

CASE NO.:
Appeal (civil) 4420 of 1999

PETITIONER:
State of West Bengal and Ors.

RESPONDENT:
Vs.
Pantha Chatterjee and Ors.

DATE OF JUDGMENT: 07/07/2003

BENCH:
Brijesh Kumar & D.M. Dharmadhikari.

JUDGMENT:

JUDGMENT

WITH

CIVIL APPEAL NOS. 4421/1999, 4422/1999 & 4423/1999
BRIJESH KUMAR, J.

The State of West Bengal and others have preferred these appeals against the judgment and order passed by the Division Bench of Calcutta High Court, dated May 2, 1996, dismissing their appeals with some modification in the Judgment of the learned Single Judge, allowing, by a common judgment, four writ petitions filed by respondents-petitioners. It will be pertinent to mention here that the Union of India, the Inspector General, Border Security Force and the Commandant 65 Battalion, Border Security Force, Calcutta were also impleaded, in the appeal, as proforma respondents 10 to 12 in the High Court.

The part time Border Wing Home Guards (for short 'BWHG') being dissatisfied with the pitiable conditions of service under which they had been working and the nominal emoluments paid to them, preferred four writ petitions before the Calcutta High Court complaining that they were being discriminated vis-a-vis other regular Border Wing Home Guards of the West Bengal and the Border Security Force Personnel, as the writ petitioner-respondents had also been performing similar duties and discharging same responsibilities. The learned Single Judge considering all the material on the record, came to the conclusion that there is a relationship of master and servant between the writ petitioners and the State of West Bengal, who is their appointing authority as well. So far the nature of the employment is concerned, as to whether it was casual and voluntary, the learned Single Judge has referred to the Memo dated October 11, 1985 issued by the Deputy Secretary, Home (Civil Defence) Government of West Bengal, a part of which is reproduced herewith: "though the Border Wing Home Guard boys are supposed to render voluntary service and are subject to rotational duty, actually the same sets who were enrolled and deployed at the time of formation of the Battalion in 1977 are still working and their duties have never been rotated." On the basis of the above, the Government of West Bengal had strongly recommended for making the services of the part time Border Wing Home Guards as permanent WBHG. The learned Single Judge has therefore concluded that the petitioners could not be treated as volunteers engaged in casual nature of work so as to be termed as part time staff of the Government of West Bengal.

The learned Single Judge also referred to a decision of Guwahati High Court in C.R. No. 119 of 1981 (Ratanlal Dutta Vs. State of Tripura and Ors.) which in turn relying upon AIR 1987 SC 664, State of West Bengal Vs. Kanak Chandra, held that there existed relationship of master and servant between such home guards and the State government. They were also held to be holders of civil posts under Article 311 of the Constitution and members of permanent staff of the State Government. After referring to decisions of this Court, a few of which may be mentioned here eg. AIR 1987 SC 2342 Bhartiya Dak Tar Mazdoor Manch Vs. Union of India and Ors., on the point that the Government could not take advantage of its dominant position to treat the work as casual and retain them on lower wages and AIR 1987 SC 2049, Bhagwan Dass and Ors. Vs. State of Haryana and Ors. for the proposition 'equal pay for equal work' besides AIR 1991 SC 101, Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Ors., it has been held by the learned Single Judge that the petitioner-respondents are entitled to the same benefits as admissible to the permanent BWHGs.

It has also been found that Union of India is responsible for the salary and other allowances payable to the writ petitioners which the Central Government had undertaken to reimburse to the State Government but the appropriate authority for redressal of their grievance is only the State of West Bengal and not the Border Security Force or Union of India. It was also found that there was clear discrimination between the permanent staff and the part time Boarder Wing Home Guards on all counts. So far the question of reimbursement is concerned it is held that the dispute is between the State Government and the Central Government which has to be sorted out between them and the respondent-writ petitioners could not be concerned with it.

