10.2011 does not appear to arise as neither the Officer has attained the age of 65 years nor BIFR has been abolished. The concerned note was communicated to Financial Services by the Director, ACC (DOPT).

19. Ld. Counsel further submitted that the issue regarding extension of tenure of respondent no. 4 and his continuance beyond 31.10.2011 was never referred to ACC by Cabinet Secretariat. On completion of period specified by Central Government in the order of appointment of respondent no. 4 dated 20.10.2008, the only mode and manner by which he could have further continued as a member / acting Chairman, BIFR was by way of re-appointment as a Member and that too on a methodology prescribed by DOPT in its Office Memorandum dated 03.07.2006 and with the approval of the ACC.

20. Further submitted that the Central Government, adopted very strange and never-heard procedure in violation of consistent practice by issuing a Notification late in the evening on 31.10.2011 whereby instead of following the statute i.e. Section 6 (2) of SICA initiating the process of re-appointment of Sh. Nirmal Singh, an illegal procedure was adopted. After retirement of

Shri Nirmal Singh, respondent no. 4 on 29.10.2011, when he had become *functus officio*, the Central Government illegally modified retrospectively the order of appointment dated 20.10.2010 of Shri Nirmal Singh, respondent no. 4 dropping the clause prescribing the tenure of 3 years and making it up to the age of 65 years i.e. up to 09.01.2013.

21. Ld. Counsel has asserted that the Notification was issued without jurisdiction, without seeking the approval of ACC and without resorting to the procedure of the re-appointment as per the statute and it violated the provision of SICA.

22. The Secretary of BIFR, however, perpetuated the illegality by modifying on 31.10.2011, its earlier Office Order dated 03.11.2008 whereby, respondent no.4 had assumed the charge of the Office of the Member, BIFR w.e.f the forenoon on 31.10.2008.

23. Ld. Counsel for the petitioner submitted that this was done quite deliberately and illegally adding retrospectively that the tenure of respondent no. 4 would continue till the age of 65 years and by deleting the expression forenoon of 31.10.2008 so as to make it appear that respondent no. 4 continued to function as Member since 31.10.2008.

24. Ld. Counsel has pointed out that there are history of appointment of members of BIFR and a reflection of constant stand of the Central Government. It had always specified the tenure for a Member of BIFR as 3 years and no exception has been made in the matter of periods specified by the Central Government in the order of appointment. Even the most recent appointment in BIFR establishes that Central Government has specified the

tenure of 3 years for a member in the Order of appointment vide Notification dated 31.02.2011.

25. The petitioner is aggrieved by the act of the respondents because of the fact that on retirement of respondent no. 4, petitioner being the senior-most Member serving in the BIFR should have been considered for being designated as acting Chairman. By illegally continuing the services of respondent no. 4 without being re-appointed as per the SICA, the petitioner has been greatly prejudiced in her right for such consideration and functioning of BIFR has been impacted adversely.

26. Ld. Counsel for the petitioner has submitted that respondent no. 4 was appointed as a Member BIFR in accordance with the provisions of Section 6(2) of the SICA and O.M. dated 03.07.2006, for a period of 3 years, with the approval of ACC in 2008. The proposal dated 02.09.2008 for appointment of the respondent no. 4 as Member BIFR was made by the respondent no. 1. The said proposal was approved by the Finance Minister and was sent to the respondent no. 3 for seeking approval of the other two members of ACC i.e. the Prime Minister and the Home Minister. Clause 4 of the said proposal specifically mentioned that the then serving members of BIFR had been appointed for a tenure of 3 years or till they attained the age of 65 years or till the abolition of BIFR whichever even occurs earliest. Clause 11 of the said proposal mentioned that the Finance Minister had approved the proposal. Vide clause 12 of the proposal the approval of ACC was sought in following words:

“Approval of the appointment Committee of the Cabinet is solicited to the proposal to appoint one officer from the above

panel as at para 9 above, in order of preference, as Member BIFR for 3 years or till he attains the age of 65 years, or till the abolition of BIFR or until further orders whichever events occurs earliest.”

