

SUREME COURT OF INDIA

Union of India

Vs.

Parul Debnath

C.A.No. _____ of 2009

(Altamas Kabir J.)

06.05.2009

JUDGEMENT

Altamas Kabir, J.

1. Leave granted.

2. In exercise of powers conferred by Article 240(1) of the Constitution of India, the President of India promulgated the "Andaman & Nicobar Islands Home Guard Regulation, 1964" (hereinafter referred to as "the 1964 Regulation"). In terms of Regulation 16 of the said Regulation, the then Chief Commissioner (now Lieutenant Governor), A&N Islands, framed the "*Andaman & Nicobar Home Guard Rules, 1965*" (hereinafter referred to as "the 1965 Rules") for providing a voluntary organization named as "A&N Islands Home Guard Organization" for use in emergency and for other purposes in the Union Territory of the Andaman & Nicobar Islands.

3. The respondents herein were appointed on different dates as members of the said Home Guard Organization under Regulation 4 of the said Regulation for periods of three years and since then they were continuously made to perform duties of a regular nature. They were also deployed to work under the operational control and supervision of the A&N Police and the overall control of the A&N Administration, without any break. From the tabulated statement forming part of the writ petition filed by the respondents, it appears that the respondents have been working for periods ranging from 12 years to 23 years. Inasmuch as, the respondents claimed to be performing works of a permanent nature, but were treated differently from the regular employees of the same organization, they claimed equal pay for equal work with the regular Home Guards or for regularization of their services.

4. Aggrieved by the differential treatment meted out to them in comparison to their counterparts in the regular administration, the respondents filed two Original Applications, being OA of India & Ors.) and O.A. No.28/AN/2002 (S. before the Central Administrative Tribunal, Calcutta Bench, Circuit Bench at Port Blair, for directions to be issued to the respondents herein to prepare an appropriate/ reasonable scheme for regularization of the

services of the Home Guards, who had been working for several years and to give them equal pay for equal work in relation to their counterparts in the regular organization and in particular to those Home Guards who were performing duties which were similar to the duties of the regular employees of the A&N Administration.

5. The Tribunal disposed of the said Original Applications by passing a common order dated 16th September, 2002, inter alia, with a direction to the respondents, and in particular the Union of India, the Respondent No.1 before the Tribunal, to consider the framing of an appropriate Scheme, in consultation with the A&N Islands Administration, for absorption/regularization/ appointment of persons like the respondents herein who had been working as Home Guards for a number of years. While framing the Scheme, the Respondent No.1 was directed to keep in view the observations made in paragraph 7 of the order to suit local conditions, keeping in mind the particular facts and circumstances of the case. It was provided that the said action should be taken by the appellants herein within six months from the date of receipt of a copy of the order.

6. The said order dated 16th September, 2002, of the Central Administrative Tribunal, was challenged by way of two writ petitions, being Parul Debnath & Ors.) and WPCT No.158 of 2003 Ors.), before the Division Bench of the Calcutta High Court, Circuit Bench at Port Blair. The said two writ petitions were disposed of by a common judgment and order dated 16.12.2003. While disposing of the writ petitions, the High Court, apart from considering the nature of the work performed by the respondents, also took into consideration the decision of this Court in *State of West Bengal & Ors. vs. Pantha Chatterjee & Ors.*¹ wherein in a similar situation certain directions had been given by this Court for framing a Scheme for similar purposes, and directed the appropriate authority to frame a Scheme as directed by the Tribunal and while doing so to take into consideration the principles laid down in Pantha Chatterjee's case (supra).

7. After the orders passed by the Circuit Bench of the Calcutta High Court at Port Blair in WPCT No.73 of 2003 and WPCT No.158 of 2003, one Manoj Kumar Singh and others, who were similarly situated as the respondents herein, moved a writ petition, being WP No.22 of 2004, before the Single Bench of the Calcutta High Court, which was disposed of on 18th March, 2004, with a direction upon the respondents to consider the case of the writ petitioners in accordance with the ratio of Pantha Chatterjee's case (supra). Special Leave Petitions filed by the Union of India against the orders passed by the Circuit Bench of the Central Administrative Tribunal, Calcutta Bench, as well as the Single Judge of the High Court, being SLP(C) No.14859 of 2004 and SLP(C) No.CC 7017/2004, were dismissed at the threshold on 9th August, 2004 and 30th August, 2004, respectively. Thereafter, on 5th April, 2005, a Scheme was framed by the appellants herein, which provided for reservation of 20% of the vacant posts to accommodate the respondents in a phased manner, while setting apart 80% of the vacancies for other candidates. The Scheme, as framed, was challenged by the respondents herein in Writ Petition No.195 of 2005 before the learned Single Judge, who by his judgment and order dated 28th July, 2006, dismissed the said writ petition upon holding that the Scheme had been framed by the Government Authorities having due regard to the principles laid down in Pantha Chatterjee's case (supra).

