

Suraj Prasad Tiwari Vs. Zila Commandant, Home Guards, Hamirpur and Others

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Court : Allahabad

Decided On : May-01-1998

Reported in : 1998(3)AWC1622; (1998)2UPLBEC1484

Judge : O.P. Garg, J.

Acts : Uttar Pradesh Home Guards Act, 1963 - Sections 2, 4, 6, 6(3), 7, 9, 10, 11, 11 (2), 12 and 13; [Constitution of India](#) - Articles 14, 21, 226, 310 (1) and 311; [Police Act, 1861](#); C.P. and Brar Home Guards Act, 1947

Appeal No. : Civil Misc. Writ No. 34750 of 1996

Appellant : Suraj Prasad Tiwari

Respondent : Zila Commandant, Home Guards, Hamirpur and Others

Advocate for Def. : S.C.

Advocate for Pet/Ap. : R.R. Shivahare, Adv.

Judgement :

O.P. Garg, J.

1. In this writ petition, the moot point for consideration and determination is whether a person serving as a Company Commander, Home Guards, holds 'civil post' and is entitled to the protection of Article 311 of the [Constitution of India](#). The facts leading to this controversy, briefly stated, are as follows.

2. Suraj Prasad Tiwart the petitioner, who is a graduate, was enrolled as Home Guard in the year 1987. Subsequently, looking to his sincerity, devotion to work and excellent performance, he was selected and upgraded to the post of Company Commander. He was posted as Company Commander. Home Guards in Muskara in district Hamirpur. The appointment of the petitioner as Company Commander was for a period of three years under the provisions of Section 11 (2) of the Uttar Pradesh Home Guards Adhinyam, 1963 (U. P. Act No. XXIX of 1963) (hereinafter referred to as 'the Act'). The initial period of appointment was further extended to three years to commence from 7.2.1997. The petitioner had some tiff with one Sri R. K. Chaurasla, Zila Commandant-respondent No. 5. He got certain false and fabricated complaints manipulated against the petitioner. The petitioner was surprised by an order dated 24.7.1996 alleged to have been passed in compliance of the order of the Home Guards Headquarters, U. P. dated 16.7.1996, whereby the services of the petitioner were terminated. The petitioner exactly was not in a position to visualise the grounds which resulted in his removal from service. The petitioner, therefore, filed the present writ petition under Article 226 of the [Constitution of India](#) with the prayer that the order dated 16.7.1996 and the consequential order dated 24.7.1996. which is contained in Annexure 3 to the writ petition, passed by the District Commandant, Home Guards, Hamirpur-respondent No. 1 be quashed and the respondents be commanded not to Interfere with his functioning as Company Commander, Home Guards in Muskara in district Hamirpur.

3. Counter and rejoinder-affidavits have been exchanged. Heard Sri R. R. Shivhare, learned counsel for the petitioner and learned standing counsel.

4. By and large, the above facts as incorporated by the petitioner in the writ petition, have not been challenged. The only substantial ground taken in the counter-affidavit by the respondents is that the petitioner was enrolled in Home

Guards Department as a volunteer and that his initial period of three years expired in the year 1990 ; that since the petitioner is not a whole-time employee, he is not entitled to any show cause notice prior to his disengagement from the post of Company Commander.

5. Learned standing counsel urged that the matter stands concluded by decision of this Court dated 28.10.1991 delivered by Hon'ble S. C. Mathur, J., in Abdul Hameed and another v. State of U. P., Civil Misc. Writ No. 9028 of 1990, by which 41 other similar writ petitions were decided, as well as the decision dated 23.9.1992 of the Division Bench of this Court in Civil Misc. Writ Petition Nos. 29824 of 1992 and 27675 of 1992 delivered by Hon'ble B. M. Lal, J., (as His Lordship then was) and Hon'ble V. Bahuguna, J., Gulam Mohd. and others v. State of U. P. In Abdul Hameed's case (supra), after wading through the various provisions of the Act, Hon'ble S. C. Mathur, J., had taken the view that 'an enrolled Home Guard does have some rights against his main employer but he has no right against the State or its officers.....There is no provision under which a Home Guard can compel the State Government or its officers to continue him on duty even though the period of three years specified in sub-section (2) of Section 11 has expired.' Placing reliance on the decision of Hon'ble S. C. Mathur, J., the Division Bench of this Court in Gulam Mohd.'s case (supra) observed, 'suffice it to say that argument of the learned counsel has no force in view of the fact that they (Home Guards) have been appointed on honorarium of Rs. 100 per month and as observed above, there is no provision under the Act under which a Home Guard can compel the State Government to continue him on duty. This being so, the relief claimed by the petitioners cannot be granted.' Accordingly, both the writ petitions were dismissed by the Division Bench.