27. It is emphasized that the proposal dated 02.09.2008 soliciting approval for the appointment of the respondent no. 4 for a period of 3 years had been approved by the Finance Minister before the same was sent to the other two members of ACC i.e. the Prime Minister and the Home Minister. The other two members of ACC approved the proposal initially approved by the Finance Minister without differing with the same in any manner. This conclusion is based on the fact that no dissenting note was recorded by other two members of ACC for differing with the approval initiated by the respondent no. 1 and approved by the Finance Minister.

28. It is further submitted that in accordance with the abovementioned approval of the proposal dated 02.09.2008 a Notification dated 20.10.2008 was issued by the respondent no. 1 which is as under:

“In exercise of the powers conferred by sub-section (2) of Section 4 read with sub-section (2) of Section 6 of the Sick Industrial Companies (Special Provisions) Act, 1985, the Central Government hereby appoints Shri Nirmal Singh, IAS (TN:70) (Retd.), as Member, Board for Industrial and Financial Reconstruction (BIFR) for three years, w.e.f the date of assumption of the charge of the post on or after 31.10.2008 or till he attains the age of 65 years or till the abolition of BIFR or until further orders, whichever event occurs the earliest.”

29. Ld. Counsel for the petitioner has submitted from the above noted facts and events that the respondent no. 1 consistently and religiously relied

upon the notification dated 20.10.2008 by which the respondent no. 4 had been appointed for a period of 3 years. Firstly; when in proposal dated 06.08.2009 made for the appointment of the petitioner and other two members it reiterated the fact that the respondent no. 4 had been appointed for a period of 3 years secondly; when vide order dated 06.09.2011 it illegally granted the extension of 6 months to respondent n. 4 w.e.f 31.10.2011 to 29.04.2012 thirdly; again, when having failed in its earlier attempt to grant extension to the petitioner, the respondent no. 1 made proposal dated 04.10.2011 and sought the approval of ACC for extension of the tenure of respondent no. 4 w.e.f 31.10.2011 for a period of 6 months.

30. Further submitted, it is clear from the above that the respondent no. 1 was well aware of the fact that the proposal dated 02.09.2008 made by the respondent no. 1 and approved by the Finance Minister for the appointment of the respondent no. 4 was for 3 years and as such had been approved by ACC for 3 years and that the tenure of respondent no. 4 was expiring by efflux of time on 30.10.2011.

31. No doubt or conflict existed in this regard at the end of any of the respondents as no objection at any stage was raised by any of the respondents. The respondent numbers 2 & 3 could have raised the objection if any in this regard when the notification dated 20.10.2008 was sent to the Establishment Officer or when proposal dated 06.08.2009 in regard to the petitioner was sent to it and it was dealt along with the file of the respondent no. 4 or when the matter was examined threadbare while considering the representations of the petitioner against the illegal extension granted to the respondent no. 4 by notification dated 06.09.2011 which was later on

withdrawn vide letter dated 16.09.2011. However, no objection was raised by any of the respondents at any stage; bogey of error in the original appointment order was raised only when they failed in granting extension to respondent no. 4 through any legal means.

32. She further submitted, however, late in the evening on 31.10.2011, respondent no. 1 issued the impugned Notification dated 31.10.2011 amending the earlier Notification dated 20.10.2008 by deleting the words “for a period of 3 years” from the said Notification and thus illegally extending the tenure of respondent for 14 months. This illegality was perpetuated by the respondent no. 5 by issuing an Office order dated 31.10.2011 modifying retrospectively the Officer Order dated 03.11.2008, which had recorded the assumption of charge of respondent no. 4, by deleting the words “w.e.f the forenoon 31.10.2008” from the said order.

33. Ld. Counsel for the petitioner has argued that the proposal dated 02.09.2008 for appointment of respondent no. 4 in its Para 4 had mentioned that the then existing members had been appointed for a period of 3 years and vide Para 12 approval of ACC had been sought for 3 years or till he attains the age of 65 years or abolition of BIFR, whichever events occurs the earliest.

