
(2013) 02 P&H CK 0054

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No's. 8993, 9725, 10482, 14263, 15093, 15095 of 2004, 1696 of 2005, 17245 of 2004; 1775 of 2003, 18173, 18233, 19560, 13389 of 2004; 2062 of 2005, 4445 of 2004; 2716 of 2005; 5125, 10923, 13309, 8993, 11094, 11042, 10947, 12651 and 14

Hardev Singh and Others

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision : 08-02-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 142, 16, 226
Punjab Home Guards Act, 1947 — Section 2, 3, 4, 5, 7

Citation : (2013) LabIC 1947 : (2013) 170 PLR 44 : (2013) 2 SCT 363

Hon'ble Judges : A.K. Sikri, C.J.; Rakesh Kumar Jain, J

Bench : Division Bench

Advocate : Rajiv Atma Ram, with Mr. Arjun Partap Atma Ram in CWP No. 8993 of 2004, Mr. Sumeet Mahajan, with Mr. Amit Kohar in CWP No. 13309 of 2004, Mr. Sukhbir Singh Mattewal in CWP No. 10923 of 2004, Mr. Dinesh Kumar in CWP No. 14166 of 2004, Mr. V.K. Sharma in CWP Nos. 5125 and 13389 of 2004, Mr. Girish Agnihotri, with Ms. Bineyjeet Sheoran in CWP No. 11042 of 2004, Mr. Vivek Sharma in CWP No. 18233 of 2004, Mr. K.S. Dadwal in CWP Nos. 11094 and 14263 of 2004, Mr. A.S. Jattana in CWP No. 4445 of 2004, Mr. Charanjit Chadha in CWP No. 19560 of 2004, Mr. TPS Chawla in CWP No. 18233 of 2004, Mr. Sanjiv Manrai in CWP No. 18173 of 2004, Mr. S.C. Chabra in CWP No. 2062 of 2005, Mr. R.S. Ahluwalia in CWP No. 17755 of 2003, Mr. Vikas Jain in CWP No. 17245 of 2004, Mr. G.S. Bhatia in CWP No. 1696 of 2005, Mr. Rajesh Punj and Ms. Sumati in CWP Nos. 10482, 9725, 10947, 15093 and 15095 of 2004, Mr. Ashok Singla, Mr. Ravish Bansal and Mr. Aakash Singla in CWP No. 12651 and 11042 of 2004, Mr. Vijay Lath and Mr. Naveen Sharma in CWP No. 2716 of 2005, for the Appellant; Vibhor Bansal, Central Govt. Counsel for Respondents No. 3 and 4 in CWP No. 11042 and 17245 of 2004, Mr. J.S. Puri, A.A.G., Punjab for the State of Punjab and Mr. A.K. Bansal for Respondent No. 2/UOI in CWP Nos. 11042 of 2004, 17245 of 2004 and 2716 of 2005, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, C.J.—Petitioners in all these petitions are Home Guards/Sectional Leaders/Platoon Commanders working in the State of Punjab for the last number of years. They are a big lot. Civil Writ Petition No. 8993 of 2004 is filed by 910 Home Guards as petitioners. Number of persons in other writ petitions is also quite large. They have approached this Court by way of these writ petitions under Articles 226 of the Constitution of India seeking an order that the respondents-State of Punjab be directed to treat them as regular employees and as a necessary corollary grant them regular pay scales and allowances including pensionary benefits to the effect that their conditions of services be also determined commensurate with the nature of duties performed by them and they be equated with different ranks in Punjab Police as per law. It is prayed that for grant of this relief, if necessary, offending portions of Home Guards Act and Rules be also quashed. Since their request was denied by the respondents by passing orders dated 11/12/19.05.2004 (Annexure P-11 to Writ Petition No. 8993 of 2004) and similar orders passed in Writ Petitions, prayer is also made that these orders be quashed. As there is a commonality of facts and relief sought and the defence of the State is also similar to all these writ petitions, these petitions were heard together. For the sake of convenience and clarity, it would be apposite to dig out the factual background from Civil Writ Petition No. 8993 of 2004.

