

A.F.R.

Court No. - 40

Case :- WRIT - A No. - 30084 of 2003

Petitioner :- Rajveer Singh

Respondent :- State Of U.P. And Others

Counsel for Petitioner :- Madan Singh

Counsel for Respondent :- C.S.C.

Hon'ble Amreshwar Pratap Sahi,J.

Hon'ble Abhinava Upadhya,J.

Hon'ble Harsh Kumar,J.

Heard Sri S.B. Singh alongwith Sri Madan Singh learned counsel appearing on behalf of the writ petitioner Rajveer Singh and Sri M.C. Chaturvedi, learned Additional Advocate General alongwith Sri J.N. Maurya Chief Standing Counsel Ist for the State.

This reference arises out of the two questions framed by a learned Single Judge in *Writ Petition No. 30084 of 2003 (Rajveer Singh Vs. State of U.P. & Others)* in relation to a stated conflict between two Division Bench judgments of this Court, namely, that of ***Riasat Ali Vs. State of U.P. 2003 (4) AWC 3046*** and an unreported judgment of another Division Bench in the case of ***Ram Kumar Vs. State of U.P. Special Appeal No. 143 of 2012 decided on 5th April, 2012.***

The learned Single Judge upon having entertained the writ petition was of the opinion that there arises a

conflict between the above two judgments and further the ratio of the other Division Bench in the case of *Ram Kumar Vs. State of U.P. & Anothers* did not lay down the correct law. The questions framed by the learned Single Judge to be considered by the Full Bench are as follows:-

“(1). Whether Division Bench judgment in *Riasat Ali Vs. State of U.P. 2003 (4) AWC 3046* holding that a Home Guard under U.P. Home Guards Act, 1963 is not holder of a civil post in view of expression to Section 10 is correct or Division Bench judgment in *Special Appeal No. 143 of 2012 (Ram Kumar Vs. State of U.P. & Others)* relying on Full Bench judgment in *Sheela Devi & Another Vs. State of U.P. & Others 2010 All.C.J. 1371*, which is a case relating to Anganbari Karyakatri and Supreme Court's judgment in *Davinder Singh & Others Vs. State of Punjab & Others 2010 (13) SCC 88* which is in the context of Punjab Home Guards Act, 1947 and Punjab Home Guards and Civil Defence (Field) Class III Service Rules, 1983 holding that Home Guard is a holder of civil post, is correct.

(2) Whether Division Bench in *Ram Kumar Vs. State of U.P. and others (supra)* has rightly held that Home Guard in State of U.P. governed by U.P. Home Guards Act, 1963 is not holder of a civil post disagreeing with the earlier Division Bench judgment in *Riasat Ali Vs. State of U.P. (supra)* and relying on Full Bench judgment in *Sheela Devi and another Vs. State of U.P. and others 2010 All.C.J. 1371* relating to Anganbari Karyakatri and Supreme Court's judgment in *Davinder Singh and others Vs. State of Punjab and others (supra)* which was not in relation to U.P. Home Guards Act, 1963, without referring the matter

to Larger Bench?"

In order to understand the controversy, it would be apt to refer to the U.P. Home Guards Act, 1963 where the concept of enrollment of home guards was introduced. It is an Act that was promulgated to raise a Volunteer Force for aiding the State Police Services as an auxiliary force. The said Act defines Home Guard under Section 2(e) as a person who is enrolled as such and includes as officer appointed under the Act. Section 2(g) defines the word "prescribed" to mean as the Rules framed under the Act. Section 2(j) defines service under the State to mean a service under the State as defined in Article 12 of the Constitution of India and includes service under any statutory corporation. The functions of Home Guards have been enumerated in Section 4 of the Act followed by the provisions of Section 6 which provide for superintendence and administration of such home guards appointed under the Act. The prescription for enrollment is provided for under Section 7 which is extracted hereinunder:-

"7. Enrolment etc. - (1) Subject to such conditions as may be prescribed, any person desiring to be enrolled as home guards shall make an application in the prescribed form. If such applicant is in private service he shall make such application through his employer, or if in service under the State through the authority competent to grant him permission to join the force.

(2) A home guard shall be formally enrolled and on enrolment make a declaration in the form set out in the First Schedule and receive 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.***

(3) Officers and other members of the Home Guards shall wear such uniforms as may be prescribed."

