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

Date of Decision 1st November, 2017

\+ **W.P.(C) 7943/2013**

S.K. BHATTACHARYA (VM) RETD. ..... Petitioner
Through Mr. A.K. Gautam, Advocate

versus

UNION OF INDIA AND ORS ..... Respondent
Through Mr. Ajay Digpaul, CGSC, UoI.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The Petitioner, who was a Group Captain in the Indian Air Force (hereinafter referred to as IAF) and had joined the Border Security Force (hereinafter referred to as BSF), Air Wing on 06.07.2004 as a Captain/Pilot on deputation basis, has challenged the orders dated 22.09.2011 and 06.01.2012 passed by the Respondent no.3 i.e. the Pay and Accounts Division of the BSF. By the impugned orders, after coming to a conclusion that a payment of Rs.8,56,666/- had been erroneously made to the Petitioner by way of flying incentives for the period 01.02.2007 to 07.02.2008, the

Respondent no.3 directed that after adjusting an amount of Rs.6,78,488/- lying with it towards the outstanding dues payable to the Petitioner, the balance sum of Rs.1,78,178/- be recovered from his account.

2. The facts relevant for the adjudication of the present petition are that the Petitioner, who was a Group Captain in the IAF was selected for deputation to the BSF Air Wing as a Captain/Pilot vide order dated 28.05.2004. Consequently, the Petitioner joined the BSF Air Wing on 06.07.2004 with his formal appointment order being issued on 30.07.2004.

3. As per the terms of the selection letter and the consequential appointment order, the Petitioner was to be governed by the terms and conditions of the deputation, as mutually agreed by the BSF and IAF vide Air Headquarters Letter No. Air HQ/C-21974/202/1/PO-1 (Dep) dated 30.12.2003. Para 5 of the Terms and Conditions of the aforesaid letter read as under:-

> *"Pay and Allowances*
> *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 @ 5% 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 2.5% of the basic pay subject to a maximum of Rs.250/- if the posting is within the same station (city).”

4. After the Petitioner joined the BSF Air Wing and was carrying out his duties as a Captain involving operation of MI-17 Helicopters of the BSF, he was initially paid the pay of the post held by him in the IAF i.e. basic pay and flying pay as applicable in the IAF alongwith deputation allowance. Subsequently he was asked to submit an option form as to whether he wanted to continue to be governed by the IAF form of pay or by BSF form of pay which included payment of flying incentives. Upon exercising his option to change over to the BSF form of pay and allowances, the Petitioner was allowed to draw the BSF form of pay and allowances w.e.f. 01.02.2007 and accordingly, he was paid a sum of Rs.8,56,666/- on account of payment of flying incentives for the period from 01.02.2007 to 07.02.2008.

5. After the Petitioner had been paid the flying incentives for the period 01.02.2007 to 07.02.2008, as payable in the BSF, a fresh Memorandum of Understanding was entered into between the

Ministry of Home Affairs i.e. Respondent no.1 and the Ministry of Defence, revising the terms and conditions of the deputationists. Consequently, w.e.f. 08.02.2008, the Petitioner was paid allowances as per the terms of the aforesaid fresh MoU signed between the aforesaid two Ministries.

6. It may be pertinent to note at this stage that similar payments towards flying incentives had also been made to one Wing Commander Arvind Kumar who had, like the Petitioner herein, also joined the BSF, Air Wing on deputation to the post of Senior Aircraft Maintenance Engineer (Senior AME), on 03.05.2004.

7. After the BSF Air Wing had made payment of the aforesaid flying incentives to both, the Petitioner and Wing Commander Arvind Kumar, an audit objection was raised with regard to payment of flying incentives to the deputationists for the period from 01.02.2007 to 07.02.2008. However, no final orders in respect of these audit objections regarding payment of flying incentives made to the Petitioner and other deputationists were passed at that time.

8. Upon completion of his deputation period, the Petitioner was repatriated to the IAF on 05.10.2008. He subsequently superannuated

from the IAF on 30.03.2009. Similarly, Wing Commander Arvind Kumar also stood repatriated to his parent cadre i.e. the IAF on 31.03.2009.

9. In September 2011, i.e. much after the Petitioner, as well as the aforesaid Wing Commander Arvind Kumar stood repatriated to the IAF, Respondent no.3 passed the impugned order dated 22.09.2011, whereby the payment of flying incentives granted to the Petitioner during the period 01.02.2007 to 07.02.2008, amounting to Rs.8,56,666/- was held to be unauthorised. Subsequently, by the impugned order dated 06.01.2012, Respondent no.3 adjusted a sum of Rs.6,78,488/- from the Petitioner's outstanding dues and further directed him to pay the balance sum of Rs.1,78,178/-.

10. During the course of hearing, we have been informed that similar orders of holding the payment of flying incentives from the period 01.02.2007 to 07.02.2008 as unauthorised were passed by the Respondent no.3 in respect of Wing Commander Arvind Kumar and a Writ Petition, registered as W.P(C) 3916/2015, was filed by him before this Court. The said petition has been allowed vide judgment dated 14.09.2017 of a Coordinate Bench of this Court, wherein it was

held that even if there may be some merit in the contention of the Respondents that the Petitioner therein was not entitled to flying incentives during the period 01.02.2007 to 07.02.2008, it would be most inequitous, harsh and unfair to ask the Petitioner to refund or repay the flying incentives paid to him at this belated stage.

11. We deem it appropriate to reproduce paras 20 to 25 of the aforesaid judgment passed in the case **Wing Commander Arvind Kumar** (***supra***)**:-**

> *"20. There may be some merit in the contention of the Respondents that the Petitioner was not entitled to flying incentive during the period 1 st 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 nonpayment 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 2 nd 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."

12. We find that the judgment of the Coordinate Bench referred to above, squarely covers the issue raised in the present petition. In fact, both the counsels are *ad idem* that the issue raised in the present petition is identical to the one decided in the aforesaid judgment dated 14.09.2017. However, learned counsel for the Respondent submits that the department is proposing to

take steps to challenge the said judgment by way of a Special Leave Petition before the Supreme Court.

13. In the above facts and circumstances, the present petition is allowed on the same lines as in ***W.P(C) No.3916/2015***. The impugned orders dated 22.09.2011 and 06.01.2012 are quashed and set aside. The Respondents are directed to release the payment of Rs.6,78,488/- in favour of the petitioner, that was wrongfully adjusted by them in terms of the impugned order dated 06.01.2012. The said amount shall be paid to the Petitioner within a period of four months from today. In case the payment is not released within the aforesaid timeline, then the Respondents shall have to pay interest @ 8 % per annum from the date of this judgment till the payment is made.

14. The writ petition is disposed of with no orders as to costs.

REKHA PALLI, J

HIMA KOHLI, J

NOVEMBER 01, 2017
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