2. The petitioners are working as Home Guards/Sectional Leaders/Platoon Commanders in the State of Punjab without any break for a minimum period of 10 years in some cases to 30 years in other cases. They are being paid at the rate of Rs. 90/- per day irrespective of ranks above mentioned. The Home Guards in the State of Punjab are governed by the Punjab Home Guards Act, 1947. The petitioners were not being given any of the benefits available to regular employees. The petitioners accordingly sent representations to the respondents. This was followed by notices including a legal notice. Upon State's failure to take any decision in the matter, various Writ Petitions including Civil Writ Petition No. 2173, 3572 and 7124 of 2004, were filed by the petitioners.

3. A Division Bench of this Court disposed of all the writ petitions with a direction to the respondent-State of Punjab to decide the petitioners' claims. The respondent-State in compliance with the directions issued by this Court rejected the claim of the petitioners vide order dated 11/12.05.2004 conveyed by the office of the Director General vide orders dated 19.05.2004 on the ground that by the nature of the Act and the Rules, the Home Guards are volunteers and no person is working as a regular Home Guard and as such are not entitled to regular pay or to be treated as regular employees. The State of Punjab placed reliance upon Civil Writ Petition No. 3975 of 1989 whereas as per the contention of the petitioners these facts are not applicable to the present case.

4. The petitioners placed reliance upon a judgment of Hon'ble Supreme Court in case State of West Bengal and Others Vs. Pantha Chatterjee and Others, In view of the ratio of law laid down by the Hon'ble Supreme Court, it becomes apparent that even though the original concept of Home Guards may have been that of a

temporary volunteer force, yet the continuous deployment of the petitioners as Home Guards has changed the nature of the employment from temporary need based to a permanent continuous employment. The petitioners have also placed reliance upon State of Haryana and others Vs. Piara Singh and others etc. etc., and Hassan Mohd. And others v. State of Haryana and others 2003 (4) S.L.R. 1 wherein it was held that if appointments are made out of eligible and qualified persons on adhoc basis, their services are continued for a long period, their service record is satisfactory and their appointments is not contrary to relevant rules, the Court may not itself frame a policy or direct regularization but can certainly direct framing of policy for regularization.

5. From the aforesaid brief factual narration, it becomes apparent that the central issue revolves around the character and status of these persons, namely, whether these petitioners are to be treated as "volunteers" with no element of "service" or they are to be treated as employees like other employees under the State of Punjab. Secondly, whether there can be any direction by this Court for creation of permanent posts and regularization of the petitioners there against.

6. During arguments before us, these issues were hotly debated between the counsel for the parties. Before we take note of these arguments and appreciate the same, it would be necessary to look into certain provisions of the Punjab Home Guards Act, 1947 (for short the Act of 1947) as well as the Punjab Home Guards Rules, 1983 (for short "the Rules of 1983").

7. Section 2 of the Act of 1947 deals with the constitution of Punjab Home Guards. This Section empowers the State Government to constitute Punjab Home Guards as a body and appoint members thereto who are suppose to discharge functions in relation to the protection of persons, the security of property and public safety. Section 3 deals with the appointment of members to this body. Section 5 enlists the powers, privileges and protection of these members. Section 7 of the Act imposes several penalties for those who would neglect or refuse to discharge their functions as members of the Home Guards. Section 9 of the Act gives the State Government power to make rules for certain purposes enumerated therein. We would like to reproduce Sections 2, 5, 7 and 9 of the Act of 1947:-

2. Constitution of (Punjab) (Home Guards):- The (State) Government may for any case constitute a body to be called the Punjab (Home Guards) the members of which shall discharge such functions in relation to the protection of persons, the security of property or the public safety as may be assigned to them in accordance with the provisions of this Act and the rules made thereunder.

3. &&.

4. &&.

5. Powers, protection and control:- (1) A member of the Punjab (Home Guards) when called out u/s 4 shall have the same powers, privileges and protection as

an officer of police appointed under any law for the time being in force.