The learned Single Judge finally issued the following specific directions : (I) part time members of the Border Wing Home Guards would be treated at par with whole time staff of the Border Wing Home Guards, (II) they would get all the privileges of the State armed police as extended to a full time Border Security Wing Home Guards (III) all the benefits available to the West Bengal Government Servants, for example, fixation of pay, benefit of provident fund, gratuity, retiral benefits and allowances and leave etc. shall also be made admissible to the petitioners (IV) arrears of service benefits were also directed to be given to them since the time of their joining (V) they were also directed to be absorbed irrespective of age bar which would stand waived. The judgment was to operate in rem covering all the part time members of the Border Wing Home Guards and each of the petitioner was awarded cost of Rs. 1,000/- which cumulatively came to Rs. 2,73,000/-.

The Division Bench also arrived at and upheld the findings as recorded by learned Single Judge. The State of West Bengal also seems to have canvassed before the Bench that the liability to make payment would only be that of the Central Government alone. However, we find that on considering the facts and circumstances and the memos issued from time to time by the Government of India and State of West Bengal, the Division Bench held that the Battalion of Border Wing Home Guards was raised by the State Government and they were being paid by and from a particular head of expenditure of the State Government. The Union of India had only undertaken for the full reimbursement of the expenditure

incurred by the State government but this would not be enough to hold that the respondent-writ petitioners are employees of Union of India. So far BSF is concerned, they exercise only operational control over them in the field. In our view, the Division Bench has rightly arrived at and upheld the finding recorded by the learned Single Judge. The work, it has been observed, is of a perennial nature and no one was discontinued on expiry of three months of initial appointment. Therefore, there was no occasion to disengage them after they were continued for years after years, on the ground that they were engaged for casual nature of work. With the above findings, the Division Bench dismissed the appeal with a modification that the order of the learned Single Judge to the effect that the judgment was in rem and levy of costs of Rs. 1,000/- for each petitioner, was set aside.

It appears that necessity was felt for raising of Border Wing Home Guards Battalion in the States of Assam, Meghalaya, Tripura and West Bengal so as to strengthen the measures against infiltrations of foreigners from across the borders. With that view, the Government of India, Ministry of Home Affairs promulgated a scheme by means of Memo No. 1/17/75-DGCD (HG) dated October 15, 1976 Government of India, Ministry of Home Affairs. It was addressed to the Chief Secretaries to the Governments of Assam, Meghalaya, Tripura and West Bengal. It is indicated in the scheme that the President had sanctioned the raising of one Border Wing Home Guards Battalion with immediate effect. The Battalion was to be raised, as far as practicable, from within a belt zone of 30 miles along the border, any slight variation, if necessary, could be permissible by the Ministry of Home Affairs. The strength of the Border Wing Home Guards Battalions was to be within the existing allocated strength of States concerned. The preference was to be given to the Home guards Organisation already on the rolls but it was to be ensured that they were available for duty during emergencies both for long and short durations. They were to conform to the required qualifications/standards. With a view to raise the Battalion speedily, permanent staff was provided to be taken on loan or retired defence, police personnel could also be taken in the Battalion. BWHG were to be utilized for the jobs assigned to them but the State Government could also deploy them for its purpose with prior clearance from the Home Ministry, Government of India. The expenditure incurred in payment of salary etc. for implementing the scheme was to be met by the Government of India. The initial expenditure on setting up the Battalion was to be incurred by the State Government itself. In case of urgency, if the State deployed the BWHG for its own purpose, the expenditure for such deployment was to be met by the State Government. The duties assigned to the Border Wing Home Guards is to be found in the appendix to the Memo dated 15.10.1976. According to which in the normal times and during period of tension on the Border they were to assist in providing local security to the border villages and thereby boost the morale of inhabitants and to pose as a deterrent against pilferage from across the border. The other duty was to protect the lines of communication in times of emergency and to assist the local administration in tackling the problems of internal security in the border areas and further as and when required to provide sub-units as auxiliaries to the Border Security Force including for the purpose of patrolling along the border and checking and preventing infiltrations.

