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

\+ **WRIT PETITION(CIVIL) No. 3916/2015**

Date of decision: 14th September, 2017

WING COMMANDER ARVIND KUMAR ..... Petitioner

Through Mr. S.C. Malhotra, Advocate with Mr. Arvind Kumar, Wing Commander.

versus

DIRECTORE GENERAL, BSF & ORS. ..... Respondents

Through Mr. Bhagvan Swarup Shukla, CGSC and Mr. Shambhu Chaturvedi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (ORAL):

Wing Commander Arvind Kumar is a commissioned officer of the Indian Air Force (IAF). The petitioner had joined the Aeronautical Engineering (Mechanical) branch of the IAF on 25th March, 1991. In 1996, the petitioner was selected in the stream of Flight Engineer to perform aircrew duties. He was promoted to the rank of Squadron Leader with effect from 15th January, 1999.

2. The petitioner had opted to join Border Security Force (BSF), Air Wing on deputation at the post of Senior Aircraft Maintenance Engineer (Sr. AME) vide signal dated 15th April, 2004.

3. On 19th April, 2004, the Air Headquarters had approved the deputation of the petitioner as a Sr. AME.

4. This letter dated 19th April, 2004 had stipulated that the terms of deputation would be as per Annexure-A to the Government of India, Ministry of Defence letter No. Air HQ/C 21974/202/1/PQ-1(Dep) dated 16th April, 2004. The aforesaid annexure on pay and allowances applicable to IAF officers on deputation to BSF, Air Wing had stated:-

> "<u>Pay and Allowances</u>
>
> 5. IAF officer will draw pay of the post held by him in his parent department (Basic pay + Rank pay + Flying pay (if applicable) plus deputation (duty) allowance. As per existing Govt orders, IAF officers will draw deputation (duty) allowance @ of 10% of the basic pay subject to maximum of Rs. 500/- p.m. if his place of posting on deputation is outside the station of present posting and 5% of the basic pay subject to a maximum of Rs. 250/- if the posting is within the same station (city)."

5. Pursuant to the aforesaid deputation orders, the petitioner reported to BSF on 3rd May, 2004 to assume charge as Sr. AME.

6. It is the case of the petitioner that he had performed flying duties as Flight Engineer in addition to technical duties as Sr. AME, while on deputation with the BSF, Air Wing.

7. The petitioner, initially, while on deputation with BSF, was paid the pay and allowances of the IAF with effect from 3rd May, 2004. The allowances included technical pay @ Rs. 2500/- per month and flying pay allowance @ Rs. 7,000/- per month. Applicable deputation allowance in addition to basic pay, rank pay, dearness allowance, etc. was also paid.

8. Allowances and pay scales applicable to pilots in the BSF Air Wing are different and distinct. Pilots in the Air Wing of BSF were entitled to flying incentives, payable as per actual flying hours undertaken. As a result the carry home pay of pilots from the Air Wing of BSF was much higher than IAF pilots on deputation.

9. This obviously led to resentment and grievance for the IAF officers on deputation with BSF who were performing identical and same duties, had lower carry home salary on being denied benefit of flying incentive.

10. This grievance of IAF pilots on deputation with BSF, Air Wing was raised and considered by the authorities. It was felt that the anomaly and discrimination must be corrected. The issue was resolved and settled vide agreement dated 8th February, 2008 incorporating amended terms and conditions for IAF personnel sent on deputation to the BSF Air Wing. Paragraph 43 of the said terms and conditions states:-

> "43.**<u>Pay & Allowances.</u>**
>
> IAF deputationists would continue to draw the pay & allowances as they were entitled and

> drawing in the IAF with deputation allowance as per GOI instructions. They may claim in addition flying and technical incentives at par with BSF Air Wing personnel with a minimum amount equal to the flying pay admissible in IAF from time to time."

11. The effect was that IAF deputationists with BSF Air Wing were entitled to draw the pay and allowance as applicable and as per the entitlement in IAF with deputation allowance. In addition, IAF deputationists were also entitled to additional flying and technical incentives at par with the BSF Air Wing personnel with the minimum amount equal to the flying pay admissible in IAF from time to time.

12. With effect from 8th February, 2008, the petitioner was accordingly entitled to benefit of the revised terms and conditions and his pay and allowance were fixed and paid in accordance with paragraph 43. To this extent, there is no dispute and debate.