7. Penalty: (1) If any member of the [Punjab Home Guards] on being called out u/s 4, without sufficient excuse neglects or refuses to obey such order, or to discharge his functions as a member of [Punjab Home Guards] or to obey any lawful order or direction given to him for the performance of his duties, he shall, on conviction by a competent Court, be punishable with [simple imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees or with both].

8. &&..

9. Rules:- The [State] Government may make rules consistent with this Act:-

a) Providing for the exercise of control by officers of the police force over members of the [Punjab] [Home Guards] when acting directly in aid of the police force;

b) Regulating the organization, appointment, conditions of service, duties, discipline, arms, accoutrements and clothing of members of the [Punjab] [Home Guards] and the manner in which they may be called out for service;

c) conferring on members of the [Punjab] [Home Guards] according to their office any powers, other than magisterial or judicial powers, exercisable by any person under any law for the time being in force; and

d) Generally for giving effect to the provisions of this Act.

8. In exercise of powers conferred by Section 9 of the Act, Rules are framed by the State Government known as Punjab Home Guards Rules, 1963. Rule 3 which deals with Units of Home Guards provides for following two units, namely;- (i) Home Guards Unit J; (ii) Home Guards Unit II. The strength of each unit of the Home Guards is provided under Rule 5 which states that the strength would be such as may be fixed by the Government from time to time. The eligibility for enlistment as a Member is provided in Rule 7. As per Rule 10 preference is to be given to ex-soldiers and ex-policemen. Rule 11 provides that even government employees or other employees, as could be made available by their respective employers, can be enrolled as supernumerary or regular members in the case of emergency. The conditions of service of such members are provided from Rule 14 onwards. Relevant rules for our perusal would, thus, be Rules, 5, 11, 12, 13, 14, 16, 18, 20, 22, 23, 27 and 29.

9. The State Government thereafter framed the Punjab Home Guards Rules, 1983. It deals with Class-III Service and this service comprises the posts shown in Appendix-A. In Appendix-A, various posts are mentioned which enlist 25 such posts and these posts include Company Commander, Platoon Commanders, Clerks, Draftsmen, Drivers, Radio Wireless Operators, Carpenters, Stenographers etc. However, Home Guards are not mentioned therein. Rules also provide methods for appointment of such category of persons, their probationary period,

their inter-se seniority, pay, leave pension, etc. as well as discipline penalties and appeals. It is not in dispute that all those who are members of this service are treated as regular employees.

10. State Government also framed Rules in the year 1988 for Class-II employees which are known as Punjab Home Guards Rules, 1988. These Class-II persons are District Commander/Battalion, 2nd-In-Command/Junior Staff Officer/Chief Instructor as well as Administrative-cum-Accounts Officer. They are also treated as employees of the Government and their various service conditions on the same basis as for Class-III employees are stipulated in these Rules. The Government has also framed Rules for Class-I Service in a similar manner. The posts which are enumerated as Class-I posts are Commandant General, Home Guards and Director Civil Defence, Deputy Commandant General, Home Guards and Deputy Director, Civil Defence, Divisional Commandants as well as Battalion Commanders/Commandant C.T.I.

11. In their endeavour to demonstrate that the Home Guards are also members of "service" and not "volunteers", first submission of Mr. Atma Ram, Senior Counsel for the petitioners, was predicated on the provisions of the Act of 1947 and the aforesaid Rules. It was submitted by him that this Act nowhere uses the expression "volunteers". It was also argued that the Act of 1947 treat all members alike, be it Home Guards or members of Class-III, Class-II or Class-I service. He submitted that in the reply affidavit filed by the State, it was accepted that these petitioners were appointed under the Act of 1947 and the Rules of 1963, though still labeling them as "volunteers", which was legally untenable.

12. Mr. Atma Ram, learned Senior Counsel also referred to Rule 2(h) of 1963 Rules which defines "member" to mean a person appointed as a member of Home Guards u/s 3 of the Act of 1947. He also submitted that they were appointed as members after undergoing the selection process and were enrolled in the service in consonance with Rule 6 of 1963 Rules.