34. Ld. Counsel has drawn the attention of this court that the respondents admitted to the extent that the said proposal had the approval of Finance Minister and it has not been contended that Home Minister and Prime Minister had applied their minds or made any modification to the Finance Minister’s proposal. It is also not the case of the respondent that any Officer

in the Secretariat of ACC had recorded any reasons for modification to the proposal approved by Finance Minister, with which Home Minister and Prime Minister might have agreed. In fact it has impliedly been admitted that an Officer in the Secretariat of ACC had committed an error in recording the proposal of Finance Minister and failed to record that approval was sought for 3 years and erroneously happened to mention that approval was sought for appointment up to the age of 65 years.

35. Accordingly, approval was granted by Home Minister and Prime Minister to the proposal made by Finance Minister and not to the erroneous noting made by an Officer in the Secretariat of ACC. The file notings were made by the Officers to note the crux of the proposal for the convenience of the members of the ACC. The crux of proposal noted by an Officer on the file sent to ACC can neither misstate the contents of proposal nor can it deviate from the proposal itself. When the proposal of the Finance Minister solicits the approval for a period of 3 years or till he attains the age of 65 years or till the abolition of BIFR, whichever events occurs the earliest, the officer while making the note cannot conveniently omit the words “for a period of 3 years”.

36. Ld. Counsel has asserted that in the present case, the noting of an Officer on the file sent to the ACC is at great variance with the original proposal of the Finance Minister due to the error in summarizing the proposal. Therefore, it would be wrong to accept that the Prime Minister and Home Minister have approved the erroneous noting of the officer and not the proposal of the Finance Minister.

37. If such an argument is accepted, it would have dangerous and far-reaching ramifications. It would vest the officer make the notings, who is only empowered to summarise the proposal for the convenience of ACC and has no power to misreport / alter the same with unjustified and dangerous powers.

38. It is further submitted that the appointment at such higher level which are required to be approved by ACC cannot be allowed to be tinkered with by the Officers by erroneous noting in this manner. The Cabinet Secretariat acts as Secretariat for all the committees of the Cabinet and procedures as well as the rules of business are the same.

39. Ld. Counsel for the petitioner has given an example that if error is committed by someone in the Cabinet Secretariat in recording the proposal of Defence Ministry, which is signed by the other members of Cabinet Committee on security presuming it to be Defence Minister's proposal, what havoc can be played with security of the country! Similarly, if someone in the Secretariat records two months instead of two days for movement of relief proposed by the Ministry concerned and such noting is signed by other members of Cabinet Committee on Management of Natural Calamities and such error is adopted, its decisions can one imagine the loss to the life and property.

40. She further submitted that if two members of the ACC had differed from the proposal approved by the Finance Minister, they would have recorded reasons on the file for differing the same. The fact that no reasons have been recorded on the file and that the other two members of ACC have

approved, what was proposed by the Finance Minister i.e vide proposal dated 09.02.2008 (this proposal included the words “for a period of 3 Years”).

41. Ld. Counsel has relied upon law decided by Hon’ble Supreme Court in a case of ***Union of India v. Bhaskarendu Dutta Majumdar* 2010 9 SCC 38**, wherein it has held that “*if ACC differs with the proposal or recommendations made by the Ministry concerned, it must give reasons for so differing to ward of any attack of arbitrariness. Those records will have to be recorded on file*”. In the absence of recording of reasons in the said matter, the Hon’ble Supreme Court has dismissed the appeal of Union of India.

42. The petitioner has also relied upon a case of ***J.S. Yadav v. State of UP* 2011 6 SCC 570**, wherein it is observed that “*in a tenure post, the incumbent goes out with the efflux of time*”. Earlier in the case of ***L.P. Aggarwal v. Union of India* 1992 3 SCC 526**, the Hon’ble Supreme Court has held that “*Tenure means a term during which an office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment to the said office begins when he joins and it comes to an end on the completion of the tenure. Such a person does not superannuate, he only goes out of the office on completion of his tenure.*”

43. Ld. Counsel for the petitioner has submitted that thus the tenure of respondent no. 4 had already ended on 28.10.2011 effectively and it could not be continued by making retrospective amendment three days later in the evening of 31.10.2011. Moreover, SICA has been declared to be a special

Act by the Hon'ble Supreme Court in *Tata Motors v. Pharmaceutical Products of India Ltd. (2008) 7 SCC 619* and therefore its provisions override the provisions of any General Act. SICA also does not contain any provision for review of orders issued under SICA, therefore, on the completion of tenure prescribed under Section 6 (2) of SICA, only reappointment orders could be issued by strictly following the prescribed procedure and no such orders have been issued in this case.