8. The matter was taken to the Division Bench in appeal, being MAT No.25 of 2006. On being convinced that the Scheme had not been framed in accordance with the views expressed in Pantha Chatterjee's case (supra), the Division Bench by judgment and order dated 22nd January, 2007, not only set aside the Scheme framed on 5th April, 2005, but also set aside the order of the learned Single Judge dated 28th July, 2006, whereby the writ petition had been dismissed. The Division Bench directed the Government Authorities to frame the Scheme afresh in keeping with the principles enunciated in Pantha Chatterjee's case (supra).

9. The instant appeal has been filed by the Union of India, the Lieutenant Governor, A&N Islands, Port Blair and other authorities of the Islands' Administration, alleging that the Division Bench of the High Court had erroneously reversed the judgment of the Single Judge despite the fact that the Scheme had been framed as per the directions of the Court in keeping with the principles set out in Pantha Chatterjee's case (supra).

10. Appearing in support of the Appeal, Mr. S.K. Dubey, learned Senior Advocate, drew the attention of the Court to the observations made in paragraphs 7 and 8 of the order of the Central Administrative Tribunal holding that having regard to earlier orders passed by the Delhi High Court for preparation of a Scheme to cover Home Guards in similar situations, it would be appropriate for the Union of India to contact the Government of NCT Delhi to examine the matter and, if necessary, modify the Scheme to suit local conditions. Mr. Dubey pointed out that the claim of the respondents herein for pay parity on the principle of 'equal pay for equal work' had been negated having regard to the provisions of the 1964 Regulation and the Rules framed thereunder in 1965. In addition, the question of regularization of the services of the respondents would not also arise as they were not working against sanctioned posts.

11. It was urged on behalf of the appellants that if all the vacancies were to be filled up from amongst the respondents, it would amount to 100% reservation, which is contrary to Articles 14 and 16 of the Constitution.

12. Drawing attention to the Scheme formulated pursuant to the directions given by the Division Bench of the High Court in WPCT No.73 of 2003 and WPCT No.158 of 2003, Mr. Dubey submitted that having regard to the compulsions of Articles 14 and 16 of the Constitution, it was decided to give effect to the directions of the High Court regarding absorption of the respondents in a phased manner. Mr. Dubey submitted that such a course of action would not only enable the authorities to implement the directions of the High Court, but to also comply with the requirements of Articles 14 and 16 of the Constitution. It was in keeping with such a policy decision that in the Scheme it was provided that of the vacancies occurring in any year, including the existing vacancies in all Group D posts under the A&N Administration and in the post of Constable in Group C under the A&N Police Department, 20% thereof would be earmarked for the Home Guards, who were enrolled and had completed at least five years of continuous services and fulfilled the eligibility conditions, including educational qualifications prescribed in the Recruitment Rules/Andaman &

Nicobar Police Manual, 1963. Mr. Dubey pointed out that in the Scheme it was also provided that the 20% quota would continue till such time as all the existing Home Guards fulfilling the eligibility conditions for absorption under the Scheme were absorbed. Mr. Dubey submitted that by its order dated 22.1.2007, the Division Bench of the High Court in MAT No.25 of 2006, erred in quashing the Scheme, as framed, upon holding that the same was not in conformity with the directions of the High Court or the directions in Pantha Chatterjee's case (supra). Mr. Dubey submitted that the Division Bench, while allowing the above-mentioned writ petitions on 16th December, 2003, directed the authorities to frame a Scheme and while doing so, to take into consideration the principles laid down in Pantha Chatterjee's case (supra). Mr. Dubey urged that there was no direction that the Scheme would have to be formulated in keeping with the principles enunciated in the said case, but to take the same into consideration while framing the present Scheme.