Upon enrollment and subject to the provisions of the Act and Rules made thereunder the District Magistrate has been empowered to call for any home guard attached to a unit posted in the district for duty in any area within the district. The Commandant General or such officers of the home guards have been authorized to call for any home guard for duty in any part of the State or even outside the State.

Then comes the prescription of powers, privileges and protection of home guards. The performance of a duty by a Home Guard is clearly protected under Sub-Section (2) of Section 9 through a statutory protection to the effect that no prosecution shall be instituted against a Home Guard in respect of anything or purported to be done by him in the discharge of his duty as a Home Guard except with the previous sanction of the District Magistrate. This provision has to be read with Section 10 which is the most important provision and calls for consideration by this Court. Home Guards under the said section have been defined to be a public servant within the meaning of Section 21 of the Indian Penal Code. The explanation added to Section 10 states "**A Home Guard shall not be deemed to be a holder of a civil post**

merely by reason of his enrollment as home guard”.

A Home Guard upon being enrolled and subject to any Rules made in this regard is bound to serve in any unit of the Home Guards to which he is for the time being attached.

It is here that one has to refer back to Section 7 where enrollment can be opted for by any applicant whether he is in private service or in any service under the State. The application has to be made in the prescribed form whereafter the formal enrollment takes place. The initial period for engagement is prescribed as three years under Sub-Section (2) of Section 11 which is extendable with the consent of the employer in the prescribed manner. Then comes the compulsion part attached to the rendering of such volunteer service under Sub-Section (3) of Section 11 which prescribes that every home guard shall be liable to serve when called out in the prescribed manner for duty in any part of the State. Rendering of service outside the State would be subject to the consent of the home guard. The home guard would be entitled to payment of such allowances as may be prescribed and they shall be called out to serve only for part time duty. The discharge, suspension and resignation of a home guard is provided for under Section 12 and penalties on account of non failure of reporting on duty are provided for under Section 13. There are other liabilities also arising out of non performance of duty including criminal liability with which we are not presently concerned.

It is in this background that the State Government has been empowered to make Regulations and Rules for carrying out the purpose of this Act in order to give effect to the provisions of the Act.

At this stage we may clarify that with regard to a permanent establishment of home guards, the State Government has framed the Uttar Pradesh Home Guard Service Rules, 1982. The said Rules define the cadre of service, namely, those who are appointed under the said Rules and in accordance with the provisions thereunder. One of the sources of recruitment is by direct recruitment through an examination to be conducted by the Uttar Pradesh Public Service Commission. The other is by promotion from amongst the Subordinate Home Guard Service Group C & D employees.

It is here that it is necessary to draw the distinction between the two sets of establishment within the Home Guards, namely, those who are engaged as volunteers and enrolled in terms of Section 7 of the 1963 Act and those who form part of the permanent establishment under the 1982 Rules. It has to be kept in mind that these two nature of engagements are entirely different from each other, one under the 1982 Rules being substantive in nature by way of selection and appointment whereas that under Section 7 of the 1963 Act being voluntary and by way of an enlistment which is to be carried out through as enrollment process as prescribed thereunder.

In the present case, the dispute which has to be

resolved is confined only to such enlisted and enrolled persons as per Section 7 of the 1963 Act. The judgment which has been referred to by the learned Single Judge on the basis whereof a conflict has been pointed out, namely that of ***Riasat Ali Vs. State of U.P. 2003 (4) AWC 3046***, also refers to the 1982 Rules, but in our opinion has not appropriately drawn the distinction between the two sets of establishment, and therefore, the question of applicability of 1982 Rules in the case of such voluntary enrollment will not arise. To that extent the judgment in the case of *Riasat Ali Vs. State of U.P. (supra)* incorrectly refers to the said rules, inasmuch as, in the case of *Riasat Ali (supra)* the issue was not related to any engagement made under the 1982 Rules.

We now proceed to examine the nature of the conflict which has been pointed out by the learned Single Judge while framing the reference. The first question which has been framed, is on the basis, as to whether a home guard as enrolled under the 1963 Act under Section 7 thereof is holder of a civil post or not, keeping in view the explanation added to Section 10 of the Act.