13. Learned Senior Counsel also took support from the judgment of the Supreme Court in State of West Bengal and Others Vs. Pantha Chatterjee and Others, . In that case, part time Border Wing Home Guards (BWHG) had alleged discrimination meted out to them in contrast with the permanent staff of BWHG even when the duties of permanent and part time BWHG were same and performed under the same situations and circumstances. The Court held that the work of part time BWHG was perennial in nature; no one was discontinued on expiry of three months as per scheme; and thereby voluntary character of scheme had lost due to continuous deployment of long number of years and therefore, they were to be given the same treatment as permanent staff. He specifically referred to the following discussion from that judgment contending that it equally applied to the present case as well:-

10. What emerges out from the two documents referred to above, on the basis of

which Border Wing Home Guards was raised, is that they were required amongst other, for the purposes of patrolling the border as well with a view to check infiltration from across the border. They have to help and assist and to do the patrolling etc. along with the under the supervision and direction of the Border Security Force authorities. One thing which deserves to be noticed is that duties of the permanent Border Wing Home Guards and part time Border Wing Home Guards are the same, and performed under the same situation and circumstances but there has been disparity in their emoluments and other facilities, necessities for performing their duties, details of which are not necessary to be indicated here. Yet another thing which is clear is that the scheme under which Border Wing Home Guards battalion was raised is the scheme of the Central Government which in substance is being implemented through the machinery of the State Government with a condition that pay and salary etc. of the full time and part time Border Wing Home Guards is to be borne by the Central Government. They have to assist and work always with border security personnel along the borders of the country. So far the engagement for a period of three months is concerned, it has been stated in the counter affidavit filed in this Court on 4.5.1998 sworn by Shri O.C. Mehta, Lt. Col. Assistant Director General, Home Guards, Ministry of Home Affairs, in Para 16 as follows:

In terms of the instruction of the Government of India, Govt. of West Bengal raised one Bn. Consisting of 8 companies of BWHG volunteers. Since inception, all the 8 cays of BWHG volunteers in West Bengal were being utilized by the DG, BSF on the Indo Bangla Desh Border. For this purpose, Ministry of Home Affairs vide their letter No. III-14011/6/79-DGCD(HG) dated 7th June 1979 issued suitable instructions for utilization of BWHG volunteers by the BSF authorities. Under these instructions, DG, BSF concerned are to sent requisition for home Guards of the concerned number of BWHG volunteers to the Comdt. General Home Guards of the concerned number of BWHG. It has also been stipulated in their said instructions of this ministry, that deployment of BWHG volunteers will not be for prolonged periods. On the basis of these instructions, DG, BSF had been approving deployment of BWHG volunteers to assist BSF initially for a period of 3 months each time which had been extended continually after every three months since 1978-79. Although the deployment of BWHG volunteers would not be prolonged, a stipulated vide sub para (vi) of MHA letter No. III 14011/6/79 - DG (HG) dated 7th June 1979 but in actual practice since 1978-79 the same members of BWHGs in West Bengal had been under continuous deployment with the BSF on account of extension of deployment period by DG, BSF on the basis of the authority given to DG, BSF. As a result all the part time members of 8 cays of BWHGs had been serving in aid of BSF since 1978-79 without break in service.

11. From the above averment, it is clear that BWHGs have been continuously deployed since 1978-79. It is also to be found that such a long and continued deployment, which was initially envisaged only for a period of three months, was

