
(2013) 11 JH CK 0014
In the Jharkhand High Court
Case No : Writ Petition (S) No. 3433 of 2013

Shiv Bachan Kumar	Vs	APPELLANT
The State of Jharkhand and Others		RESPONDENT

Date of Decision : 13-11-2013

Acts Referred:

Bihar Home Guards Act, 1947 — Section 3(1)

Citation : (2014) 1 AJR 835 : (2014) 1 JLJR 241

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : Devesh Krishna, for the Appellant; Vaibhav Kumar, J.C. to A.G., for the Respondent

Final Decision : Allowed

Judgement

S. Chandrashekhar, J.—Challenging order of dismissal dated 18.06.2011 and the appellate order dated 07.04.2013, the petitioner has approached this Court by filing the present writ petition. The brief facts of the case are that, pursuant to an advertisement dated 13.01.2004, the petitioner applied for appointment on the post of Constable. The petitioner appeared in the physical test conducted on 26.07.2004 and on being successful, he was appointed as constable on 15.05.2005. On 04.04.2012, a charge-memo was served upon the petitioner on the allegation that he gave wrong information of his being Home Guard in his application form and he had obtained identity-card through wrongful means. On 13.04.2011, the petitioner submitted his reply however, a departmental proceeding was initiated against the petitioner. After the enquiry report was submitted. A second show-cause notice was issued to the petitioner on 11.04.2011, which was replied by the petitioner. The disciplinary authority passed order of dismissal from service on 18.06.2011 and the appeal preferred by the petitioner has also been dismissed on 07.04.2013.

2. A counter-affidavit has been filed by respondent No. 4, stating as under:-

7. That with regard to the statement made by the petitioner in paragraph-2, in the instant writ petition under reply, it is humbly stated and submitted that the petitioner has already filed W.P. (S) No. 248/12 for same and similar relief and which has been dismissed by the Hon''ble Mr. Justice Narendra Nath Tiwari and as such it is false to say that the petitioner has not filed earlier for same and similar relief.

8. That with regard to the statement made by the petitioner in paragraph-3 (i to ix), in the instant writ petition under reply, it is humbly stated and submitted that the petitioner has already challenged the order passed by the respondent No. 5 which was already been dismissed by the Hon''ble Court and the answering respondent has not violated any provision of law and passed the order in accordance with law, so question of any violation or writing any wrong does not arise at all. The alleged Departmental Proceeding has been properly initiated against the petitioner and after due enquiry and evidence the petitioner has been dismissed from the service. So the petitioner is not entitled to get any relief from the Hon''ble court.

9. That with regard to the statement made by the petitioner in paragraph-4, in the instant writ petition under reply, it is humbly stated and submitted that the same hence require no comment.

10. That with regard to the statement made by the petitioner in paragraph-5 to 9, in the instant writ petition under reply, it is humbly stated and submitted that the said facts has already been decided in the earlier W.P. (S) No. 248/12 and all are based on record and therefore the petitioner has to give strict proof thereof.

11. That with regard to the statement made by the petitioner in paragraph-10 (i to iii), in the instant writ petition under reply, it is humbly stated and submitted that the same are matters of records hence the petitioner has to give strict proof thereof.

12. That with regard to the statement made by the petitioner in paragraph-11 and 12 in the instant writ petition under reply, it is humbly stated and submitted that the same are matter of record hence required no comment.

13. That with regard to the statement made by the petitioner in paragraph-13 (i to xiv), in the instant writ petition under reply, it is humbly stated and submitted that the Departmental Proceeding initiated against the petitioner and charge has been framed in accordance with law and there is no violation of any provision of law and the allegation against the petitioner found correct and as such the petitioner is not entitled to get any relief by this Hon''ble Court as the earlier W.P. (S) No. 248/12 was already been disposed of by the Hon''ble Court on the similar ground and so far the question of documents the petitioner has to give strict proof thereof.

3. Heard the learned counsel appearing for the parties and perused the documents on record.

4. The learned counsel appearing for the petitioner has raised two fold contentions namely, (i) the charge against the petitioner was vague and therefore, the petitioner was denied an effective opportunity to meet the charges, and (ii) under the provisions of the Bihar Home Guards Act, 1947 and the Rules framed thereunder, the petitioner was a Home Guard and since it has been found by the departmental authorities that the identity-card produced by the petitioner was not obtained by wrongful means, the order of penalty removing the petitioner from service is based on "no evidence" and therefore, liable to be quashed.

5. Per contra, Mr. Vaibhav Kumar, J.C. to A.G., has submitted that there was a specific provision in the advertisement which requires the petitioner to furnish the certificate of being a Home Guard. Since, the day on which the petitioner submitted his application, the petitioner had not completed the training and therefore, he was not a Home Guard and thus, the petitioner furnished wrong information and therefore, a departmental proceeding was initiated against the petitioner in which the charge of furnishing false information has been found correct and therefore, the penalty of dismissal from service has been passed by the disciplinary authority.