6. Sri R. R. Shivahare, learned counsel for the petitioner pointed out that an earlier decision of this Court reported in Vibhuti Narain Singh v. State and another, 1986 UPLBEC 1130, which squarely covered the point, escaped the notice of Hon'ble S. C. Mathur, J., while deciding Abdul Hameed's case, (supra), consequently, the Division Bench also went wrong in dismissing the writ petitions, placing reliance on the decision of Hon'ble S. C. Mathur, J., which was directly in conflict with the earlier decision of Vibhuti Naratn Singh, (supra). It was also pointed out that in a

recent case in *Dashrath Singh Parihar v. State of U. P. and others*, 1997 (1) AWC 376. Hon'ble R. H. Zaldi, J., has, placing reliance on the decision of Vibhuti Narain Singh (*supra*) concluded that the post of Company Commander is a 'civil post' within the meaning of Article 311 and Company Commander cannot be removed from service without serving him a proper charge-sheet, without giving him an opportunity of hearing and since the order of removal of a Company Commander was in utter disregard and in violation of Article 311, the order of removal was liable to be quashed. On the basis of the authority of Vibhuti Narain Singh's case (*supra*), as well as *Dashrath Singh Parihar's* case (*supra*), the learned counsel for the petitioner urged that the petitioner is entitled to the relief claimed as the order of his removal from the post of Company Commander was passed without any show cause notice, opportunity of hearing and holding of any departmental enquiry.

7. I have given thoughtful consideration to the matter and find that the decision of the Division Bench of this Court in *Gufarn Mohd's* case (*supra*), should not be an impediment in taking a contrary view for one simple reason that the Division Bench has relied upon the decision in *Abdul Hameed's* case in which earlier decision in *Vibhuti Narain Singh's* case (*supra*), was not noticed. Therefore, without being bound and feeling fettered by the holdings in *Abdul Hameed's* and *Gulam Mohd.'s*, case (*supra*), the matter may be considered afresh in the light of the various provisions of the Act and the catena of decisions of the Apex Court in which the expression 'civil post' has come to be interpreted.

8. The expression 'civil post', as occurring in Articles 310 and 311 of the [Constitution of India](#), has not been denned. This connotation, however, has been subject to scrutiny by the Supreme Court as well as other High Courts on several occasions. The expression 'civil post', *prima facie*, means, an appointment or office on the civil side of the administration as distinguished from, a post under the Defence Forces. The only persons, who are excluded from the purview of Article 311(1) {which is in the nature of an exception to the general provisions under Article 310(1) are--(a) members of the Defence Services, and (b) persons holding any post connected with defence. All persons, excepting the above two classes, who hold any post under the Union or a State, hold a 'civil post'. There are broadly

two tests for determining the question whether a person holds a 'civil post'-- (1) whether the person is employed to perform duties and functions which fall within the sphere of activities, duties and functions of the State and (2) whether the person claiming to be the holder of a 'civil post' is under the employment and administrative control of the State, as regards his appointment and other terms of employment, as well as his work and conduct. It is immaterial whether the employee is a member of any of the Civil Service or whether the Civil Services Rules are applicable to him or not. This aspect of the matter has been elaborately discussed in *Nagendra v. Commissioner*, AIR 1955 Cal 56 and *Brij Nandan v. State of Bihar*, AIR 1955 Pat 353. Similarly, whether remuneration is paid or not, is immaterial as has been held in *Jayanti Prasad v. State of U. P.*, AIR 1951 All 793 and *Rems v. Province of Bengal* 1953 (57) WM 767. provided the person has been employed by the Union or State to a post for the discharge of public duties, not connected with defence. A 'post', in this context, denotes an office. A post under the State is an office or a position to which duties, in connection with the affairs of the State are attached, an office or position to which a person is appointed and which may exist apart from and Independently of the holder of the post. A 'post' under the State means a 'post' under the administrative control of the State. Sometimes, a question for determination arises whether a relationship of 'master and servant' exists between the Government and employee in question and this fact is to be determined on a consideration of all the relevant circumstances in each case. In *Pradyat v. Chief Justice*. (1955) 2 SCR 1331. It was observed that, in general, selection by the employer coupled with payment by him or remuneration or wages, the right to control the method of work and power to suspend or remove from employment . are Indicative of the relation of master and servant. But, co-existence of all the Indicia is not predicated in every case to make the relation one of master and servant. Ordinarily, the right of an employer to control the employee of doing the work and the power of superintendence and control may be treated as strongly Indicative of the relation which Imports the power not only to direct the doing of some work but the power to direct the manner tn which the work is to be done. In *Shiv Nandan v. Punjab National Bank*. (1955) 1 CCR 1427 and *Piyare Lal v. Commissioner of Income Tax*, 1963 SCR 669. It was held that if the employer has that power, prima facie, the relation is that of master