contrary to the Scheme taking away the voluntary nature of the Scheme. It appears that it was after their continued deployment for over 10 years that in 1989 the petitioners approached the High Court for same emoluments and conditions of service as applicable to the permanent staff of the BWHGs. The Scheme envisaged that on being released, after a period of three months, the volunteer Home Guards could go back and resume their vocations and may earn their livelihood and may be called as and when needed again for a short period whereafter again they could pursue their vocation. The step which seems to have been taken to disengage them and withdrawal of the power to recruit because of the number of cases filed in Court, is only to be ignored as extraneous. It is said to have been done in the year 1992. By that time they had already put in near about 14 years of service. After working for such a long period, patrolling the borders in all weathers without any facilities, as provided to other permanent staff of BWHGs and performing same duties, it is too much to say that their deployment was of a casual and voluntary nature and the Central Government will not be concerned with them and that it would be the responsibility of the State Government alone. The problem of infiltration continues. It is not over. To say that they are being disengaged since they volunteered to be BWHG and they are free to resume their previous vocation, is simply arbitrary, unreasonable and legally unacceptable. Once they were made to work for ten to fifteen years or so without break, there hardly remained any chance or scope for them to resume their old vocations. The attitude of the Government, the least to say, is surprisingly strange. It would not be expected of them to cling to the technicalities of forms rather than to see the substance and realities of existing facts and prevailing situation which is of their own making. It is simply unfair on their part to keep on quibbling with the questions that there existed no relationship of master and servant, or that BWHG were simply volunteers under a Scheme having acquired no rights, it is immaterial, whatever be the circumstances. Once the decision was taken to disengage them, the Central Government under the guise of the scheme wanted to wash off its hands of these people who have been guarding the borders of the country for years together under all conditions and circumstances, at its instance. Now to tell them that it is only the State Government which concerns them and the Central Government has nothing to do with it at all, is totally unfair and unreasonable.

12. There is no dispute about the fact that there has been disparity in emoluments and other working conditions, between the part time BWHGs and the BWHGs on the permanent staff although both have been deployed for performing the same nature of duties and have been working for the same duration in the same conditions but one of them with and the other without the necessities of the job, facilities and benefits of the service. It is true and rightly held that BWHG could not compare themselves with BSF personnel but the difference between the permanent staff and the part time staff which had been made in the scheme was obliterated and rendered ineffective. There is no real distinction between the two, namely, the permanent BWHG and the part time

BWHG in absence of non-release of the latter after three months of the appointment, as per the Scheme. It has not been indicated by the appellants or the Union of India that petitioners were ever disengaged of their assignment temporarily or the State Government had availed of their services after due and prior permission of the Central Government, or they were ever freed to resume their old vocational pursuits. It is in the affidavit of the authorities that BWHGs are under operational command of B.S.F. authorities, when deployed for patrolling along Indo Bangladesh border. In the background of what has been indicated above, in our view the findings arrived at by the High Court cannot be faulted with.

13. On the first date of hearing in this matter the learned Additional Solicitor General appearing for the Union of India urged that the State of West Bengal could not argue the matter in a manner so as to fasten the liability upon the Central Government, since the Union of India was impleaded only as a proforma respondent. Therefore, it was not open for the appellant to take the Govt. of India by surprise and seek relief which may saddle the Central Government with financial liability or to say, that the petitioners-respondent are the employees of the Central Government. We find that in the appeal this aspect was considered by the High Court vis-a-vis these two parties viz. State of West Bengal and the Central Government. In any case so as to be able to argue the matter on merits and to have further instructions in that connection, from the Central Government, as prayed by the learned Additional Solicitor General the matter was adjourned. After having received the necessary instructions, the learned Addl. Solicitor General took up the stand that the petitioners will not be entitled to relief as granted by the High Court for the following reasons:

1. The petitioners have been members of a voluntary organization;
2. They were recruited under the State Home Guard Act by the State machinery;
3. Master and servant relationship of the petitioners existed only with the State Government; and
4. Central Government was liable to bear the financial liability as provided under the Scheme.

14. Surprisingly, the point of it being a voluntary organization is beaten time and again by the State as well as by the center, despite their own admission that voluntary character of the Scheme was lost due to continuous deployment of the petitioners for long number of years and their non-relieving after three months to enable them to go back to their vocational engagement.

14. Another judgment referred to by Mr. Atma Ram, again that of the Apex Court, was in the case of Union of India (UOI) and Others Vs. Parul Debnath and Others, . That case pertained to the Home Guards of Andaman and Nicobar Islands where the members of Home Guards Organization had been performing regular duties continuously for 12 years to 23 years. Their claim for

regularization and equal pay for equal work with regular Home Guards was accepted and a direction was given to the appropriate authority to frame a scheme for regularization. A direction was given even to create supernumerary posts.