13. The dispute and debate raised in the present writ petition, relates to the period 1st February, 2007 to 7th February, 2008. During this period, the petitioner herein was paid what has been described as "BSF kind of Pay". There is correspondence and file notings, which would show that the matter regarding disparity of pay of deputationists, i.e. of IAF officers, and BSF, Air Wing was examined at different levels. The deputationists from the Air Force obviously were pressing for and seeking parity and equivalence. This is clear from the file notings relied and referred to by the respondents. In particular, reference is drawn to the file notings made by Gp. Captain S.K. Bhattacharya, Director (Air OPS), who was a deputationist IAF

officer working in the BSF, Air Wing. These file notings were approved at different levels, by Deputy Commandant (Finance), Inspector General (Personnel) and Financial Advisor, BSF. Reliance was placed upon paragraph 4.2 of the DOPT OM dated 5th January, 1994, which requires that the borrowing authority should obtain option of the employee on deputation within one month of joining the ex-cadre post whether he would like to exercise option to draw pay either in the scale of pay of deputationist/foreign service/ ex-cadre post or his basic pay in the parent cadre plus deputation (duty) allowance plus personal pay, if any.

14. In terms of the aforesaid file notings, the petitioner who had exercised his option was paid the "BSF kind of pay" during the period 1st February, 2007 to 28th February, 2008 by including flying incentive as admissible to Air Wing of the BSF.

15. Later on, it appears that audit objection was raised on payment of flying incentive to the petitioner and other IAF officers. The objection was that the extant terms and conditions of deputation were settled and agreed vide memorandum dated 16th April, 2004. The petitioner was sent on deputation on the aforesaid terms and conditions, which did not entail payment of flying incentive payable to personnel of the Air Wing of the BSF. The petitioner was entitled to draw the pay of the post held by him in the parent department-IAF, i.e., basic pay plus flying pay in addition to applicable deputation duty allowance. In view of the audit objection, the respondents initiated process for recovery of excess payment of Rs. 8,50,131/- towards

flying incentive paid during the period, 1st February, 2007 to 7th February, 2008.

16. This prompted the petitioner to file the present writ petition. The petitioner has prayed for setting aside the decision to recover Rs.8,50,131/- and for refund of Rs.6,87,749/- alongwith interest @ 12% per annum from the date of recovery till the payment. The petitioner has also prayed for payment of technical incentive for the period 1st February to 31st March, 2009 amounting to Rs.29,91,000/- alongwith interest @ 12% per annum by setting aside and quashing the letter dated 22nd October, 2014 of the Personnel Directorate, BSF. Several other prayers are also made, including the prayer for payment of flying incentive for the period 3rd May, 2004 till 30th January, 2007, etc.

17. Learned counsel for the petitioner, on instructions from the petitioner, who is present in the Court, has however, given up and not pressed these prayers except the prayer for setting aside the recovery order for Rs.8,50,131/- on account of payment of flying incentives during the period 1st February, 2007 to 7th February, 2008. The petitioner has also asked for refund of the amounts already recovered or not paid to the petitioner and withheld. The petitioner had filed an application for stay and vide order dated 6th October, 2016 an interim order was passed restraining the respondents from affecting recovery of flying incentive/technical incentive from the salary of the petitioner. This interim order was to remain in force for a period of three months or till further orders, whichever was earlier.

18. On the last date of hearing, we had asked the counsel for the respondents to obtain instructions whether the respondents were ready and willing to withdraw their claim/demand for recovery and give a quietus to the matter. We had in the said order observed that *prima facie* there cannot be two different pay scales, one applicable to deputationists and the other to the officer of the parent cadre/department when both are performing identical and same duties. Reference was also made to the amended terms and conditions dated 8th February, 2008 as well as the OM dated 5th January, 1994, which entitles a deputationist to exercise option and get paid at the grade, as applicable in the borrower department. The petitioner had placed reliance on the decision of this Court in Writ Petition (C) No. 2862/2012, ***Gp. Capt. Joe Emmauel Stephen versus Commandant (Personal), Directorate General of BSF and Others***, decided on 8th July, 2013, and had relied on paragraph 44 of the Memorandum of Understanding dated 8th February, 2008.