and servant as distinguished from that of an Independent contractor. On the other hand, if the test of administrative control and the relationship of master and servant is established, a fact that the holder does not enjoy a definite rate of pay, but works on commission or is a part time employee or that he is protected by Industrial and Labour law, does not exclude him from the category of the holder of a 'civil post' under the Government.

9. Without burdening this judgment with the plethora of rulings on the point, suffice it to make a reference to a celebrated decision of the Constitution Bench of the Supreme Court in *State of Assam and others v. Kanak Chand Dutta*, AIR 1967 SC 984. In that case, the question was whether a Mauzadar in Assam who is known as a revenue contractor. Is the holder of a 'civil post' and consequently, a public servant. The primary duty of a Mauzadar was to collect land revenue and other governmental dues with the collection of which he is entrusted. He is responsible for the collection of toll tax, house tax, Tahabazarl, grazing fees and forest dues. He undertook to pay into the Treasury the full amount of all Instalments of land revenue and local rates Included in the zamabandl and all the house tax, toll tax and grazing fees, within one month of the date on which they fall due for payment. In regard to land revenue, house dues are confined to collection and he is not concerned with Us assessment, the settlement of land and the checking of maps or assessment papers. There are executive instructions contained in Assam Land Revenue Manual providing for method of selection, appointment and dismissal of a Mauzadar. the dues and emoluments of the office and the registers to be kept and maintained by him. A Mauzadar is generally an influential and well-to-do resident of the Mauza. He may be appointed or dismissed by Deputy Commissioner subject to the Commissioner's approval and suspended by Deputy Commissioner on his authority. A Mauzadar's successor is ordinarily selected from amongst the members of his family. If a suitable heir of deceased Mauzadar is a minor, the post may be kept open for him for a period not exceeding three years and an agent being appointed in the meantime to carry on the duties of Mauzadar. Remuneration of a Mauzadar is generally by way of commission on the revenue local rates and grazing dues collected by him but he may also be paid a fixed salary. Judged in the light of the above facts, the Supreme Court held that the Mauzadar is a person holding a 'civil post' under the State within the meaning of

Article 311 and there is a relationship of master and servant between the State and a person acting as a Mauzadar. A Mauzadar was held to be entitled to the protection of Article 311 of the [Constitution of India](#).

10. In the backdrop of the above legal position, now let us examine the provisions of the Act to determine whether a Company Commander in Home Guard is the holder of a 'civil post' within the meaning of Article 311 or not. The preamble indicates that the Act was brought into existence 'for the constitution of a force known as the Uttar Pradesh Home Guards for utilising its services for duties in times of emergency and serving as an auxiliary to the police' for the maintenance of law and order'. Section 2 (e) defines a 'Home Guard' to mean a person who is enrolled as such, and includes an officer appointed under the Act. Section 4 enumerates the functions of the Home Guards : they are to serve as auxiliary to the police, and, when required, help in maintaining public order and internal security ; to help the community in air raids, fires, floods, epidemics and other emergencies ; to function as an emergency force for such special tasks as may be prescribed ; to provide functional units for essential services and to perform such other duties, relating to any measure of public welfare as may be prescribed. The Commandant-General of Home Guards and other officers are to be appointed by the State Government under Section 5 of the Act. Under Section 6, the Superintendence of Home Guards vests in and is exercised by the State Government and the administration of the Home Guards throughout the State vests and is exercised by the Commandant General and other officers. In sub-section (3) of Section 6, it is provided that subject to the general control and direction of the District Magistrate, the administration of the Home Guards in a district shall vest in and be exercised by the District Commandant. Section 7 deals with the enrolment of the Home Guards, who after the enrolment, receives a certificate of appointment in the form set out in the Second Schedule under the seal and signature of such officer as may be prescribed, by virtue of which he shall be vested with the powers and privileges and be subject to the duties of a Home Guard. Under Section 8, the District Magistrate or the District Commandant have been vested with the power to pass an order to call out any Home Guard attached to a unit posted in the district for duty in any area within that district. The Commandant General may call out any Home Guard for duty in any part of the