6. Before advertng to the contentions raised on behalf of the counsel appearing for the parties, it would be appropriate to notice the provisions under the Bihar Home Guards Act, 1947 and the Bihar Home Guards Rules, 1953.

The Bihar Home Guards Act, 1947

2(a). "Home Guard" means a person who is enrolled as such under this Act; and

3. Constitution of Home Guards.-(1) The State Government shall constitute in such manner as may be prescribed for each of the areas specified in a notification under sub-section (3) of Section 1, Home Guards who shall discharge such functions in relation to the protection of persons, the security of property or public safety in any area within the State of Bihar as may be assigned to them in accordance with the provisions of this Act and the rules made thereunder.

(2) The Home Guards in the State of Bihar shall for the purposes of this Act be deemed to be a single force and the members thereof shall be formally enrolled; and such force shall consist of such number of officers and men, and, their qualifications and conditions of training and service shall be such as may be prescribed.

(3) A Home Guard shall, on enrollment, make a declaration in the form specified in the First Schedule and receive a certificate of appointment in the form specified in the Second Schedule, under the seal and signature of such officer as may be prescribed, by virtue of which the person holding such certificate shall be vested with the powers and privileges of a Home Guard.

8. Period of service and discharge.-(1) Subject to any rules made in this behalf, a Home Guard shall be required to serve the State Government for a period of

twelve months (including the period spent over training) which period may be extended by the State Government to such further period as it may consider necessary, and the Home Guard shall thereafter serve in the reserve force for a period of three years and, while in the reserve, shall be liable to be called out for duty at any time.

(2) Every Home Guard shall be entitled to receive his discharge from the Home Guards on the expiration of the period specified in sub-section (1); but any such person may before he becomes so entitled be discharged by such authority and subject to such conditions as may be prescribed.

(3) A Home Guard shall, within ten days of his discharge under sub-section (2), surrender the certificate of appointment granted to him under sub-section (3) of Section 3 to such authority as may be prescribed.

The Bihar Home Guards Rules, 1953.

4. Qualifications for enrollment as a Home Guard. Any person-

(a) who is not less than 19 years and not more than 40 years of age on the 1st day of January of the year in which the application for enrollment is made;

(b) who is of good moral character;

(c) who is physically fit to undergo arduous outdoor duties;

(d) whose height is not less than 5' 4" and chest measurement not less than 31" (unexpanded) or in the case of Scheduled Tribes of Chhota Nagpur Division or the Santhal Parganas District and of persons belonging to the Purnea District and the Saharsa Sub-district, whose height is not less than 5' 2" and chest measurement not less than 30" (unexpanded); and

(e) who has passed at least the Upper Primary or equivalent, examination;

shall be eligible for enrollment as a Home Guard:

Provided that members of the Auxiliary Force, India, or of the Territorial Army shall not be eligible for enrollment.

5. Procedure for appointment of officers and men of the Home Guards Force.-(1) The Inspector-General, the Commandant, the Officer Commanding, Training Camp, and the Battalion Commanders shall be appointed by the State Government.

(2)(i) The Inspector-General shall, on the recommendation of a committee constituted by the State Government appoint all non-gazetted officers of the force of and above the rank of Jamadar Company Commanders, namely, Camp Adjutants, Quarter-Masters, Subedars, Battalion, Adjutants, Jamadars including District Company Commanders.

(ii) The Commandant shall, on the advice of a committee constituted by the

State Government, appoint all Jamadar Head Clerks and Accountants.

(iii) The Commandant shall appoint all Havildar Clerks, Writer Naiks, Naiks, L/Naiks and Sepoys in the force.

(3) The Battalion commanders shall appoint Platoon Commanders and Section Leaders ordinarily from amongst the Home Guards on the recommendation of the Company Commanders.

(4)(i) Applications for enrollment as a Home Guard shall be made in Form A (in Hindi) to the District Magistrate of the district in which the applicant ordinarily resides or to the Commandant.

(ii) Home Guards shall be enrolled by the District Magistrate on the recommendation of-

(a) a district committee in each district consisting of the commandant or, in his absence, Battalion Commander, the District Magistrate and the Superintendent of Police of the district, and a non-official member nominated by the State Government. The District Magistrate shall be the Chairman of the committee; or

(b) a State Committee consisting of the Commandant and such other members as the State Government may, by notification in the Official Gazette, appoint. The Chairman of this committee shall be nominated by the State Government.

