

# **Jiban Krishna Mondal & Ors vs State Of West Bengal & Ors on 29 January, 2015**

**Author: Sudhansu Jyoti Mukhopadhaya**

**Bench: Sudhansu Jyoti Mukhopadhaya, Vikramajit Sen**

REPORTABLE

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6373 OF 2010

JIBAN KRISHNA MONDAL & ORS.

APPELLANT(S)

VERSUS

STATE OF WEST BENGAL & ORS.

RESPONDENT(S)

WITH

C.A. No.6374 of 2010

C.A. No.6375 of 2010

C.A. No.55 of 2015

C.A. No.56 of 2015

C.A. No.57 of 2015

C.A. No.58 of 2015

C.A. No.59 of 2015

C.A. No.60 of 2015

C.A. No.61 of 2015

## **J U D G M E N T**

SUDHANSU JYOTI MUKHOPADHAYA,J These appeals have been preferred by the appellants against the judgment and orders passed by the Calcutta High Court in F.M.A. No.588 of 2002 etc. dated 31st January, 2008, in W.P. No. 14779(W) of 2005 etc. dated 23rd July, 2008 and in M.A.T. No. 4609 of 2006 dated 26th November, 2008. By the impugned judgment dated 31st January, 2008, Division Bench of the High Court set aside the judgment of learned Single Judge dated 21st May, 1999 in C.O. No.21365(W) of 1995 and disposed of the writ petitions preferred by appellants-members of the Home Guards and their Association accordingly. By the impugned orders dated 23rd July, 2008 and 26th November, 2008, learned Single Judge and Division Bench of the High Court respectively disposed of the writ petitions preferred by appellants-Home Guards and appeals preferred by the State relying on observations made by Division Bench in F.M.A. No. 588 of 2002.

2. The only question involved in these appeals is whether the appellants and other members of West

Bengal Home Guards are in services of the State and whether they are entitled for regularization of their services or any other relief.

3. The appellants took plea before the High Court that the members of West Bengal Home Guards are in the services of the State performing the same duty like police constables who are Government employees. They are also entitled for regularization of their services and regular pay at par with the police personnel.

4. The aforesaid plea taken by the appellants were opposed by the State of West Bengal and Union of India. According to them, the members of West Bengal Home Guards are volunteers who are neither employees of the State nor entitled for regular scale of pay and hence the question of regularization of their services does not arise.

5. The submission on behalf of the appellants was accepted by the learned Single Judges of the High Court who directed the State to give equal salary, allowances and other benefits as allowed by service standard to police personnel of Class IV category. Against which, the appeals were preferred by the State before the Division Bench. By the impugned judgment and orders High Court disposed of the said appeals and fresh writ petitions preferred by the Home Guards. By the impugned judgment dated 31st January, 2008, the Division Bench of the High Court held that the members of Home Guards are volunteers. However, taking into consideration the sufferings and miseries so highlighted by the members of the Home Guards, the Division Bench observed:

"We, however, express our desire that the legislature as well as executives should re-think on the issue as to what best they can do within the frame work of the Constitution for welfare of the members of the home guard. They have given some benefits in deference to the desire of this Court as discussed above. We hope and trust in future they would try to give something more. We, however, cannot issue any direction on that score. It would be open for the legislature to re-enact the law on the subject. It would be open to the executives to extend further benefits if permissible within the scope of the said Act of 1962 as amended up-till date. We, abundantly make it clear that our desire should not be construed as any special right accrued in favour of the members of the home guard to claim as a matter of right any further benefit from the State. The State would be free to act in accordance with law. While doing so they should keep in mind the plight of the members of the home guard so highlighted by us as above and should consider their case sympathetically in the light of the observation made by us herein before."

6. It is informed that pursuant to judgment and orders passed by the High Court the State of West Bengal has increased the duty allowance which is more than Rs.300 per day.