44. To sum up her arguments, Id. Counsel for the petitioner has submitted that it is clear from the above facts that respondent no. 1 instead of submitting clarifications for considerations of ACC, issued the impugned Notification late in the evening of 31.10.2011, which in fact extended the tenure of respondent no. 4 by more than 14 months after he had already been relieved on completion of his stipulated tenure. By doing so, respondent no. 1 has not only arrogated to himself the authority vested in ACC but has issued an illegal order which is violative of approval granted by ACC in 2008, is in defiance of the directions of ACC asking for submission of clarification in respect of tenure stipulated in original order. It is also violative of Section 6 (2) of SICA. Therefore, the impugned Notification dated 31.10.2011 deserves to be quashed.

45. On the other hand, Mr. A.S. Chandhiok, Id. ASG appearing on behalf of respondents no. 1, 2, 3 & 5 has submitted that the following facts are not in dispute:

(i) That respondent no. 4, who's appointment is under challenge, is eligible for appointment up to sixty five (65) years as per the statutory provisions i.e. Section 6 (2) of SICA, 1985.

(ii) That ACC approved the proposal for appointment of Respondent no. 4 till he attains the age of 65 years or till the abolition of BIFR or until further orders, whichever event occurs the earliest.

(iii) That respondent no. 4 till date continues to function as the Acting Chairman BIFR and is due to demit the office only on 09.02.2013 i.e. date he attains the age of 65 years.”

46. Ld. ASG has further submitted that the relief sought by the petitioner in this writ petition is as under:

(i) Declare the appointment of respondent no. 4 as illegal by setting aside the impugned order dated 31.10.2011.

(ii) Declare the retrospective amendment of joining order dated 03.11.2008 by setting aside the impugned order of Under Secretary of BIFR dated 31.10.2011.

(iii) Direct respondents to consider the petitioner for the post of Chairman, BIFR.

47. It is submitted that the petitioner presumes that it is a case of an amendment / fresh appointment that has been made vide Notification dated 31.10.2011 and that the said Notification is not legally sustainable as the same does not have requisite ACC approval.

48. Ld. ASG has argued that without challenging the original impugned order dated 20.10.2008, petitioner challenged to the subsequent Notification dated 31.10.2011 on its own, which shall not survive considering the fact that the Notification dated 31.10.2011 is mere rectification of mistake with respect to the appointment already made / approved vide order dated 15.10.2008.

49. Ld. ASG has further submitted that the present case is not a case of fresh appointment, but it is a case of mere rectification of the original appointment order / Notification dated 20.10.2008.

50. He further submitted that the ACC approved the appointment of respondent no. 4 till respondent no. 4 attains the age of 65 years. The letter no. 18/43/2008-EO (SM.II) dated 15.10.2008 of the ACC Secretariat specifically states as follows:

“The Appointments Committee of Cabinet (ACC) has approved the proposal for the appointment of Shri Nirmal Singh IAS (TN:70) (Retd.) as Member, BIFR w.e.f the date of assumption of charge of the post and till he attains the age of 65 years or till abolition of BFR or until further orders, whichever event occurs the earliest.”

51. Ld. ASG has clarified that in fact it is during the implementation of the said approval order that an error had occurred in the Notification dated 20.10.2008 issued by the Under Secretary of the Ministry. Once a mistake crept in the Notification dated 20.10.2008, accordingly, the same mistake got into the record of BIFR office also which came to the knowledge of Ministry on 28.10.2011 when the ACC Secretariat itself pointed out the fact that original appointment of respondent no. 4 was till he attains the age of 65 years. On receiving the same, the error was rectified vide Notification dated 31.10.2011.