(iii) After holding tests of the general knowledge, alertness, intelligence and physical fitness of the candidates (who make applications to the District Magistrate) under its supervision, the District Committee shall interview all or such of the candidates as it thinks fit and recommend, in order of preference, to the District Magistrate such number of candidates as may be equal to fifty per cent more than the number of vacancies. The State Committee shall likewise interview all the candidates, who make applications to the Commandant or such of them as it thinks fit, and recommend, in order of preference, any number of candidates it considers suitable to the District Magistrate of the district in which the candidate ordinarily resides.

(iv) After such verification of character and antecedents of the candidates recommended by the District Committee and the State Committee as may be necessary the District Magistrate shall enroll the required number of Home Guards.

(v) The Home Guards will be enrolled before joining the training centre by the District Magistrate, or at the time of joining the training camp by the Officer Commanding, Training Centre, who shall obtain the approval of the District Magistrate of the district concerned within a month of such enrollment.

7. On perusal of the above provisions, I find that a person would be treated as Home Guard once he is enrolled under the provision of the Bihar Home Guards Act, 1947. There is no provision in the Act or in the Rules which provides that a person would be treated as a Home Guard only after completion of training. On

the contrary, the provisions under the Act particularly, Section 8 makes it clear that a person can undergo training during the service period.

8. Now, coming to the facts of the case, I find that in the advertisement there was a stipulation that a candidate was required to furnish a certificate of Home Guard. The petitioner was enrolled as Home Guard on 18.04.2003 and the advertisement was issued on 13.01.2004. The last date for submission of the application was 15.02.2004. During this period, the petitioner had already commenced his training from 03.01.2004 and he was issued an identity-card, a copy of which was annexed with the application by the petitioner. In the advertisement, it is nowhere mentioned that a candidate was required to furnish the certificate with respect to the training which a Home Guard would have undergone. I further find that the charges framed against the petitioner are vague inasmuch as, in the charge framed against the petitioner it has not been specifically put to the petitioner that, in view of the specific condition in the advertisement, the petitioner was required to produce the certificate of training. It has also not been stated in the charge framed against the petitioner that only after completion of training, a person would be entitled to be treated as a Home Guard however, the enquiry has proceeded on such premises only and thus, I find that the petitioner was deprived of an effective opportunity to defend himself.

9. In *M.V. Bijlani Vs. Union of India (UOI) and Others*, , the Hon'ble Supreme Court has held as under:

25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.

10. I further find that though the petitioner was appointed in the year, 2005, a charge has been framed against the petitioner in the year, 2011 and no reason has been assigned by the respondents for framing such a charge against the petitioner at such a belated stage. Admittedly, the certificates submitted by the petitioner were verified by the authorities once again in the year, 2007 however, no irregularity was detected by the authorities. No reason has been assigned by the respondents for initiating the departmental proceeding against the petitioner after about six years.

11. In *The State of Madhya Pradesh Vs. Bani Singh and another*, the Hon'ble Supreme Court has held as under:

4. The appeal against the order dated December 16, 1987 has been filed on the ground that the Tribunal should not have quashed the proceedings merely on the ground of delay and laches and should have allowed the enquiry to go on to decide the matter on merits. We are unable to agree with this contention of the learned counsel. The irregularities which were the subject matter of the enquiry is said to have taken place between the years 1975-77. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April 1977 there was doubt about the involvement of the officer in the said irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage. In any case there are no grounds to interfere with the Tribunal's orders and accordingly we dismiss this appeal.

12. I find that the enquiry report as well as the orders passed by the departmental authorities have proceeded on the presumption that only after completion of training, a person would be treated as Home Guard and since the petitioner had not completed his training at the time when the advertisement was issued or at the time when the forms were submitted, the petitioner was not a Home Guard. However, I do not find any provision in the Bihar Home Guards Act or the Rules in support of such contention. It has been merely assumed by the respondents that only on completion of the training, a person would be treated as a Home Guard which, according to me, is contrary to the statutory provisions under the Bihar Home Guards Act and the Rules. It has been admitted by the departmental authorities themselves that the petitioner has not been found guilty of obtaining identity-card by wrongful means. I am of the opinion that in the absence of any statutory provision, the plea taken by the petitioner is justified and therefore, it cannot be said that the petitioner had furnished wrong/false information and obtained appointment by furnishing a wrong information. I find that even in the Application Form, there is no column requiring a candidate to furnish details of training.

13. In view of the aforesaid, I find that the procedure which has been adopted by the enquiry officer and the departmental authority for arriving at a conclusion that the petitioner had obtained appointment by furnishing false information, is erroneous and no reasonable person would have arrived at such a conclusion. I further find that there is no legal evidence brought on record by the department to establish the charge against the petitioner and therefore, the impugned orders dated 18.06.2011 and 07.04.2013 are liable to be quashed and are hereby quashed.

14. In *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others*, the Hon''ble Supreme Court has held as under,

17. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter''s source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

In the result, the writ petition is allowed and the respondents are directed to reinstate the petitioner with full back wages.