

Ramanand Singh

Vs

State of Bihar and Another

Civil Appeal No. 1311 of 1970

(D. A. Desai, A. P. Sen, Baharul Islam JJ)

15.03.1982

JUDGMENT

DESAI, J. -

1. Appellant Ramanand Singh who claimed that he was Company Commander in the Bihar Home Guards Organisation, has questioned the order of termination of his service on May 1, 1952 by Commandant-General. Appellant was enrolled, according to him, as voluntary Home Guard by the District Magistrate on February 2, 1948. He was promoted and posted as Honorary Company Commander in Bihar Home Guards Organisation on February 16, 1949. He was recruited as Company Commander on Regular pay-roll according to him on a permanent post on March 1, 1949. He proceeded on leave for two months on March 18, 1950. It appears he was arrested on the allegation that he was involved in an offence of dacoity on April 12, 1950, and he remained in jail till 1964 during which period he was once acquitted by the Sessions Judge but the acquittal was set aside by the High Court of Bihar at Patna but on a further appeal to this Court he was acquitted. After being released from jail he filed M.J.C. No. 781 of 1964 in the Patna High Court impleading the State of Bihar and Inspector-General of Home guards as respondents. In the petition the appellant contended that his induction into the Home Guards Organisation as volunteer Home Guard on February 2, 1948, was by the District magistrate and that his subsequent promotion and posting as Honorary Company Commander and regular Company Commander was by the Provincial government and, therefore, his dismissal from service by the Commandant-General, Home Guards is violative of Article 311 of the Constitution and was void ab initio. This was the only contention which the High Court was invited to examine. A division Bench of the High Court held that no order of the Government of Bihar appointing the appellant as Company Commander, Home guards, has been produced. The High Court further observed that the appellant relied upon what are known as Bihar Home Guards Rules, 1948 ('1948 rules' for short) under which the appointing authority for the Company Commander was the provincial Government but it was conceded before the High Court that Rule 5 on which the appellant relied, was subsequently amended on December 27, 1949, conferring power on the Commandant-General to appoint Company Commanders and when the Rules were overhauled in 1953 this Amendment was continued and, therefore, the High Court found no merit in the contention of the appellant. Accordingly the High Court dismissed the petition with no order as to costs. Hence this appeal under the unamended Article 133(1)(a).

2. The appellant appeared in person and canvassed the same contention before us. We must frankly confess that this case suffers from a total lack of information. The respondents also have not placed on record various documents which they could not ought to have easily produced before the court and the only explanation Mr. Bhagat, learned counsel who appeared for the respondents, offered to us was that the appellant was prosecuted in a number of courts and the record pertaining to him was

called for by various courts and, therefore, it has become impossible for the respondents to trace the relevant records and to place the same before this Court. Maybe, the respondents may be handicapped in this behalf but thereby the situation does not improve and the case is being disposed of on utterly insufficient data. Even the appellant who argued with vehemence, has not produced the relevant records but wanted us to draw adverse inference against the respondents because his grievance was that on number of occasions his house was searched and his grievance was that on number of occasions his house was searched and his papers were taken away by the search parties, and therefore, he was unable to produce the primary documentary evidence which would have helped this Court in judgment the issues in their proper perspective, but the respondents had the original documents and they are being withheld with an ulterior motive.

3. Appellant says that his dismissal as Company Commander on May 1, 1952, by the order of the Commandant-General is void ab initio because it is ordered by an authority lower than the appointing authority and, therefore, Article 311 is violated. In support of this contention appellant drew our attention to Rule 5 of the 1948 Rules enacted in exercise of the power conferred by Section 13 of the Bihar Home Guards Act, 1947, ('Act for short') The Act is a bare skeleton statute and no provision of it would be helpful in deciding the contention raised before us. Appellant relied upon Rule 5 which reads as under :

5. Procedure for appointment of officers and men of the Home Guards Force. - (1) The Commandant-General, Battalion Commandants and Company Commanders shall be appointed by the provincial Government on the recommendations of a Committee, the constitution of which shall be announced in the Official Gazette by general or special orders of the Provincial Government.

(2) The Commissioner of the Division shall appoint Platoon commanders on the recommendation of the Commandant-General.

(3) The Battalion Commandants shall appoint Section Leaders, ordinarily from amongst the Home Guards, on the recommendations of platoon and Company Commanders.

(4)(i) Application for enrollment as a Home Guard shall be made in Form A (in Hindi) to the District magistrate of the district in which the appellant ordinarily resides.