13. Mr. Dubey submitted that in order to strike a balance between the constitutional provisions and the directions given both by the Central Administrative Tribunal and the High Court, the authorities framed the instant Scheme which they thought would take care of both the conditions. It was also urged that the direction given for creation of supernumerary posts to provide for absorption of the existing Home Guards had been deprecated by this Court on several occasions in view of the financial implications on the State Administration in the creation of such posts and the infrastructure to go along with it. In this regard, reference was made to the decision of this Court in *Divisional Manager, Aravali Golf Club and another vs. Chander Hass and another*² wherein, since in spite of the fact that there were no sanctioned posts of tractor drivers against which the respondents could be regularized, directions had been given to create such posts and to regularize the services of the claimants against the said newly-created posts, this Court was of the view that such a direction was completely beyond the jurisdiction of the Courts. Further observations were made to the effect that the Court cannot direct the creation of posts since the same is the prerogative of the executive or the legislative authorities and the Court could not arrogate to itself this purely executive or legislative function and direct creation of the posts in the organization. It was also observed that this Court has, time and again, pointed out that the creation of a post is an executive and legislative function as it involves economic factors.

14. In support of his submissions regarding phase-wise absorption, Mr. Dubey referred to the decision of this Court in the case of *Mool Raj Upadhyaya vs. State of Himachal Pradesh*³ in which, in a similar situation, a Bench of three Judges of this Court observed that having regard to the additional financial implications that may be incurred by the proposed Scheme for regularization, as modified, the State should not be burdened with the financial implications arising out of payment of arrears for the period mentioned therein. It also approved the Scheme which included the decision to regularize the daily-wage/muster-roll workers in a phased manner on the basis of seniority-cum-suitability. Mr. Dubey also referred to another decision of this Court in *Gujarat Agricultural University vs. Rathod Labhu Bechar and others*⁴ wherein also this Court permitted the regularization of a large number of daily-rated labourers to be effected in a phased manner. Mr. Dubey lastly referred to the decision of this Court in *State of Manipur and another vs. KSH. Moirangninthou Singh and others*⁵ wherein following the decision in the case of *Secretary, State of Karnataka and*

*others vs. Uma Devi and others*⁶ it was held that in the absence of specific rules, the Court did not have power to direct regularization of the services of the Home Guards under the *Manipur Home Guards Act, 1966*.

15. Mr. Dubey submitted that the judgment and order of the learned Single Judge did not warrant any interference by the Division Bench, and, accordingly, the judgment under appeal was liable to be set aside and the scheme as framed was liable to be approved.

16. Mr. Dubey's submissions were hotly contested by Mr. B.K. Das, learned Advocate, who contended that the Scheme, as framed, was only meant to pay lip- service to the directions given by the Tribunal as well as the High Court and had been rightly quashed by the Division Bench in MAT No.25 of 2006. He urged that the directions as given by the Division Bench while disposing of the writ petitions specifically directed the authorities to frame a Scheme in keeping with the principles enunciated in Pantha Chatterjee's case (supra) since the decision of the Tribunal was justified. Since the said direction is relevant for disposal of this appeal, the same is extracted herein below:- "The appropriate authority shall frame a Scheme as directed by the learned Tribunal, if necessary, by issuing an appropriate Notification for the purposes mentioned in the order appealed against. When the Scheme is to be formulated, the appropriate authority shall take into consideration the principles laid down in the decision in Pantha Chatterjee(supra)."

17. Mr. Das submitted that from the above directions, it would be crystal clear that it was the intention of the High Court that the Scheme as contemplated should be formulated after taking into account the principles laid down in Pantha Chatterjee's case (supra). He submitted that otherwise, if that were not the intention, reference to Pantha Chatterjee's case (supra) was redundant. Referring to the Scheme, as framed, Mr. Das urged that it was the intention, both of the Central Administrative Tribunal as also of the High Court, that all the respondents had to be absorbed together and not in instalments, as has been sought to be done in the Scheme as framed by the authorities. Furthermore, the directions given being for absorption, it only required regularization of the services of the respondents and not new appointments and hence the question of reservation on any count is not applicable in the facts of the instant case.

18. Mr. Das submitted that the Scheme as framed was not in keeping with the directions given by the Division Bench and it had been wrongly claimed on behalf of the appellants that in the absence of any specific directions, they were not required to frame the Scheme on the basis of the observations made in Pantha Chatterjee's case (supra). Mr. Das urged that if every portion of the Scheme were to be analyzed carefully, it would be evident that the same had been framed in a manner which was contrary to the directions given by the Division Bench while disposing of the writ petitions and not also in keeping with the views expressed in Pantha Chatterjee's case (supra). Mr. Das urged that in the Scheme an attempt had been made to create a divide within the same class of Home Guards whose cases fall within the scope of the directions given by the Division Bench, which was not its intention.