#### STAND OF THE APPELLANTS

7. The gist of the arguments advanced on behalf of the appellants can be summarized as follows:

(i) A bare reading of the provisions of the West Bengal Home Guards Act, 1962 (hereinafter referred to as '1962 Act') and West Bengal Home Guards Rules, 1962 (hereinafter referred to as '1962 Rules') clearly establishes that there is an organized service called the Home Guard under the State and there exists master and servant relationship between the Home Guards and the State Government. The State Government exercises complete supervision and control over the work done by the Home Guards and directs what work is to be done and in what manner it is to be done. The Home Guards satisfies all the following tests laid down by this Court in *Balwant Rai Saluja vs. Air India Ltd.* (2014) 9 SCC 407 to determine the relationship of master and servant:

(i) who appoints the workers;

(ii) who pays the salary/remuneration;

(iii) who has the authority to dismiss;

(iv) who can take disciplinary action;

(v) whether there is continuity of service; and

(vi) extent of control and supervision i.e whether there exists complete control and supervision.

(ii) The State Government failed to prescribe pay scale of the Home Guards which is one of the essential conditions of service. In the 1962 Rules, it was merely stated that the service would be voluntary and unpaid, which was never the intention of the Act. The Act never intended to create voluntary service of Home Guard.

(iii) Rule 4 of the 1962 Rules is ultra vires the Act inasmuch the Act never contemplated that the service would be voluntary and unpaid. Rule 4 is also unconstitutional, being arbitrary and being violative of Articles 14 and 16 of the Constitution of India and it amounts to forced labour under Article 23 of the Constitution.

(iv) Appellants were regularly appointed as per the procedure prescribed under the said Act and Rules. The appointment letters of the appellants clearly state that they are appointed as members of Home Guard under the Act and while on duty they will have the same powers, functions and privileges as Police Officers appointed under the Police Act (Act V), 1861.

The appointment letters do not state that the appellants were appointed as volunteers. Even as per the finding of the Division Bench of the High Court in the impugned judgment "it is however an admitted fact for all practical purposes that they are engaged on continuous basis upto the age of 60

years when then are disengaged because of their advance stage." It is thus wrong to contend that the appellants were appointed as volunteers and not as members of Home Guard.

(v) West Bengal Home Guards (Amendment) Act, 1990 was passed by the West Bengal Legislature whereby the word "member" was substituted by word "volunteer". However, the Act is not retrospective and came into force on 1st October, 1989. It is pertinent to note that all the appellants were appointed between 1966 and 1974, i.e. prior to coming into force of the Amendment Act. The Amendment Act has thus not altered the status of the appellants from that being "member" of Home Guards to "volunteer" of Home Guards.

(vi) The Home Guards were initially paid Rs.2.50 per day which was enhanced to Rs.24.71, then to Rs.53, to Rs.117 and finally to RS.328 which is presently being paid. The payment of Rs.328 per day to them who are duly trained is a pittance and much below the minimum scale of pay of the State Government. Payment of wages below the minimum wages fixed under the Minimum Wages Act, 1948 amounts to forced labour within the meaning of Article 23 of the Constitution. The appellants are thus entitled to regular scale of pay from the date of their appointment.

#### STAND OF THE STATE OF WEST BENGAL

8. On the other hand, according to learned counsel for the State, in absence of any sanctioned post for members of Home Guard, the appellants cannot claim to be employees of the State. The word "appointment" used in the Act and Rules amounts to enrollment of members in the Home Guard. The following submissions were also made:

Section 7 of the Act provides that the members of Home Guard called out u/s 5 directly in aid of police force shall be under the control of officers of such force in such manner as may be prescribed by rules made u/s 9. This provision clearly indicates that whenever any member of Home Guard will be called he will discharge his duties. The expression "called out" clearly shows that their services are called out only when they are required as per the circumstances and thus they are not rendering any service like a permanent employee.

Rule 4 provides that the service in the Home Guard shall ordinarily be voluntary. A plain reading of the objects/reasons and the provisions of the Act and the rules framed thereunder clearly indicates that the services of the members of the Home Guard are voluntary in character.