19. We would agree with the counsel for the respondents that the decision in ***Gp. Capt. Joe Emmauel Stephen*** (supra) dealt with a different issue, i.e., whether an Air Force officer could wear the uniform and carry their own rank and badges while on deputation in the BSF. Aspect dealt with in the said judgment related to whether a Group Captain in the IAF was equivalent to Deputy Inspector General of BSF. However, another issue decided in the writ petition was whether the Air Force personnel on deputation in the BSF under the terms of the Memorandum dated 8th February, 2008, would be entitle to flying pay as well as flying incentive. It was held

that flying pay payable to the IAF officers would not be adjusted from the flying incentives, payable to the IAF officers while on deputation with the BSF. In other words, flying incentive was in addition to the flying pay.

20. There may be some merit in the contention of the respondents that the petitioner was not entitled to flying incentive during the period 1st February, 2007 to 7th February, 2008 in view of the MOU or the terms and conditions of deputation dated 16th April, 2004, notwithstanding OM dated 5th January, 1994 by which the deputationists have the right to opt for the grade applicable in the borrower department. However, the question raised before us is with regard to recovery of the excess payment, which had been made on account of flying incentives. This payment was made to the petitioner between 1st February, 2007 to 7th February, 2008. There are several factors and reasons in favour of the petitioner, which have compelled us to accept the prayer made by him. In ***State of Punjab and Others versus Rafiq Masih***, (2015) 4 SCC 334, the Supreme Court had dealt with cases where Government employees had been paid monetary benefits in excess of their entitlement. After referring to the earlier case law, the Supreme Court had culled out the following guidelines and principles, which should be applied by the court or the tribunal while dealing with such cases:-

> "**18.** It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the

decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(*i*) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(*ii*) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(*iii*) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(*iv*) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(*v*) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

21. We would now like to highlight that the present case would be covered by clause (v) above as we are of the opinion that it would be most iniquitous, harsh and unfair to ask the petitioner to refund or repay the flying incentives paid to him and why we feel this would outweigh the equitable balance of the employer's right to recover.

22. The petitioner undoubtedly was performing the same and identical duty as officers of the Air Wing, BSF. The petitioner was not only flying helicopters, but was carrying out maintenance work as Senior Aircraft Maintenance Engineer. We have noted the two

separate orders, which were issued in the case of the petitioner, when he was sent on deputation. The issue and grievance regarding non-payment of flying incentives to IAF personnel had led to resentment, heart burning and dissatisfaction. There was discrimination and disparity, which could not be justified in equity. The issue was resolved with the amendment of terms and conditions vide Memorandum dated 8th February, 2008. No doubt, the memorandum is not retrospective, but we cannot ignore the fact that it corrects the anomaly and the discrimination, which had prevailed earlier. In the present case, the petitioner's claim for "BSF kind of pay" was examined and considered by the authorities in the BSF, who had agreed. The petitioner thereupon opted for "BSF kind of pay". The same was granted for the period 1st February, 2007 to 7th February, 2008. The amount paid was after due consideration and examination at different levels to ensure that there was no disparity and difference in the pay or incentives payable to IAF personnel and those belonging to Air Wing of the BSF.

23. Noticeably, the petitioner was repatriated and had joined the parent cadre on 31st March, 2009. The recovery proceedings were initiated against the petitioner on or after 2nd March, 2012. Arrears of the Sixth Pay Commission amounting to Rs.5,96,114/- were not paid by the BSF and were adjusted against the recovery. This had the effect of the denying the petitioner benefit of the Sixth Pay Commission.

24. Another amount of Rs.91,635/- has been possibly deducted from the amounts payable to the petitioner by the BSF. Yet another

amount of Rs.1,24,560/- has been recovered by adjustment of flying incentive due and payable for the month of February and March, 2009 and pre-flight meals for the period 1st April, 2008 to 31st March, 2009.

25. The respondent-BSF would accordingly release the payments withheld by them and undo adjustment of Rs.5,96,114/-, Rs.91,635/- and Rs.1,24,560/- and payments would be made within a period of four months from the date a copy of this order is received by the respondents. In case payments are not made within four months as stipulated, the respondents would pay interest @ 8% per annum from the date of this judgment till payment is made. Balancing out equities, we have not directed the respondents to pay interest with effect from the dates the amounts were retained and adjusted. We have only directed payment of interest from the date of this judgment and that too if the payment is not made within four months from the date a copy of this order is received. There would be no order as to costs.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

SEPTEMBER 14, 2017
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