On a close scrutiny, the provisions relating to voluntary enlistment and enrollment under Section 7 of the 1963 Act are clearly aimed at providing a supplementary help and to act as an accessory to the police forces of the State. One who gets enrolled, he stands enlisted as a part-timer as per Section 11 of the 1963 Act. A Home Guard so enlisted is a Public Servant as defined under Section 21 of the IPC and the acts

performed during duty are protected under Section 9(2) of the 1963 Act. On enlistment, a Home Guard receives a certificate of appointment as per Section 7(2) thereof. A Home Guard is bound to serve whenever called upon to perform duties. It is thus a performance of public duty by someone who voluntarily applies for the same which is subject to enrollment and then being called upon to perform a prescribed duty. Dr. S.B. Singh, learned counsel for the petitioner is therefore right in his submission that the activity entrusted to an enlisted Home Guard when he is called upon to perform the same transforms his action into a public duty. A Home Guard is liable to serve and in default is also subject to penal action. There are provisions of suspension and discharge from services. Payment of allowances is also prescribed with liberty to resign. Viewing the nature of the duties to be performed, a closer look at Section 4 of the 1963 Act is necessary. The same is extracted hereinunder:-

"4. Functions. - The Home Guards will have the following functions:-

(a) they will serve as auxiliary to the police, and, when required, help in maintaining public order and internal security;

(b) they will help the community in air raids, fires, floods, epidemics and other emergencies;

(c) they will function as an emergency force for such special tasks as may be prescribed;

(d) they will provide functional units for essential service; and

(e) they will perform such other duties, relating to any measure of

public welfare as may be prescribed."

A perusal thereof indicates that even though Section 3 of the Act describes the Uttar Pradesh Home Guards as a volunteer force, yet their duties encompass a substantial area of policing, emergency and essential public services and other duties of importance as a measure of public welfare.

The question is, who can be described as the holder of a civil post. This would be obviously dependent on the nature of engagement, employment or appointment coupled with the nature of the services or duties to be performed. In ordinary parlance, a person, outside the defence services, engaged in the work of the State is a civil servant and he is said to be in civil service. As to who would be holder of a civil post, it would be apt to quote paragraph no. 9 and paragraph no. 10 of the judgment in the case of **State of Assam Vs. Kanak Chandra Dutta, AIR 1967 SC 834:-**

"9. The question is whether a Mauzadar is a person holding a civil post under the State within Art.311 of the Constitution. There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State. See marginal note of Art.311. In Art.311, a member of a civil

service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. See the marginal notes- to Arts. 309, 310 and 311. The heading and the subheading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

10. In the context of Arts. 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution. See Art. 310. 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 a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310(2) contemplates that a post may be abolished-and a person holding a post may be required to vacate the post, and it emphasises the idea of a post existing apart from the holder of the

post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post."

A learned Single Judge of this Court, following and applying the said ratio, held that a company commander engaged for a period of three years under Section 11(2) of the U.P. Home Guards Act 1963 was holder of a civil post. Paragraph nos. 10 to 13 of the said reported decision in the case of ***Suraj Prasad Tiwari Vs. Zila Commandant, Home Guards, Hamirpur Laws (All) 1998 (5) 107 = 1998 (3) AWC 1622*** are extracted hereinunder for ready reference:-

"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 falls 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' by an 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 in 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."*

The aforesaid view was specifically reconsidered in the reference before the Division Bench in the case of **Riasat Ali Vs. State (supra)** and was overruled. Paragraph nos. 18 to 21 and Paragraph nos. 27 to 35 of the said decision are extracted hereinunder:-

18. *Section 10 Explanation contains declaration of 'Post' of Home Guard, not to be a 'civil post'. Explanation is part and parcel of the main section. It is a declaratory-clause leaving no room for doubt or entertain controversy as to whether 'Home Guard' is a civil service. A 'Home Guard' may have incidence of 'civil service', but it cannot be treated as such because of the Explanation attached to Section 10 of the Act which unequivocally declares it to be not a 'civil post'.*

19. *Article 311 of the Constitution is not relevant so long it is found that 'post' under consideration is in fact not a 'civil post'. Aforesaid Article of the Constitution does not provide the basis or criterion or the test to ascertain whether it is a 'civil post'.*

20. Article 311, Constitution of India contains statutory protection to a person who is member of a civil service of Union/State. The Constitution nowhere contemplates that a 'service'/'post' cannot be declared to be 'civil service' or 'civil post' through statutory enactment.