Like in other states, in West Bengal also the members of the Home Guard are meant for voluntary service and in effect they have accepted the above position for decades together and now at almost the fag end of their enrollment as member, they cannot demand that they were entitled to be appointed in the substantive post and entitled to get any pay scale whatsoever.

All throughout their enrollment as members they have received duty allowances, which were time to time fixed by the order of the Governor of West Bengal. Further in the affidavits the appellants have incorrectly used the expression "daily wages" instead of "duty allowance". Section 9 of the Act empowers the State Government to make rules in different fields including condition of service and allowances. But no pay has been prescribed in the rules made thereunder as well. But in terms of provisions of the Act duty allowance has been given to them as prescribed from time to time. Since the Act and Rules did not prescribe any scale of pay, the question giving any pay scale did not and does not arise. But all throughout they were paid duty allowances. It cannot be said that the members of the Home Guard were treated as bonded labour because neither were they forced to work nor were they unpaid. They were paid a substantive amount which is called as Duty Allowance.

It would be evident from the statement of objects and reasons of the 1990 amendment, that the voluntary character of the Home Guards Organization and its members had not also been explicit in the 1962 Act because of use of the word "appointment as members", and this gave rise to confusion and claims of permanent status. The amendment Act was brought in 1990 so as to clarify the voluntary character of the Home Guard Organization and that the volunteers were enrolled in honorary and voluntary capacity. The expression "Voluntary" was used in the 1960 Rules itself. If objects and reasons of the 1962 Act, 1990 Act and the provisions of the Act and Rules are taken into consideration, it can be safely said that the status of the members of the Home Guard are voluntary in character and only when they are called upon to discharge their duty they perform their duty. Further they are not entitled to get any pay or any other benefits except duty allowances which the State Government may time to time fix.

#### STAND OF THE UNION OF INDIA

#### 9. Learned Attorney General appearing on behalf of Union of India made the following submissions:

The concept of Home Guards has always been voluntary. This concept originated after the Second World War. In India, it was first conceived as a force in 1946. The Bombay Home Guards Act, 1947 apparently was among the first few of such State enactments. Its preamble states that it is "a volunteer organization for use in emergencies....." Section 3 provides for appointment of Home Guards, "who are fit and willing to serve....." Rule 8 of the Bombay Home Guard Rules, 1953 provides that the term of a Home Guard shall be three years.

The following features are note-worthy in the said Act.

There is no salary, retirement benefits like pension etc. There is no regular cadre.

The term of Home Guard is only 3 years.

(iv) Persons "fit and willing to serve" are to come forward to join as Home Guards.

(v) It is a volunteer organization.

(vi) No methodical system of recruitment.

This Act has been extended to Delhi.

A Careful perusal of almost all the State enactments will show that the Organization was always meant to be voluntary and it consisted of people from all walks of life. In fact Government servants were also enrolled in the Home Guards to be called as and when the need arises. However such persons were to route their application through their employers with the employer's No objection to lend their service. In fact refusal of an employer or obstruction met with penal consequences. For the period when these enrolled person were called for Home Guard duty, their service was treated as continuing and salary was to be paid. This shows that Home Guards are not a separate full time employment but it was utilized for specific occasions. Realizing that the 1962 Act did not use the term "volunteer" or "enrolment" and since there was a spate of litigations, the Act was amended in 1990. The Statement of Objects and Reasons dated 18th April, 1990 is critical. It states that the Act was passed in the wake of external aggression in 1962. It states that the voluntary character was also not explicit in 1962 Act and this gave rise to confusion and claims of permanent status. It was made clear that the character of Home Guards shall be voluntary where volunteers would be enrolled in honorary and voluntary capacity. What was implicit was thus made explicit. The 1962 Act was made after more than 15 years of other State Acts. The legislature of the State would be aware of the legislatures in different parts of the country dealing with the same issue and had framed it accordingly. By virtue of amendment, the concept of voluntary nature of service and voluntary organization was made clear.