15. Mr. Atma Ram, learned Senior Counsel also drew our attention to the orders passed in Civil Writ Petition No. 3975 of 1989 where regularization was ordered after completion of 240 days which order was upheld by a Division Bench of this Court and even SLP was also dismissed. A copy of the reply filed by the Government in that case is annexed with the petition as Annexure P-13. The learned Senior Counsel submitted that there also the stand taken was that the Home Guards Organization from the very inception is of voluntary nature. It was further argued that the only defence of the respondents that there were no posts or no right for regularization in view of judgment of Hon"ble Supreme Court in case Secretary, State of Karnataka and Others Vs. Umadevi and Others, , is of no consequence in the instant case. In so far as regular posts are concerned, he argued that they were needed to be created and direction could be issued in tune with the judgment of the Supreme Court in Parul Debnath's case (supra). He further submitted that the respondents have themselves issued instructions dated 18.03.2011 and 17.11.2011 in compliance with the directions contained in Uma Devi's case (supra) to regularize those daily wagers/work charge employees who have completed 10 years of service upto 10.12.2006 with further direction that to carry out such directions even if the posts are to be created by the concerned department that may be done.

16. Learned counsel appearing for other writ petitioners adopted the aforesaid submissions of Mr. Atma Ram. In addition, Mr. Sumit Mahajan, learned Senior Advocate has cited a judgment dated 10.09.2010 delivered by the Supreme Court in Civil Appeal No. 7904 of 2010 titled as Devinder Singh and others v. State of Punjab which was decided along with another Civil Appeal No. 7905 of 2010, Appellants in these cases were also "volunteers" of Punjab Home Guards who were appointed in the same manner. Their services were, however, terminated on the ground that they were involved in the act of indiscipline at Railway Station, Amritsar on 02.10.2004. This order of termination was challenged by filing writ petitions in this Court which were dismissed on the ground that since they were "volunteers" engaged in Honorary capacity and had no civil rights, the termination of their services on account of the allegations leveled against them could not be considered in violation of law. The Supreme Court vide that judgment set-aside the orders of this Court and allowed the appeals directing re-instatement.

17. Claiming pay parity with regular employees, support of following two judgments was taken out by learned counsel for other writ petitioners (i) Full Bench judgment of this Court in case Avtar Singh v. State of Punjab and others 2012 (2) S.C.T. 31, and (2) Home Guard Sainik Evam Parivar Kalyan Sangh and others Vs. State of Madhya Pradesh and another, decided by Madhya Pradesh

High Court.

18. Mr. J.S. Puri, learned Additional Advocate General appearing for the State of Punjab countered the aforesaid submissions. His main thrust was that the petitioners were appointed as "volunteers" only under the 1963 Rules. They were not appointed to any Class-I, Class-II and Class-III posts for which separate service Rules were framed. He heavily relied upon the reasons given by the State in the impugned orders dated 11/12/19.05.2004 whereby the claim of the petitioners was rejected. His submission in this behalf was that by the very nature of the Act and Rules, and the form of declaration furnished by the members of the Home Guards Organization in accordance with the provisions of Section 8 & 9 of the 1947 Act and Rule 6 of the 1963 Rules, the Home Guards are volunteers and no member is working as a regular Home Guards with whom the comparison of Home Guards Volunteers can be made. The Home Guards Volunteers are being paid duty allowance of Rs. 90/- per day with effect from 26.10.2001. Prior to this date they were given Rs. 70/- per day as duty allowance. The expenditure on Home Guards volunteers is shareable between the Central Government and the State Government. He also submitted that the Home Guards of the State of Punjab were paid the highest wages. He further submitted that in the impugned orders dated 11/12/19.05.2004, following significant aspects were considered:-

a) The Home Guard Volunteers constitute a separate class or category of persons by themselves.

b) In the State of West Bengal and Others Vs. Pantha Chatterjee and Others, , the Apex Court had upheld the parity of part time Border Wing Home Guards with their regular counter parts but in the present case no regular Home Guards is available who can be treated as a regular employee of the State Government. Therefore, this judgment of the Apex Court cannot be made applicable to the Punjab Home Guards being a distinguishable one.