21. None of the earlier decisions of this Court dealt with this point. We are not aware of any valid basis or genesis to infer that the Explanation to Section 10 of the Act is 'ultra vires'. Article 311, Constitution of India merely confers certain protection to a person if he holds a 'civil post' in a State or Centre. This Article has no relevance nor it is at all material to determine whether a post is civil or not.

27. Having considered respective contentions at the Bar as well as the aforesaid judgments, we have no doubt that so long as Explanation attached to Section 10 of the Act continues on the Statute, even if a service or post has incidences, of 'civil service'/'civil post' as held by Supreme Court in the case of State of Assam and Ors. v. Kanak Chand, AIR 1967 SC 884, the statutory declaration that post of Home Guard is not a civil post, cannot be ignored. The said statutory provision (Explanation to Section 10 of the Act) has to be given purposeful meaning and to be duly honoured. In our humble but considered opinion, there is no conflict between Article 311, Constitution of India and said Section 10 with its Explanation.

28. We may re-state that it is not possible to appreciate as to how Explanation attached to Section 10 seeks to whittle down the rigour of the constitutional protection provided through Article 311, Constitution of India so long as a Home Guard does not hold 'civil post'

as declared by the Act itself.

29. At this juncture, we would like to note that the decision of the learned single Judge rendered in the case of Abdul Hameed (supra) in view of the Division Bench decision in the case of Gulam Mohammad and Ors. (supra) cannot be applied in view of the enforcement of Rules, 1982.

30. Again another learned single Judge (O.P. Garg, J.) in the case of Suraj Prasad Tewari v. Zila Commander, Home Guards, Hamirpur and Ors., 1998 (3) AWC 1622 : (1998) 2 UPLBEC 1484, adopted reasoning given in the earlier judgment of this Court in the case of Vibhuti Narayan Singh (supra) and referred to Article 311 in holding that Home Guards under the Act hold a civil post. However, in para 12 of the reported Judgment in the case of Suraj Prasad Tewari (supra) learned single Judge, we note with due respect, did not appreciate that even 'intents' and 'features' of service Justify declaration of it as a civil service or post, but it cannot be treated as such if Legislature specifically--through legislative enactment--declares it not to be a civil service/civil post, and consequently, protection of Article 311 cannot be taken resort to Article 311 of the Constitution of India to treat it as a civil service or a civil post.

31. We do not find that in any of the above referred cases or in the two writ petitions before us, any material is placed to declare the Explanation attached to Section 10 of the Act to be ultra vires of the Constitution of India or the same being non est because of lack of competence on the part of the Legislature to enact such a provision.

32. We hasten to note that in view of the various conspicuous features of the Home Guard service (as also noted by Hon'ble D.K. Seth

in the case of Raghvendra Singh (*supra*), it may be very hard and source of discomfort to note that persons working as Home Guard under the Act and the Rules framed thereunder though they have attending duties which has all features of a civil post/civil service, still they have been deprived of the status/stature of civil post and denied protection enshrined in Article 311 of the Constitution of India to a civil service or civil post.

33. We cannot, at the same time ignore that even if Act and Rules contemplate a service, which has incidence of 'civil service', the most conspicuous distinguishing feature of the Act is the Explanation embedded in Section 10 of the Act which contemplates continuance in another employment including a civil service or civil post in the State/Union.

34. Explanation attached to Section 10 of the Act cannot be ignored or sidelined for extending protection contemplated under Article 311(2) Constitution of India. Hardship, if any, is perpetuated, as observed by learned single Judge in the case of Raghvendra Singh (*supra*), it is for the Legislature to remove the statutory hurdle but the Court cannot sideline or ignore it.