52. For the convenience, order dated 15.10.2008 is reproduced as under:

“The Appointments Committee of the Cabinet (ACC) has approved the proposal for appointment of Shri Nirmal Singh IAS (TN:70) (Retd) as Member, BIFR, w.e.f the date of the

assumption of the charge of the post and till he attains the age of 65 years or till abolition of BIFR or until further orders, whichever event occurs the earliest.”

53. Notification dated 20.10.2008 is reproduced as under:

“In exercise of the powers conferred by sub-section (2) of Section 4 read with sub-section (2) of Section 6 of the Sick Industrial Companies (Special Provisions) Act, 1985, the Central Government hereby appoints Shri Nirmal Singh, IAS (TN:70) (Retd.) as Member, Board for Industrial and Financial Reconstruction (BIFR) for three years, with effect from the date of assumption of the charge of the post on or after 31.10.2008 or till he attains the age of 65 years or till the abolition of BIFR or until further orders, whichever event occurs the earliest.”

54. Notification dated 31.10.2011 is reproduced as under:

“In partial modification of Notification of even numbers dated 20th October, 2008 and in exercise of the powers conferred by sub-section (2) of Section 4 read with sub-section (2) of Section 6 of the Sick Industrial Companies (Special Provisions) Act, 1985, the Central Government hereby appoints Shri Nirmal Singh IAS (TN:70) (Retd), as Member, Board for Industrial and Financial Reconstruction (BIFR) w.e.f 31.10.2008 till he attains the age of 65 years (i.e. 9th January, 2013) or till the abolition of BIFR or until further orders, whichever event occurs the earliest.”

55. Ld. ASG has argued that reading the order dated 15.10.2008 with Notification dated 20.10.2008 and Notification dated 31.10.2011 makes it amply clear that Notification dated 31.10.2011 was mere rectification of the error as pointed out by the ACC Secretariat itself vide letter dated 28.10.2011. Same is reproduced as under:

“Please refer to Department of Financial Services communication NO. 20 (1) / 2004-IFII(PI) date

04.10.2011 regarding extension of tenure of Shri Nirmal Singh as Member / Chairman Board for Industrial & Financial Reconstruction (BIFR) for a period of six months w.e.f 31.10.2011.

2. *The Competent Authority has observed as under:-*

“The Appointments Committee of the Cabinet had, in 2008, approved the appointment of Shri Nirmal Singh, IAS (TN-70) (Retired) as Member, BIFR with effect from date of assumption of charge for the post or till he attains the age of 65 years or till abolition of BIFR or until further orders, whichever event occurs the earliest. In this background, the question of extension of tenure of Shri Nirmal Singh Beyond 31.10.2011, does not appear to arise as neither the Officer has attained the age of 65 years nor the BIFR has been abolished”

3. *The Competent Authority has further directed the Department to clarify, as to why the Department had made original appointment for a period of three years, when there was no such direction from the competent authority.*

4. *I am desired to convey the above direction of the Competent Authority for necessary action and early clarification.”*

56. The same was in terms of the ACC approval communicated vide letter dated 15.10.2008 by the ACC Secretariat.

57. It is further submitted that the Notification dated 20.10.2008 is a Ministerial act and there is no bar under law that it could not be rectified. The power to rectify the mistake by Ministry is implicit from the approval communicated on 15.10.2008 by the ACC Secretariat. The rectification of an error committed while implementing of ACC decision does not require a fresh approval from the ACC. The same is not the requirement under law as

alleged by the petitioner. The Ministry is well within its right to correct its own errors / mistakes.

58. Ld. ASG has argued that even if it is admitted for the sake of argument though not being admitted that it is a case of amendment of orders / Notification dated 28.10.2008, the amendment is still permissible as the said amendment relates back to the original approval dated 15.10.2008.

59. The Doctrine of Relation Back is a principle that something done today will be treated as if it were done earlier. This Doctrine is applied under certain circumstances. For example, a document held in escrow and then delivered later will be treated as if delivered when it was put in the escrow. Delivery of deed to the guarantee relates back to the date it was originally deposited with the escrow agent.