c) The relief is required to be moulded in each case as warranted in the facts and circumstances of a particular case. Rameshwar Dass Sharma and others working as Home Guards in Punjab State had also filed a Civil Writ Petition No. 3975 of 1989 in this Court. In that writ petition, they had prayed for regularization of service and grant of regular pay scales. The State of Punjab had taken preliminary objections in its written statement that Home Guards Volunteers are paid daily allowances for the called out period. They cannot be equated with regular salary/wages paid employees. They are not regular employees of this department and their appointments are on voluntary basis. They are paid only daily allowance for the called duty period. That writ petition was dismissed by this Court on 25.9.1989 in view of preliminary objections taken in the written statement. A Civil Miscellaneous Application No. 611-A of 1990 arising out of this Civil Writ Petition was also dismissed by this Court on 06.03.1990. The matter went to the Supreme Court and the Supreme Court also vide orders dated 30.07.1991 in I.A. No. 3 in Petition for Special Leave to Appeal (Civil) No. 12465

of 1990 had dismissed the SLP and interlocutory application observing that the petitioner was not entitled to any relief as the Home Guards who were ordinarily demobilized army personnel are employed on the basis of temporary need from time to time and in case they are called back to do work with arms in hands, they are paid on daily basis and as such petitioner could not ask for regularization. The order dated 30th July, 1991 passed by the Apex Court reads as under:-

Heard petitioner in person and learned counsel for the respondent. The counter affidavit indicates that the Home Guards who are ordinarily demobilized Army Personnel are employed on the basis of temporary need from time to time and in case they are called back to do work with arms in hands, they are paid at the rate of Rs. 30/- per day on the basis of eight hours working during the day, or otherwise they are paid at the rate of Rs. 25/- per day. Petitioner, according to the respondent, being an employee under the system cannot ask for regularization. In such circumstances, we do not think that the petitioner is entitled to any relief. We have impressed upon learned counsel, however, to find out from the Home Guard Organization if in any manner, the petitioner can be accommodated in a limited way. The SLP and the interlocutory application are disposed of accordingly.

19. The judgments cited by learned counsel for the petitioners were sought to be distinguished on the ground that those cases pertain to different States and outcome was on the basis of specific statutes governing there whereas the present case was to be governed on the touch stone of the Act of 1947 and the Rules of 1963. He submitted that in so far as this Act is concerned, there was a specific judgment of a Division Bench of this Court in the case of Rameshwar Dass Sharma's (supra) which holds the field. He also submitted that the seven members Bench of the Supreme Court in Uma Devi's case (supra) is applicable as a binding precedent which position has been clarified by the subsequent Bench in the case of Official Liquidator Vs. Dayanand and Others,

20. Various submissions of Mr. Puri can be summated in the following manner:-

- i) These Home Guards are engaged as volunteers and are not appointed to any service in the State. For this, the provisions of the Act of 1947 are to be taken into consideration and the petitioners cannot rely upon the judgments rendered in the context of statutes of other States.
- ii) There is no enforceable right in favour of the petitioners, statutory or otherwise, as they are not holding any post.
- iii) There are no sanctioned posts and on this ground also their claim for regularization cannot be entertained.
- iv) No mandamus can be issued by the High Court for creation of posts or regularization in view of judgment of Uma Devi's case (supra).
- v) Plea of legitimate expectation is not tenable as identical plea was rejected by

the Supreme Court in Uma Devi's case (supra).

vi) Likewise, the plea predicated on Article 23 of the Constitution is not available which was also specifically repelled in Uma Devi's case (supra). The Court in that case acknowledged the concept of adhoc service.

vii) Going by the nature of appointment of these Home Guards, mere continuance of such persons for more than decade is of no consequence.

21. We have considered the respective submissions of counsel for the parties on either side. At the out set, we agree with the submission of learned counsel for the respondents that the cases of these petitioners are to be examined in the context of the Act of 1947 and the Rules framed thereunder. In so far as the nature of engagements of these Home Guards in the State of Punjab is concerned, the matter arising out of Civil Writ Petition No. 3975 of 1989 i.e. Rameshwar Dass Sharma's case (supra) which was taken upto Supreme Court, the Supreme Court had accepted that these Home Guards are ordinarily demobilized army personnel who are employed on the basis of temporary need from time to time and in case they are called back to do work in the arms with hand they are paid at the specific rate per day.