35. In view of the above, we hold that the Home Guard under the Act and Rules do not hold a civil post."

The Division Bench in the case of **Riasat Ali** (*supra*) categorically referred to the explanation to Section 10 and also observed that the question of vires has not been raised nor it has been tested in any other case. Therefore, so long as the said provision remains on the statute book, the issue as to whether a home

guard is a civil post or not, is no longer in confusion. We are entirely in agreement with the aforesaid proposition of law laid down in the case of Riasat Ali, inasmuch as, inspite of the observations by the Division Bench, there is no challenge raised to the vires of the explanation added to Section 10 of the Act referring to a home guard as not being holder of a civil post. In the absence of any such challenge raised, we do not find it necessary to probe the matter any further and leave it at that stage without prejudice to the rights of any person who may choose to challenge the vires of the said provision in any appropriate case, but so long as, the statute contains the explanation added to Section 10, the view taken by the Division Bench in the case of Riasat Ali (*supra*) to that extent will continue to hold the field.

The first question, therefore, referred by the learned Single Judge without there being any challenge raised to the vires to the aforesaid explanation stands answered accordingly.

Coming to the second question as to whether home guard in the State is not holder of a civil post, we do not find there to be any conflict in the two judgments, the reference whereof has been made to us. The Division Bench in the case of ***Ram Kumar Vs. State of U.P, (supra)*** has nowhere held that a home guard is a holder of a civil post. There is no final view expressing conflict except for referring to certain decisions of the Apex Court and the arguments raised in this regard on behalf of either of the parties. We have been unable to

find out any ratio laid down therein so as to warrant any inference of conflict and therefore the second question as framed by the learned Single Judge practically does not arise for any consideration.

Learned counsel for the petitioner has relied on the following judgments to advance his submissions:- ***Smt. Sheela Devi & Another Vs. State of U.P. & Others 2010 (5) ADJ 86 (FB); State of Gujarat & Another Vs. Akshay Amrutlal Thakkar 2006 SCC (L&S) 290; Davinder Singh & Others Vs. State of Punjab & Others 2010 (13) SCC 88; Grah Rakshak, Home Guards Welfare Association Vs. State of Himachal Pradesh & Others 2015 (6) SCC 247; The State of Assam & Others Vs. Kanak Chandra Dutta AIR 1967 SC 884.***

The learned counsel to substantiate his submission has also referred to the following Act and notification:- ***Home Guards, Public Safety, Security of Property Act 8 of 1947*** and ***Government of Punjab Department of Home Affairs and Justice Notification dated 14th September, 1983.***

Learned counsel on behalf of the State also relied on a compilation of the same set of judgments coupled with the notifications and the Rules that have been referred to in the said judgments.

As we find that none of those judgments referred to by the Apex Court had the occasion to examine the provisions of the 1963 Act as presently involved, we do not find it necessary to proceed to analyse the same

keeping in view the conclusions already drawn hereinabove. The same may assume importance for an aid to interpret the 1963 Act as and when the occasion arises whenever a challenge to the vires is raised in any appropriate case. The same would be only an academic exercise at present.

We may however observe that one of the issues that was dealt with in the case of Ram Kumar (*supra*) was of the maintainability of a writ petition under Articles 226 and 227 of the Constitution of India in the event any action is questioned being violative of Article 14 of the Constitution of India or of any legal rights under the Act.

In this regard, we may point out that the Apex Court in the case of ***A.K. Nag Vs. General Manager (P.J.) Indian Oil Corporation Ltd, Haldia & Others 2005 (7) SCC 764*** which is a three Judges decision had the occasion to deal with a somewhat similar situation in the case of an employee of the Indian Oil Corporation where also the issue of the employee holding a civil post and applicability of Article 311(2) of the Constitution of India had been raised. The said decision answered the question holding that an employee of the corporation was not holder of a civil post. It however held that even in such situations where the employee is claiming protection of the audi alteram partem Rule, there cannot be a straight jacket formula but if the action is unreasonable or arbitrary then in that event the tenets of Article 14 would be attracted and the same can be tested on the anvil thereof for which the said decision further

ruled that a writ petition under Article 226 read with Article 227 would be maintainable. A Home Guard as observed above may for the time being be not holder of a civil post, but there is a substantial statutory control of the State administration under the 1963 Act. Consequently, we do not find there to be any conflict on this issue and once the law has been clarified by the Apex Court we find that the judgment in the case of Ram Kumar (*supra*) rightly holds that a writ petition would be maintainable under Article 226/227 of the Constitution of India in the event an action taken under the 1963 Act is questioned.

In view of the two questions referred, having been answered by us, let the judgment be now placed before the learned Single Judge for proceeding further in the matter.

Order Date :- 1.10.2018

S.Chaurasia