The amendment is thus purely clarificatory. It made explicit what was implicit before. Clarificatory amendments will be retrospective in nature since the intention of the Act would be deemed to be right from the inception. Hence the term voluntary and enrolment will always be deemed to have been there.

10. For determination of the issue, it is necessary to notice the 'Genesis' of Home Guards Organization and relevant provisions of Acts and Rules framed by State of West Bengal with regard to Home Guards Organization.

11. Genesis In the Compendium of Instructions of Home Guards published by Directorate General Civil Defence, Ministry of Home Affairs, Government of India, New Delhi, the Genesis of Home Guard Organization is shown as below:

"1.1. Genesis During World War-II, 'Home Guards'- a voluntary citizen organization for local defence was raised in the United Kingdom. In India, in 6th December 1946, Home Guards were raised in Bombay to assist the police in controlling Civil disturbances and communal riots. Subsequently, this concept of a voluntary citizen's

force as auxiliary to the Police for maintenance of law and order and for meeting emergencies like floods, fires, famines etc. was adopted by several other States such as Paranti Raksha Dal, West Bengal Village block and Civic Guards. In the wake of Chinese Aggression in 1962, the Centre advised the States and Union Territories to merge their existing voluntary organizations into one all - India force known as 'Home Guards' which would be voluntary both in concept and character.

1.2. Role The following revised roles are assigned to the Home Guards. These instructions have been reiterated from time to time:

- (a) Serve as an auxiliary to the police and assist in maintaining internal security.
- (b) Assist the community in any kind of emergency an air raid, a fire, a flood, an epidemic and so on.
- (c) Organise functional units to provide essential services such as motor transport, pioneer and engineer groups, fire brigades, nursing and first-aid, operation of water and power supply in installations etc.
- (d) Promote communal harmony and give assistance to the administration in protecting weaker sections of the Society.
- (e) Participate in socio-economic and welfare activities such as adult education, health and hygiene, development schemes and such other tasks as are deemed useful."

#### WEST BENGAL HOME GUARDS ACT, 1962

12. Initially, West Bengal Home Guards Ordinance, 1962 (West Bengal Ordinance XI of 1962) was promulgated. In exercise of the power conferred u/s 9 of the said Ordinance, the Government of West Bengal, Home Department, Police by notification No.4583P 1 dated 13th November, 1962 framed "The West Bengal Home Guards Rules, 1962".

The Ordinance subsequently was made an Act known as "The West Bengal Home Guards Act, 1962.

From Statement of Objects and Reasons shown in (Part IVA) the Calcutta Gazette Extraordinary dated 14th November, 1962, we find that the Home Guard Organization was raised after the Chinese aggression. The Statement of Objects and Reasons reads as follows:

"STATEMENT OF OBJECTS AND REASONS In connection with the defence of the country against external aggression it has been found necessary to raise an organization of Home Guards, the members of which may be called out for the protection of persons, the security of property or the public safety and for such other allied functions as may be assigned to them according to circumstances. Accordingly,

the West Bengal Home Guards Ordinance, 1962, was made and promulgated by the Governor under clause (1) of Article 213 of the Constitution. The present Bill is intended to enact the provisions of the said Ordinance. The clauses of the Bill are self-explanatory."

Section 3 of the Act relating to constitution of Home Guards reads as follows:

"3. Constitution of Home Guards. The Superintendent of Police in a district or the Commissioner of Police in Calcutta may constitute for the district or Calcutta, as the case may be, a body to be called the Home Guards, the members of which shall discharge such functions in relation to the protection of persons, the security of property or the public safety as may be assigned to them in accordance with the provisions of this Act and the rules made thereunder."

As per Section 5 of the Act, the Superintendent of Police may at any time call out a Home Guard for training or to discharge any of the functions assigned to the Home Guard in accordance with the provisions of the Act.