State or outside the State. A provision regarding powers, privileges and protection of Home Guards has been made under Section 9 of the Act. The Home Guards have been given the corresponding ranks in the police force as may be subject to the provisions of the [Police Act, 1861](#)- A Home Guard cannot be prosecuted in respect of anything done or purporting to be done by him in the discharge of his duty as a Home Guard, except with the previous sanction of the District Magistrate. Section 10, however, makes a specific provision that though the Home Guards are to be the public servant, but they are not 'civil servants'. The Explanation to Section 10 provides that a Home Guard shall not be deemed to be a holder of a 'civil post' merely by reason of his enrolment as Home Guard- Section 11 deals with the liability for service, inasmuch as, a Home Guard shall be bound to serve in any unit of the Home Guards to which he is for the time being attached and the initial period during which a Home Guard may be required to serve shall be three years from the date of his enrolment. Every Home Guard shall be liable to serve, when called out in the prescribed manner, for duty in any part of the State, and the Home Guards called out for duty may be paid such allowances as may be prescribed. The Home Guards may ordinarily be called out to serve in the areas of their enrolment and only for part time duty. Under Section 12 the Commandant-General or any other officer prescribed in that behalf, shall have the authority to discharge or suspend any member of the Home Guards in accordance with the rules made in that behalf. If a Home Guard falls to report himself when called out for duty, or without sufficient excuse, neglects or refuses to obey any lawful order or direction of his superior officer or other competent authority, or fails to discharge his function as a member of Home Guards while on duty, or deserts his post, or is guilty of cowardice or offers any unwarranted personal violence to any person in his custody, he is liable to be prosecuted and punished under the provisions of Section 13 of the Act.

11. A close examination of the above provisions would make it abundantly clear that a Home Guard is employed by the State and is under its direct administrative control. There is no sphere of his employment and work. such as, appointment, function, duties, powers and privileges, which is left untouched and uncontrolled by the State Government. Due protection has been provided which is available to every public servant in the performance of his public duty. The primary function of

a Home Guard is to serve as auxiliary to the police in times of emergency and for maintenance of public order and Internal security. There is, thus, complete control over the work, function and duties of a Home Guard. It is not that any person who volunteers himself to work as Home Guard may be enrolled. There has to be scrutiny before making an appointment or enrolling a Home Guard. The power of suspension, termination or removal vests in the State Government. A Home Guard cannot disobey the orders of the State Government or desert his duties. In view of the various provisions contained in the Act, the position of a Home Guard is not that of a volunteer but of a public servant as has been specifically mentioned in Section 10 and as the position flows from the various other provisions of the Act.

12. A little doubt is created by the Explanation appended to Section 10 which provides that though a Home Guard is a public servant, he is not to be treated as holding a 'civil post' merely because of his enrolment under the Act. In Vibhuti Narain Singh's case (supra), this aspect of the matter was considered. It was observed that the Explanation is of no assistance in the determination of the controversy. Section 10 appears to have been enacted to Include a Home Guard within the ambit of Section 21 of the Indian Penal Code. However, any question under Article 311 of the Constitution has to be determined with reference to the connotation of these words as appearing in the Constitution itself. The meaning of a term as appearing in the Constitution cannot be controlled or whittled down by any ordinary law. If a person holds a civil post, as contemplated by our Constitution, he cannot be excluded from the protection or privilege conferred upon him by a constitutional provision by the, simple expedient of excluding him from the definition of holder of 'civil post byan ordinary statutory provision. Section 10, therefore, in my view, cannot negate the meaning of 'civil post' as contained in Article 311 of the [Constitution of India](#), merely because a sweeping provision has been made 1n the Act. In view of the various decisions of the Supreme Court, particularly that of Kanak Chand Dutta's case (supra), all the relevant considerations for determining a 'civil post' exist in the case of a Home Guard enrolled under the Act. To fortify the point it would not be out of place to make a reference to a decision reported in Sher Singh Malhan v. State of M. P.. AIR 1955 Nag 175, in which again a question was whether a person holding rank of Deputy Company Commandant, whose services were terminated without complying with