(ii) Home Guards shall be enrolled by the District Magistrate on the recommendation of a Committee in each District consisting of the Commandant-General or in his absence Battalion Commandant, the District Magistrate and the Superintendent of police of the district, and a non-official Member nominated by the Provincial Government. The Chairman of the Committee shall be nominated from amongst its Members by the Provincial Government.

(iii) After holding tests of the general knowledge, alertness, intelligence and physical fitness of the candidates under its supervision, the Committee shall interview all or such of the candidates as it thinks fit and recommend, in order of preference, to the District Magistrate, a number of candidates 50 per cent more than the number of vacancies.

(iv) After such verification of character and antecedents of the candidates

recommended by the Committee as may be necessary, the district Magistrate shall enrol the required number of Home Guards.

(5) Seniority shall be determined by rank, and as between persons of the same rank by the date of promotion or appointment to the rank.

4. Relying on this Rule the appellant contended that the power to appoint Company Commander was conferred by the Rules on the provincial Government and, therefore, Commandant-General would not be the appointing authority and was in fact not the appointing authority and, therefore, the order dismissing the appellant from service made by the Commandant-General is by an authority lower than the appointing authority and therefore Article 311 is violated. Now, this simple question could have been answered one way or the other if the appointment order of the appellant was placed on record before this Court. It is agonising or the judicial process that this order is not available. Appellant contends that appointment order given to him was taken out from his house during the search of his house. That the house of the appellant was searched is not in dispute. We fail to see why the appointment order of the appellant should be taken away during the search. It is equally true that the counterfoil or a copy of the order must be available in the records of the respondents. They pleaded their inability, not very convincing, to produce the same for the reasons here in before set out. The unfortunate fact remains that the order is not before us. But appellant contends that if the Rule is manifestly clear that the power to appoint Company Commander was conferred on the provincial Government unless otherwise shown, the court must proceed on the assumption that the rule has been complied with and the authorities acted according to law. There is considerable force in this submission but there are two aspects which preclude us from taking it to its logical conclusion; one being that the High Court noticed in its judgment that it was conceded before the High Court that Rule 5 was subsequently amended on December 27, 1949, whereby the Commandant-General was designated as the appointing authority for Company Commanders and this amended Rule was continued when Bihar Home Guards Rules, 1953 replaced the 1948 Rules. The appellant countered by saying that even if the submission about the amendment is correct, the amendment came into force on December 27, 1949, while he was appointed as company - Commander on March 1, 1949 and, therefore, unamended Rule 5 would be enforce and the conclusion is inevitable that the Provincial Government was the appointing authority. Again there is considerable force in the submission but out attention was drawn to an order dated May, 21, 1949, issued in the name of the Commandant-General making appointment of 16 persons as whole time Company Commanders in the Bihar Home Guards Organisation. The opening part of the order has some significance and it may be extracted :

The following Honorary company commanders are appointed as whole time Company Commanders in the Bihar Home Guards on probation on the scale of pay of Rs. 100-160-E-B. 6-190 plus C.L.A. at the rate of Rs. 30 p.m. with effect from March 1, 1949 and are posted to districts noted against each.

At serial No. 4 appears the name of the appellant and he is posted at Gaya. Now, according to the appellant this is not the appointment order but it is the posting order. The language of the order does not admit of this construction. If the appointing authority was someone other than the Commandant-General who was only the posting authority, the order would have read :

The following Company Commanders who were appointed by the Provincial Government vide its order (No. sic) as whole time Company Commanders in the Bihar Home Guards on probation on the scale of pay of Rs. 100-5-160-E.B.-6-190 plus C.L.A. at the rate of Rs. 30 p.m. with effect from

march 1, 1949 are posted to districts, etc.

The order rather reads that it is not only an appointment order but on being appointed by the Commandant-General posting orders are also simultaneously issued. Shorn of the non-required details, the order reads 'the following Honorary Company Commanders are appointed and are posted'. Therefore, the order is both an order of appointment and of posting. It is issued in the name of the Commandant-General. The appointment becomes effective from March 1, 1949, from which date even according to the appellant, he was appointed as Company Commander and this very order recited his name and his posting. Therefore, it would appear that the appointment was made by the Commandant-General even though Rule 5 conferred power on the Provincial Government to make such appointments. It is quite likely that the amendment referred to in the judgment of the High Court may have been made with retrospective effect. We are left to guess work but this positive order would show that the appellant was appointed as Company Commander by the Commandant-General. Therefore, the Commandant-General had the power to dismiss him. The dismissal order would not be void on the ground that it is made by an authority lower than the appointing authority. Therefore, the contention of the appellant must be negatived.

5. As the only contention advanced in this appeal is found to be without merits, the appeal is dismissed with no order as to costs.

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