In the year 1990 by notification No.1189-I dated 30th July, 1990, the West Bengal Home Guards (Amendment) Act, 1990 was notified. It was given effect from 1st October, 1989. By the said amendment in place of a 'body' 'a body of volunteers' was substituted in Section 3. Similarly, by Section 7 of the Amendment Act the word 'member' in Section 6 was substituted by the word 'volunteers'. By Section 8 of the Amendment Act in Section 7 the word 'Member' was substituted by the word 'volunteers'. By Section 9 of the Amendment Act the word 'members' in Section 8 was substituted by word 'volunteers' and in place of words 'as a member of the Home Guards' the words 'as such volunteer' were substituted. By Section 10 of the Amendment Act, in clause (b) of sub Section 2 of Section 9 of the Act the word 'enrolment' was substituted in place of the word 'appointment' and for the word 'members' the word 'volunteers' was substituted. Similar substitutions were made in different clauses of Section 9.

#### WEST BENGAL HOME GUARDS RULES, 1962

13. Rule 3 deals with appointment and reads as follows:

"3. Appointment (i) Application for enrolment as members of the Home Guards shall be in the form set out in Schedule A to these rule and shall be presented to the Group Commander of the area within which the applicant resides. The Group Commander shall interview the candidate and shall forward the application with his recommendations through the Home Guard Commandant to the appointing authority and such authority may, in its discretion, refuse to accept any particular recommendation for appointment. All recruits shall be formally enrolled with due ceremony on parade, provided that before such enrolment, a recruit shall if he is in service, be required to produce a certificate from his employer agreeing to spare his services for training and duty when so required."



Rule 4 relates to conditions of service, as quoted below:

"4.Conditions of service-Save as the State Government may otherwise direct in the case of any class of officers, service in the Home Guards shall ordinarily be voluntary and unpaid.

Provided that the State Government may determine the allowances to be paid to the members of the Home Guard when calls out on duty."

Rule 7 relates to duties as follows:

"7.Duties-Members of the Home Guards may be called out on duty.

(i)to assist the police force in the protection of Civil population against the forces of crime and disorder;

(ii)to work in close touch with Civil Defence Organization;

(iii)to perform such duties in connection with the protection of persons, the security of property or the public safety as the State Government may, from time to time, by rule assign to them."

Rule 8 relates to order for calling out Home Guards and reads as follows:

"8.Order for calling out Home Guard-A Home Guard in its entirety or such portion thereof as the Superintendent of Police or the Commissioner of Police, as the case may be, thinks fit may be called out on any particular occasion and for such purpose a written order shall be issued in a district by the Superintendent of Police and in Calcutta by the Commissioner of Police."

14. From plain reading of the aforesaid Rules, the following facts emerge:

(i) West Bengal Home Guards are enrolled as member of the Home Guard in the form set out in Schedule A of the Rules.

(ii) The Home Guards shall ordinarily be volunteers and unpaid. But the State Government may determine the allowances to be paid to the members of the Home Guard when they are called out for duty.

(iii)There is no fixed duty for members of the Home Guard. When they are called out for duty, they shall assist the police force in the protection of civil population against the forces of crime and disorder. They have to work in close touch with Civil Defence Organization and have to perform such duties in connection /with the protection of persons, the security of property or the public safety as the State Government may,

from time to time, determine.

Therefore, if the 1962 Act is read with 1962 Rules, we find that members of Home Guards are ordinarily unpaid volunteers for whom the State Government shall determine the pay and allowances when called out for duty.

15. The voluntary character of the Home Guards Organization was not explicit in the 1962 Act because of the use of word "appointment as members", though it was explicit from 1962 Rules as noticed above.

For the reasons aforesaid, the State Government issued Amendment Act, 1990.

16. The Statement of Objects and Reasons of amended 1990 Act reads as follows:

"STATEMENT OF OBJECTS AND REASONS Home Guard Organization was created in West Bengal in the wake of the external aggression on India in 1962 and the West Bengal Home Guard Act was passed in the same year. Since the passing the Act, there have been many changes in the working of the organization as a result of which the Act has become outdated. There is no reference in the 1962 Act to the post of Commandant General, Home Guards, West Bengal which was created long after the enactment of the current Act. Although the Commandant General, Home Guards, West Bengal has been given the task of commanding and controlling Home Guards Organization in the districts in West Bengal and administering Home Guards Budget, legally he cannot issue any direction to the Superintendent of Police or to other police officers posted in the Home Guard section of the district. There is hence absence of a chain of command in the Home Guards Organization.