60. Ld. ASG has submitted that in the case in hand, the aforesaid Doctrine is applicable as in much as there was no fresh appointment of respondent no. 4. Respondent no. 1 on receipt of communication dated 28.10.2011 from the ACC Secretariat vide its Notification dated 31.10.2011 has only rectified the error which occurred into the earlier Notification dated 20.10.2008. Therefore, a clarification of such nature would not in any way alter the nature of appointment and thus by application of the Doctrine of Relation Back, the appointment of respondent no. 4 is to be considered from the date of original appointment read with clarification issued vide Notification dated 31.10.2011.

61. Ld. ASG submitted that in the entire writ petition ACC's decision communicated on 15.10.2008 is not under challenged or is the subject matter

of the writ petition. As such the arguments addressed by the petitioner on this point cannot be entertained.

62. The respondents in this regard as relied upon a case of ***Bharat Singh & Ors. v. State of Haryana and Others 1988 (4) SCC 534*** wherein it is held as under:

“When a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the Court will not entertain the point.”

63. The arguments of the petitioner that the approval order dated 15.10.2008 was not in the public domain hence could not have been challenged does not hold ground as after filing of the counter-affidavit by the respondents in February, 2012, the said order was placed on record and even at that stage, the petitioner could have amended the petition to challenge the order dated 15.10.2008 or the letter dated 28.10.2011 as the entire thrust of arguments of the petitioner hinges on these orders which are beyond the subject matter of the present petition.

64. He further submitted that the approval of ACC communicated vide letter dated 15.10.2008 is not contrary to proposal sent by the Ministry of Finance on 02.09.2008. There is no difference of opinion on the proposal or the approval. As argued by Id. Counsel for the petitioner, that the proposal of Finance Ministry cannot be undone by the ACC and if ACC do not agree

with the proposal then, the reasons are to be given by the Officers for difference in their opinion. In this regard, it is submitted that in the present case, as borne out from the record of ACC file which was placed before this Court during the course of hearing, there is no difference of opinion on the appointment of respondent no. 4 up to the year 65. The proposal dated 02.09.2008 by the Ministry of Finance is as under:-

“The Search Committee was requested to suggest a panel of suitable officers to fill the ensuing vacancy of Shri A.K. Goswami, whose term is to expire on 30.10.2008. Accordingly, the meeting of the Search Committee was held on 11th August, 2008 under the Chairmanship of Dr. V. Krishnamurty, Chairman, NMCC. The Committee considered the names of all Secretaries to Govt. of India and Chairman and Managing Directors of Public Sector Banks, who have retired in the one year prior to 31.05.2008. After detailed deliberations the Committee recommended the following candidates for consideration for appointment to the Post of Member, BIFR in order of preference:

- i. Shri Nirmal Singh, IAS (Retd.)-(TN:70)*
- ii. Sh. A.K. Mohapatra, IAS (Retd.)-(HP:71)*

A copy of the minutes of the Search Committee meeting is at Annexure V.

Common proforma prescribed for submission of proposals requiring approval of the Appointments Committee of the Cabinet, duly filled in, is enclosed.

Finance Minister has approved the above panel for consideration for appointment as Member in BIFR.

Approval of the Appointments Committee of the Cabinet is solicited to the proposal to appoint one Officer from above panel as at Para 9 above, in order of preference, as Member, BIFR for three years or till he attains the age of 65 years or till the abolition of BIFR or until further orders, whichever event occurs earliest.”

**COMMON PROFORMA FOR PROPOSAL REQUIRING
APPROVAL OF THE APPOINTMENTS COMMITTEE OF
THE CABINET.**

(FOR POST OUTSIDE CENTRAL STAFFING SCHEME,
NON-SECRETARIAT POSTS AT DEPUTY SECRETARY /
DIRECTOR LEVEL, BOARD LEVEL POSTS IN PUBLIC
SECTOR UNDERTAKINGS)

1	Ministry / Department	Ministry of Finance, Department for Financial Services
2	Proposal	Appointment of any one in the panel of following two officers: 1. Sh. Nirmal Singh, IAS (Retd.) (TN-70) 2. Shri A.K. Mohapatra, IAS (Retd.) (H.P:71) as Member of the Board for Industrial and Financial Reconstruction (BIFR) for a period of three years or up to the age of 65 years or till the abolition of BIFR or until further orders whichever event takes place earliest.