In pursuance of the above said letter of the Govt. of India, dated 15.10.1976, the West Bengal Police Directorate issued a letter dated 14.3.1977 addressed to the Superintendent of Police of seven districts in the State of West Bengal in connection with

raising 8 companies of the Border Wing Home Guards as desired by the Govt. of India. A "secret" appendix was also enclosed along with the letter dated 15.10.1976 issued by the Govt. of India. Apart from indicating the role of the Border Wing Home Guards, it indicates the strength of the platoon and the number of persons with their designation who were to be employed on full time pay basis as well as on part time basis. It was provided that full time establishment was to be paid scale of pay and allowances admissible to the State armed police whereas Home Guards on part time basis were to be paid honorarium ranging from Rs.5 per month to Rs.15 per month depending upon the rank, namely, Guardsman, Lance Naik, Naik, Platoon Havaldar. The State Government, accordingly, as per Scheme of Government of India, recruited full time and part time Border Wing Home Guards, under the West Bengal Home Guards Act, 1962.

The main plank to oppose the writ petitions filed by the respondents has been that "Home Guards" is a voluntary organization. The part time Border Wing Home Guards are entitled to the honorarium and they are to be paid only as and when their services are required and utilised. Their appointment was not to exceed for a period of more than three months except in cases where it was recommended otherwise by the authorities of the Border Security Force.

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 and 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 coys 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. III14011/6/79 â\200\223 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 coys of BWHGs had been serving in aid of BSF since 1978-79 without break in service. 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 Central 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. 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 the 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. 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.

Surprisingly, the point of it being a voluntary organization is beaten time and again by the State as well as by the Centre, 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. In that connection it may again be pertinent to reproduce Paragraph 4 of the counter-affidavit filed in this Court by the Central Government on 4.5.1998:

"The contents of Para 4 of the counter affidavit needs no reply since matters of record. The present situation which led to BWHG volunteers claiming service benefits is due to the fact that voluntary concept which is back bone of home guards organizations was not followed in letter and spirit by the state government. Due to

continuous deployment neither the turnover of personnel was carried nor apparently mandatory training was imparted."

By whose fault this scheme lost character of Voluntary Nature is not relevant for the purposes of the petitioners. It was the Scheme of the Central Government, it should have monitored its implementation to see that it was being executed as framed. Then again, the BWHGs were deployed and continued by BSF authorities, who were authorised in that behalf by the Central Government. BWHG could not be left in a lurch after being engaged continuously for more than 10 to 15 years for patrolling the borders under the conditions worthy of those who were doing the same job under the label of permanent staff. During all this period they were paid less and facilities and amenities were also almost nil. After suffering such a discrimination for a period of about a decade or more, when they approached the Court, then alone a decision is taken to disengage them for the reason that cases were being filed in the Court for being provided with similar conditions of service which were being enjoyed by their counter-part under the label of permanent staff. The Central Government could not hanker on technicalities of voluntary nature of their engagement despite their own admission of facts to the contrary. The stand of the State and the Central Government both are not bona fide. It is not good for an ideal employer to avoid liability and deny to give, what is legally due to one. Defeating such genuine and legal claims on technicalities would only result in great injustice.

With a view to recapitulate the legal position, we may briefly refer to some decisions of this Court apart from those relied upon by the High Court. In a decision reported in (1988)3 SCC p.354, Jaipal & ors. etc.etc. vs. State of Haryana & ors. etc.etc., it has been held to be a constitutional obligation to ensure equal pay for equal work where the two sets of employees discharge similar responsibilities under similar working conditions. The plea of temporary or casual nature of employment or full time and part time employees had been negated. Similarly, in the case reported in (1986) 1 SCC 637, Dhirendra Chamoli & Anr. vs. State of Uttar Pradesh, it was held that casual workers could not be denied same emoluments and benefits as admissible to the temporary employees on the ground that they had accepted the employment with full knowledge of their disadvantage. In (1991) 1 SCC p.619, Grih Kalyan Kendra Workers' Union vs. Union of India & ors., though on facts no discrimination was found but the principle of 'equal pay for equal work' was upheld and recognized where all were placed similarly and discharging same duties and responsibilities irrespective of casual nature of work. This right had been held to have assumed status of a fundamental right in service jurisprudence having regard to constitutional mandate of 'equality' in Articles 14 and 16. In Daily Rated Casual Labour through Bhartiya Dak Tar Mazdoor Manch Vs. Union of India & Ors., (1988) 1 SCC p.122, right of daily rated casual workers in the P & T department was recognized and they were directed to be paid in minimum of the scale as was admissible to the regular workers as both discharged similar work and responsibilities.