The voluntary character of the Home Guards Organization and its voluntary members had not also been explicit in the 1962 Act because of use of the word "appointment as members", and this gave rise to confusion and claims of permanent states.

In view of the above reasons, the present amendment to West Bengal Home Guard Act, 1962 is proposed with the objectives of establishing the control of Commandant General, Home Guard, West Bengal over Home Guards Organization in West Bengal districts and defining the ex officio capacity of Additional Commandant General, Home Guard of the Commissioner of Police in Calcutta and of making clear the voluntary, character of the Home Guard Organization where volunteers are enrolled in honorary and voluntary capacity.

The Bill has been framed with the above objects in view."

Thereby the intention of the Legislature to create a voluntary Home Guard Organization is made clear.

17. In *Rajesh Mishra v. Govt. of NCT of Delhi*, 98 (2002) DLT 624, the High Court speaking through S.B. Sinha, J held that that the Home Guards is a voluntary organization and there is no Master-Servant relationship between Government and Home Guards. It was held that they are not civil servants and they cannot move before the Tribunal u/s 19 of the Administrative Tribunal Act.

18. In *State of Manipur and another v. Ksh. Moirangninthou Singh and others*, (2007) 10 SCC 544, this Court reiterated the voluntary nature of service of members of Home Guard and held:

"8. It may be noted that Home Guards have been constituted as a voluntary organisation for service in emergencies and hence it cannot be treated on a par with other organisations like the army, paramilitary organisations or the civil police.

[pic]11. A perusal of the provisions of the Home Guards Act and the Rules show that the Home Guards was meant to be a reserve force which was to be utilised in emergencies, but it was not a service like the police, paramilitary force or army, and there is no right in a member to continue till the age of 55 years. We approve the view taken by the Delhi High Court in *Rajesh Mishra v. Govt. of NCT of Delhi*.

13. The concept of Home Guards was of a voluntary citizen force as auxiliary to the police for maintaining law and order and for meeting emergencies like floods, fires, famine, etc. and for civil defence."

19. A Careful perusal of genesis of Home Guards and its role will show that the Organization was always meant to be voluntary and it consisted of people from all walks of life. In fact Government servants were also enrolled in the Home Guards to be called as and when the need arises. A large number of State enactments i.e. Andhra Pradesh Home Guards Act, 1948, Bombay Home Guards Act, 1947, Assam Home Guards Act, 1947, Manipur Home Guards Act, 1966, Madhya Pradesh Home Guards Act, 1947, Punjab Home Guard Act, 1947, Rajasthan Home Guards Act, 1963 etc. placed before this Court in compilation by learned Attorney General during the hearing makes it clear that the provisions of all these enactments are more or less similar. The voluntary nature is a basic feature of the Home Guards.

20. Majority of the appellants has attained the maximum age and are no more members of the Home Guards. The appointment letters enclosed by the remaining category of appellants, do not suggest that they are performing duty all over the year like any Government servant. There is nothing on the record to suggest the master-servant relationship. They were appointed pursuant to Home Guard Rules, 1962 and it is made clear that their services are voluntary and will not get any pay but the duty allowance as may be fixed by the State Government from time to time.

In that view of the matter, we hold that the appellants are not entitled for regularization of service. Further, in absence of any comparison of duties, responsibilities, accountability and status, they may not be equated with the Police Constables or personnel to claim parity with the pay or scale of pay as provided to the Police personnel. The High Court by the impugned judgment and orders rightly refused to grant regularization of their services. We find no merit in these appeals and they

are accordingly dismissed.

.....

...J. (SUDHANSU JYOTI MUKHOPADHAYA) .....

...J. (VIKRAMAJIT SEN) NEW DELHI, MARCH 10, 2015.