**PARTICULARS OF THE OFFICER PROPOSED TO BE
APPOINTED FOLLOWED BY PARTICULARS OF THE
OTHER OFFICERS CONSIDERED**

1	Name of the Officer	Shri Nirmal Singh	Shri A.K. Mohapatra
2	Proposal	For a period till Sh. Nirmal Singh attains the age of 65 years or till the abolition of BIFR or until further orders whichever event takes place	For a period till Sh. A.K. Mohapatra attains the age of 65 years or till the abolition of BIFR or until further orders

			earlier.	whichever event takes place earlier.
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65. The proposal dated 02.09.2008 by the Ministry of Finance to appoint either respondent no. 4 or Mr. A.K. Mohapatra was placed before the ACC. The ACC out of the two, appointed the respondent no. 4 and took conscious decision to approve the appointment of respondent no. 4 till the age of 65 years or till the dissolution of the Board or until further orders in the light of the proposal received from the Ministry of Finance. Therefore, there is no difference of opinion as alleged by the petitioner and the arguments and the judgment cited by the petitioner on the point of difference of opinion does not hold ground.

66. Ld. ASG has asserted that the Appointment Committee of Cabinet is the supreme body with regard to the appointments of senior positions in the Government. The ACC is quite different from a Committee constituted under Section 4 (1) of the CVC Act, 2003 in judgment cited. The ACC is not bound with the proposal sent from the Ministry concerned. The present case is not the one where the ACC has in any way disagreed with the proposal sent from the Ministry of Finance. In fact, on receipt of the proposal, the same has been processed by the ACC Secretariat which is as under:-

“Approval of the Appointments Committee of the Cabinet is solicited to the proposal to appoint the three Officers as approved in Para 9 above as Members, BIFR for three years or till they attain the age of 65 years or till the abolition of BIFR or until further orders, whichever event occurs earliest.”

67. It is further submitted that the effect of the Notification dated 31.10.2011 is that the tenure of appointment of respondent no. 4, which had ended by efflux of time due to the expiry of stipulated tenure of three years on 28.10.2011 has been illegally extended till the respondent no. 4 attains the age of 65 years is totally misplaced and unfound, whereas the appointment of respondent no. 4 was always made by the ACC till the age of 65 years. So, there is no question of tenure ending on 28.10.2011. The said issue also gets clarified from the fact that Office of the ACC vide its letter dated 28.10.2011 has informed the Ministry that the appointment was approved in 2008 till he attains the age of 65 years or till the abolition of BIFR or until further orders, whichever events occurs the earliest.

68. I have heard Id. Counsel for the parties.

69. The petitioner aggrieved with the impugned Notification dated 31.10.2011 vide which the term of respondent no. 4 was extended till he attains the age of 65 years or till abolition of BIFR or until further orders, whichever event occurs the earliest.

70. It is not in dispute that as per Section 6 of SICA, the Chairman and Member shall hold an Office not exceeding 5 years or till he or she attains the age of 65 years.

71. Respondent no. 4 was appointed as Member of BIFR vide Notification dated 20.10.2008 and it was specified in the said Notification that respondent no. 4 was appointed for a period of 3 years w.e.f the date of assumption of charge and as per the said Notification, accordingly his tenure comes to an end on 13.10.2011.

72. Thereafter, respondent Department of Financial Services sent a proposal to Cabinet Secretariat seeking approval of ACC to extend the tenure of respondent no. 4 as a member for a period of 6 months w.e.f 31.10.2011 and same was routed through Department of Personnel and Training.

73. The Office of the Cabinet Secretary did not move the proposal for approval, but conveyed the observation that ACC in 2008 had approved the appointment of respondent no. 4 till he attains the age of 65 years or till the abolition of BIFR or until further orders, whichever event occurs the earliest.