the provisions of Article 311 of the [Constitution of India](#), is the holder of a 'civil post' or not. The petitioner, in that case, was governed by C. P. and Barar Home Guards Act, 1947, the provisions of which are akin to the provisions of the Act. In the preamble, the C. P. and Barar Act was passed to create a body of volunteers to supplement police force and to assist in any general measure of public welfare in Madhya Pradesh. It was held that there was no doubt that the petitioner Sher Singh held 'civil post' in the State and was entitled to the protection under Article 311. The fact that the present petitioner is drawing only an honorarium of Rs. 100 per month and that he was required to perform his duties on part time basis as and when called upon, would not make any difference in view of Kanak Chand Dutta's case (supra). In Brojo Gopal Sarkar v. Commissioner of Police. AIR 1955 Cal 556, the Calcutta High Court has held that a member of a Special Police Force has the status of a holder of 'civil post', entitled to the protection of Article 311.

13. In view of the above analysis and placing reliance on the direct decisions of this Court in Vibhutt Narain Singh's case as well as in Dashrath Singh Parthar's case (supra), I have no hesitation in recording a finding that the petitioner, who is a Company Commander, enrolled under the Act. Is holding a 'civil post' and is, therefore, entitled to the protection under Article 311 of the [Constitution of India](#).

14. It is an indubitable fact that before passing the impugned order, terminating the services and disengaging the petitioner, no charge-sheet was served upon him. He was not required to show cause, no opportunity of hearing was afforded and no departmental enquiry was conducted into the allegations of misconduct and remissness against the petitioner. The provisions of Article 311 of the [Constitution of India](#) were given a total go-by perhaps on the ground that the State thought that since the petitioner is a volunteer and not holding a 'civil post' has no right to the protection of Article 311 of the Constitution of India. As such, the termination of services is, ipso facto. Illegal and void. The Apex Court in a catena of judgments in the case of L. Robert D'Souza v. Executive Engineer, 1982 (1) SCC 654 ; Delhi Cloth and General Mills v. Shamhoo Nath Mukherji, 1977 (4) SCC 412 ; Santosh Gupta v. State of PatSala, 1980 (3) SCC 340 ; State Bank of India v. V. N, Sundara Moneu, 1976 (I) SCC 822 ; Hindustan Steel Limited v. Presiding Officer, Labour Court, 1976 (4) SCC 822 and in the Constitutional Bench of the Supreme

Court in Punjab Land Development and Declamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh, 1993 SCC 682, has not approved the practice of terminating the services by short circuiting the procedure of departmental enquiry.

15. The principles of natural Justice are part of the In-built procedure for terminating the temporary employees without assigning any reason. In the Instant case, the petitioner has worked to the full satisfaction of his superior for a long period. Even if it be taken that he continued to be a temporary employee, the services could not be terminated without assigning any reason particularly when the post which the petitioner was holding continues to survive. The Impugned order of termination turns out to be unjust, arbitrary and unfair, violative of principles of Article 14 of the [Constitution of India](#). It also violates Article 21 of the Constitution. Inasmuch as Article 21 takes within its sweep the life with liberty, dignity of person which means a livelihood without which the glorious contents of the dignity of the person would be reduced to animal existence. It has been interpreted that the colour and content of procedure established by law must be in conformity with the maximum fairness and processual Justice. A strong reliance is placed on the decision of the Supreme Court in the case of D.K. Yadav v. J. M. A. Industries Limited. 1993 (67) FLR 111, for fortifying the above reasonings.

16. In the result, the writ petition succeeds and is allowed with costs. The Impugned order dated 24.7.1996, which is Annexure-3 to the writ petition, passed by the District Commandant, Home Guards, Hamirpur, based on the order dated 16.7.1996 of Headquarters, is hereby quashed. The respondents are directed to reinstate the petitioner on the post of Company Commander. It is further directed that the honorarium according to rules, shall be paid to the petitioner for the period he has remained out of Job.

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