In the present case we have seen that there has not been any dispute about the nature of duties of the two sets of BWHGs. Ordinarily, no doubt they could claim benefits only in accordance with the scheme under which they were engaged. But as held earlier, the scheme was not implemented in its terms as framed. Hence, the distinction sought to be drawn between the part-time and the permanent BWHGs had obliterated and

both worked together shoulder to shoulder under similar situations and circumstances and discharged same duties. Once the scheme as framed failed to be implemented as such by those at the helms of the affairs and the part-time BWHGs were continued under the authority of those vested with such power to continue them, it is not open to the State Government or the Central Government to deny them the same benefits as admissible to members of the permanent staff of BWHGs. The decisions reported in (1992) 2 SCC p.29, Karnataka State Private College Stop-gap Lecturer's Association vs. State of Karnataka & ors. and (1999) 8 SCC 560, Government of India & ors. vs. Court Liquidator's Employees Association & ors. may also be beneficially referred to.

On the basis of the scheme, as promulgated by Government of India, the State Government with the sanction of the Governor of West Bengal raised the Battalion of Border Wing Home Guards, as indicated earlier and they were to be paid from a given head of expenditure of the State Government. The Scheme, however, makes it clear that the expenditure incurred would be reimbursed by the Central government. The Central Government should not and cannot get out of this undertaking. It is no doubt true that the State of West Bengal being in the position of an employer of the respondent-petitioners, owes the primary responsibility of making all the payments on account of salary, allowances and other perquisites to them as admissible to the permanent staff of the Border Wing Home Guards but this burden of expenditure must be ultimately borne by the Central Government. The petitioners have been guarding the borders of the country assisting the BSF in checking the infiltration from across the border. The petitioners have been working and discharging their duties under the control of the authorities of the Border Security Force. We also find that the Central government cannot shed its responsibility by raising a lame plea that it was because of the State Government that voluntary character of the engagement of the writ petitioners, as per scheme, was lost. In our view, the primary responsibility for deployment for such a long duration squarely lies upon the Central government. The deployment was envisaged to be for a period of 3 months, to be continued, only if necessary as may be assessed by the authorities of the Border Security Force. The authority to continue the deployment beyond the period of 3 months was entrusted to the responsible authorities of the Border Security Force by the Central Government itself. There is no dispute that the writ petitioners were continued accordingly. In such a situation the State Government hardly had any choice in the matter to cease or withdraw the deployment engaged in the job of patrolling of borders under operational control of BSF.

In the circumstances indicated above the High Court has rightly come to the conclusion that so called part time Border Wing Home Guards could not be treated differently from the permanent staff of the BWHG. They have been rightly accorded parity with them.

The petitioners may not suffer any further because of any confusion or misunderstanding between the Central and the State Government, if at all, we, therefore, feel it necessary to observe that the Central government must in all fairness accept its responsibility and make the necessary funds available for reimbursement, at the earliest. In this regard we make the specific directions to the effect that: (1) The State Government shall carry out order passed by the High Court and clear all the consequential monetary benefits to the writ petitioner-respondents within a period of 3 months from today with Statement of account to be forwarded to the Central Government for reimbursement; (2) The Central Government

within two months of the receipt of the said reimbursement statement shall reimburse the amount to the State of West Bengal; (3) In case there is any dispute or confusion in regard to the actual amount payable on account of reimbursement or otherwise, the same shall be sorted out between the State of West Bengal and the Central Government at the earliest but that would not be cause of delay in payment as indicated above; (4) that there shall be no delay in payment to be made as scheduled above by the State of West Bengal to the petitioners nor by the Central Government to the State of Bengal on account of reimbursement which may be subject to final settlement; in case of any dispute or doubt about the same, to be sorted out sooner or later between them.

The appeals preferred by the appellant-State of West Bengal are dismissed with costs subject to modification/further directions as indicated in the preceding paragraph.