74. For the convenience the order dated 15.10.2008 is reproduced as under:

“The Appointments Committee of the Cabinet (ACC) has approved the proposal for appointment of Shri Nirmal Singh IAS (TN:70) (Retd) as Member, BIFR, w.e.f the date of the assumption of the charge of the post and till he attains the age of 65 years or till abolition of BIFR or until further orders, whichever event occurs the earliest.

75. Inadvertently, vide Notification dated 20.10.2008, the term of respondent no. 4 was mentioned for 3 years and same is reproduced as under:

“In exercise of the powers conferred by sub-section (2) of Section 4 read with sub-section (2) of Section 6 of the Sick Industrial Companies (Special Provisions) Act, 1985, the Central Government hereby appoints Shri Nirmal Singh, IAS (TN:70) (Retd.) as Member, Board for Industrial and Financial Reconstruction (BIFR) for three years, with effect from the date of assumption of the charge of the post on or after 31.10.2008 or till he attains the age of 65 years or till the abolition of BIFR

or until further orders, whichever event occurs the earliest.”

76. Therefore, vide impugned Notification dated 31.10.2011, respondents modified the earlier Notification dated 20.10.2008 in exercise of its Powers conferred by Sub-Section (2) of Section 4 read with sub-section (2) of Section 6 of the Sick Industrial Companies (Special Provisions) Act, 1985 and made it till respondent no. 4 attains the age of 65 years i.e. 09.01.2013 or till the abolition of BIFR or until further orders, whichever event occurs the earliest.

77. First of all, respondent has raised the objection that petitioner has not challenged the original appointment Order / Notification dated 20.10.2008 and has only sought relief declaring the appointment of respondent no. 4 as illegal by setting aside the impugned order dated 31.10.2011.

78. Though it was not in the access of the petitioner that a proposal of respondent no. 4 was sent for 3 years and the ACC had approved it till he attains the age of 65 years, but this came to her notice only when the respondents filed the counter-affidavit. The petitioner had sufficient time to amend the petition.

79. In my considered opinion, in the facts and circumstances of the case, if the petitioner has not challenged the original appointment Order / Notification dated 20.10.2008, it would not make any difference because of the fact that this Court has to see whether the impugned order dated 31.10.2011 and the approval of the ACC i.e. instead of 3 years up to age of 65 years is valid or not.

80. As per Section 6 of the SICA, the member / Chairman can hold an

office for a period of not exceeding 5 years or till he or she attains the age of 65 years.

81. ACC is the competent authority, who has to take decision out of the proposal made by the concerned Ministry. In the present case, note prepared by the Secretariat of ACC and proposal sent by the Ministry were put up before the ACC. After perusing the same, the ACC approved the appointment of respondent no. 4 till he attains the age of 65 years or till abolition of BIFR or until further orders, whichever event occurs the earliest.

82. Undisputedly, as per past practice the tenure of the members have been 3 years. However, the ACC has not done anything contrary to the Act or contrary to the proposal sent by the Ministry. The ACC simply ignored the term of 3 years and rest of the proposal has been approved as it is. The ACC is not bound to take decision, as it is, the proposal placed before it. It being the competent authority empowered to take any decision permissible in law.

83. I have no hesitation to say that the Secretariat of ACC is bound to prepare and put up the note as per the proposal sent by the Ministry. The said Office has no right to change, alter or modify the same as happened in the present case.

84. However, I do not seen any *mala fide*. It seems to be a casual approach which ought not to have been. If there was any purpose behind, then notification of the year 2008 would have been in the same manner. The aforesaid notification was also issued casually. This court expect from the concerned Ministry and Secretariat of the ACC to be careful in future.

85. In view of the above discussion, I find no merit in the instant petition.
86. Consequently, the same is dismissed with no order as to costs.

CM. NO. 4770/2012 (Direction)

In view of the above, instant application becomes infructuous and disposed of as such.

SURESH KAIT, J

OCTOBER 09, 2012

Jg