22. No doubt, the Act of 1947 does not use the expression "volunteer" in so far as these Home Guards are concerned. However, at the same time, intention was to take these Home Guards on voluntary basis as support system. This becomes clear from the tenor of Rules which were framed for these Home Guards known as Punjab Home Guards Rules, 1963. The purpose is to enlist such persons as "member" as provided in Rule 7 and while enrolling as such preference is given to Ex-soldiers and Ex-policemen as per Rule 10 thereof. Rule 11 of Punjab Home Guards Rules, 1963 is very significant in this behalf as per which even Government employees or other employees can be enrolled as supernumerary or regular members in the case of emergency. This provision clearly militates against the argument of the petitioners that they are the employees inasmuch as a government employee/or other employee cannot get another employment even in government service. When we see these Rules in juxtaposition with Punjab Home Guards Rules, 1963, 1983 as well as 1988, the contrast becomes more striking. Under the Punjab Home Guards Rules, 1963, a person appointed is known as a "member" appointed u/s 3 of the Act of 1947 as Home Guard, whereas under the Punjab Home Guards Rules, 1983, it mentions specific "posts" like Clerk, Commandant, Draftsman, Drivers, Carpenters, etc. These are "appointment to the posts in service" by the Appointing Authority under Rule 4. Same is the position of appointment to Class-II posts. Thus whereas persons holding specific designation in Class-II and Class-III posts are the members of service, same status is not accorded to the Home Guards who are appointed under the 1963 Rules.

23. Mr. Puri appears to be correct in his submission that having regard to the provisions of the Act of 1947, judgment in the case of Pantha Chatterjee's case

(supra) cannot be made applicable herein which case is considered in the light of statute of the West Bengal under which the Border Wing Home Guards (BWHG) was constituted.

24. No doubt, the Apex Court made important observations in para No. 14 thereof to the effect that with continuous deployment of such Home Guards in that State, the voluntary character of the scheme was lost. No doubt, here also, the petitioners have been working for a number of years as Home Guards. However, at the same time, it is not possible for this Court to either give directions for framing of scheme for regularisation or giving direction to create supernumerary posts. The law in this regard stands settled by the Seven Members Bench of the Supreme Court in Uma Devi's case (supra) which is not only a subsequent judgment but that is a judgment of the larger Bench and later in point of time.

25. Again in a recent judgment in the case of State of Rajasthan and Others Vs. Daya Lal and Others, the Supreme Court has re-emphasized that the High Courts will not give any direction for creation of posts or to frame a scheme for regularization and such a direction can only be given by the Supreme Court in its powers under Articles 142 of the Constitution. This is so declared in the following manner by the Supreme Court in that case:-

8. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date

(that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

26. The nature of binding precedent of Uma Devi's case (supra) is impressed upon by the Supreme Court much strongly in the subsequent judgment in the case of Official Liquidator's case (supra) in the following words:-

57. By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in Secretary, State of Karnataka v. Uma Devi (supra) is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio of the Constitution Bench judgment has been followed by different two-Judges Benches for declining to entertain the claim of regularization of service made by ad hoc/temporary/daily wage/casual employees or for reversing the orders of the High Court granting relief to such employees Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., Gangadhar Pillai Vs. Siemens Ltd., , Kendriya Vidyalaya Sangathan and Others Vs. L.V. Subramanyeswara and Another, Hindustan Aeronautics Ltd. Vs. Dan Bahadur Singh and Others, . However, in U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others, on which reliance has been placed by Shri Gupta, a two-Judges Bench has attempted to dilute the Constitution Bench judgment by suggesting that the said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution and that the same is in conflict with the judgment of the seven-Judges Bench in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another,

70. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on

the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed. We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

71. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judges Bench in U.P. State Electricity Board v. Pooran Chandra Pandey (supra) should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.

For all these reasons, this Court cannot help the petitioners in any manner and the relief as prayed for cannot be granted in exercise of powers under Article 226 of the Constitution. These petitions are accordingly dismissed.