19. Reference was made to the decision of this Court in *Baburam vs. C.C. Jacob and others*⁷ wherein it was laid down that the prospective declaration of law by the Supreme Court under Article 141 of the Constitution is to avoid reopening of settled issues and to prevent multiplicity of proceedings. Accordingly, once the matter relating to the regularization of the services of the Home Guards had been decided finally in Pantha Chatterjee's case (supra), it was no longer open to the Central Government to frame a Scheme to defeat the said decision.

20. It was urged by Mr. Das that the decision of the Division Bench did not warrant any interference.

21. Having considered the submissions made on behalf of the respective parties, we are inclined to accept Mr. Das's submissions, which were in support of the decision of the Division Bench of the Circuit Bench of the Calcutta High Court at Port Blair.

22. Firstly, we are in agreement with Mr. Das and the Division Bench of the High Court that the intention of the earlier Division Bench while disposing of the two writ petitions filed by Manoj Kumar Singh and others was that the Scheme was to be framed not only in terms of the directions given by the Central Administrative Tribunal, but also in the light of the views expressed in Pantha Chatterjee's case (supra). A glance at the Scheme framed makes it very clear that the same had not been framed in terms of the directions given by the Division Bench and also this Court and certainly not in keeping with the decision in Pantha Chatterjee's case (supra). As has been very rightly pointed out in the judgment under appeal, it was the intention, both of the Tribunal and the High Court, as well as this Court, that the respondent Home Guards were to be absorbed in the regular establishment of the Andaman & Nicobar Islands and no new appointment was required to be made. It was, therefore, the further intention of the Tribunal as well as the Courts that the absorption of the eligible respondents were to be at one go and not in phases, as has been sought to be suggested in the proposed Scheme. In fact, such a procedure had neither been directed by the Tribunal nor the High Court, nor this Court in Pantha Chatterjee's case (supra). As a result, the question of 100% reservation would not arise since the absorption of the respondents did not amount to new appointments which could have given rise to the question of reservation. In our view, the Division Bench has very correctly observed that the intention of the Tribunal and the Courts was that the benefits to be given to the writ petitioners (respondents herein) should be extended to all of them uniformly and without making any discrimination. The very fact that some of the respondents would be regularized, while the others would have to wait till the next vacancies arose or the possibility that some of the candidates who were otherwise eligible, might not even be absorbed, was never the intention when the directions were given to frame a Scheme for absorption of the respondents. In our view, such a course of action appears to have been adopted to negate the effect of the earlier orders so that the respondents as a whole were deprived of the benefit of absorption and the further benefit of 'equal pay for equal work', as was indicated in Pantha Chatterjee's case (supra). As a direct consequence of the disparity in the pay structure of the respondents, who were to be absorbed in stages, their post-retiral benefits would be affected and would not be uniform, which was also not intended when directions were given for framing of Scheme to absorb the said respondents.

23. Clause (h) of the Scheme, which has been commented upon by the Division Bench of the High Court, denies to the respondents any other benefit other than those specified in the Scheme, thereby creating a class within a class, which is not only contrary to Article 16 of the Constitution but is also contrary to the directions given by the High Court regarding absorption of the existing Home Guards. Even clause (i) is arbitrary and discriminatory in nature as it contemplates a situation where some of the respondents who were otherwise eligible, may not at all be absorbed in the regular administration which would disentitle them to the benefits of the directions given by the Central Administrative Tribunal and the High Court.

24. On the question of creation of supernumerary posts, it may be indicated that while it is no doubt true that creation of posts is the prerogative of the executive, in order to meet certain special exigencies such a course of action has been resorted to by this Court and in our view this is one such case where such a direction does not need any intervention.

25. In such circumstances, we see no reason to interfere with the judgment impugned and the appeal is accordingly dismissed.

26. The appellants and those concerned are directed to implement the directions given by the Division Bench in the impugned judgment within three months from the date of communication of this order.

¹2003 (6) SCC 469

²2008 (1) SCC 683

³1994 (Supp.) 2 SCC 316

⁴2001 (3) SCC 574

⁵2007 (10) SCC 544

⁶2006 (4) SCC 1

⁷1999 (3) SCC 362