

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.13593 OF 2017

Vishal Gajendra Surwase and others ... Petitioners
Vs.
Union of India and others ... Respondents

Mr. Mihir Desai, Senior Advocate i/by Mr. S. S. Kulkarni for the Petitioners.

Mr. Y. S. Bhate a/w. Mr. A. R. Gole for Respondent Nos.1 and 2.

Mr. Arshad Shaikh a/w. Mr. Hafeezur Rehman for Respondent Nos.3 to 6.

Mr. Dinesh Adsule, Advocate for Respondent Nos.7 to 16.

**CORAM : UJJAL BHUYAN &
MADHAV J. JAMDAR, JJ.**

Reserved on : AUGUST 13, 2021

Pronounced on : SEPTEMBER 20, 2021

JUDGMENT AND ORDER : (Per Ujjal Bhuyan, J.)

Heard Mr. Mihir Desai, learned senior counsel for the petitioners; Mr. Bhate, learned counsel for respondent Nos.1 and 2; Mr. Arshad Shaikh, learned counsel for respondent Nos.3 to 6; and Mr. Adsule, learned counsel for respondent Nos.7 to 16.

2. Sixty one petitioners have joined together and have instituted the present common proceeding under Articles 226 and 227 of the Constitution of India. Initially, at the time of filing the writ petition the prayer made was for setting aside and quashing Ex.A advertisement dated 03.08.2017 for direct recruitment to the post of 'watchman' (security guard) in the establishment of Food Corporation of India at Manmad in the District of Nasik, Maharashtra State. Further prayer made was for a direction to respondent Nos.4 and 5 to issue fresh advertisement giving due preference to the petitioners. Additional prayer was made for a direction to respondent No.4 to consider the case of the petitioners for regular appointment to the post of 'watchman'

(security guard) in the establishment of respondent No.5 i.e., Area Manager, Food Corporation of India, Manmad by giving them preference and relaxation in the upper age limit as well as in academic qualification barring technical qualification.

3. According to the petitioners, they are working as 'watchman' (security guard) in the establishment of respondent No.5. Many of the petitioners are working as such since the year 2009. Details of the petitioners, such as, age, date of joining, educational qualification, caste category and the salary earned have been furnished in the form of a statement forming part of paragraph No.2 of the writ petition.

4. Respondent No.4 issued an advertisement dated 03.08.2017 for filling up 187 posts of 'security guard'. Grievance of the petitioners is that while issuing the said advertisement respondent Nos.3 to 6 did not consider the case of the petitioners. That apart, the said advertisement was contrary to guidelines and circulars of Food Corporation of India (FCI).

5. It is stated that petitioners are working in clear vacancies in the post of 'watchman' (security guard) under respondent Nos.5 and 6. They are thus "workmen" as defined under section 2(s) of the Industrial Disputes Act, 1947. It is also stated that petitioners are working as home guards, having been selected and appointed as such under the Bombay Home Guards Act, 1947. As per directions and orders of the Commandant they had discharged their duties at the establishments of respondent Nos.3 to 5 working as watchman (security guard). It is the case of the petitioners that they had completed 240 days in each calendar year of service and that their service records are clean and unblemished.

6. It is in the above context that petitioners have contended that they are entitled to regularization of their services in the post of 'watchman' (security guard).

7. Petitioners have also relied upon circular dated OMISS-03-2013-03 dated 16/17.05.2013 issued by respondent No.3 which lays down guidelines for recruitment to the post of 'watchman' (security guard). It specifically provides for giving preference to casual employees engaged in Food Corporation of India (FCI) in any capacity and working as on 31.12.2012. It is the contention of the petitioners that while issuing the impugned advertisement respondent Nos.3 to 6 had failed to adhere to the guidelines laid down in the circular dated 16/17.05.2013.

8. After enactment of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 and when the provisions of the said Act were made applicable to Nasik and four other districts in the State of Maharashtra, respondent No. 5 registered itself with the Security Guards Board constituted under the said Act and also got the names of the petitioners registered on the guard pool prepared and maintained by the Security Guards Board, Nasik. Petitioners have pleaded that they are physically fit and eligible to be regularized in the post of 'watchman' (security guard).

9. Subsequently, the writ petition was amended following order of this court dated 27.02.2019. By way of amendment 10 persons were impleaded as respondents being respondent Nos.7 to 16. As per paragraph 12A inserted by the amendment, the above respondents had applied for the post of 'watchman' (security guard) pursuant to the said advertisement whereafter they were selected. Petitioners have stated that in all 47 candidates were selected. Respondent Nos.7 to 16 have been added as respondents in representative capacity. Selected candidates have since been given postings *vide* order dated 01.03.2019 issued by respondent No.5.

10. Petitioners have also contended that their services are required to be regularized in terms of the Food Corporation of India (Staff)

Regulations, 1971 framed in exercise of the powers conferred by section 45 of the Food Corporations Act, 1964.

11. Following the amendment, petitioners have additionally sought for setting aside and quashing the appointments of respondent Nos.7 to 16 and similar other selected candidates to the post of 'watchman' (security guard).

12. This court by order dated 13.12.2017 had issued notice. Subsequently by order dated 27.02.2019 while leave to amend the writ petition was granted to the petitioners, it was directed that *status-quo* as on 27.02.2019 in respect of employment of the petitioners should continue to operate until further orders.

13. Respondent Nos.3 to 6 in their common reply affidavit have at the outset asserted that petitioners are not working and never worked as Class IV employees of Food Corporation of India (FCI) as claimed in the writ petition at any point of time. Petitioners are employees of Nasik District Security Guards Board. They do not have any bond or contract with FCI and, therefore, there is no privity of contract between petitioners and FCI. Nasik District Security Guards Board is providing security services to FCI from 01.05.2014 and in this connection has deployed the petitioners as security guards at FCI, Manmad.

13.1. On the other hand, petitioners themselves have stated in the writ petition that they were appointed as home guards under the Bombay Home Guards Act, 1947. If that be so then they were not appointed as Class IV employees of FCI. Statements of the petitioners are not only contradictory but are also contrary to facts on record.

13.2. Respondents had published the impugned advertisement after obtaining sanction of the FCI Headquarter for recruitment to 187 posts of 'watchman'. The said advertisement was published in several

newspapers. It is asserted that the advertisement did not contravene any FCI circular. Pursuant to the advertisement a selection process was undertaken for direct recruitment to the post of 'watchman'. The selection process comprised of two stages i.e., written test followed by physical endurance test which was only for qualifying purpose. The final merit list was prepared on the basis of written test subject to qualifying in the physical endurance test.

13.3. Respondents have stated that reliance placed by the petitioners on the FCI circular dated 16/17.05.2013 for recruitment to the post of 'watchman' is misplaced inasmuch as the same has been kept in abeyance *vide* letter dated 04.07.2013 for want of approval of the Government of India. Therefore, the circular dated 16/17.05.2013 is no longer in force. Instead fresh guidelines in the form of circular dated 09/19.08.2016 are applicable in respect of recruitment to the post of 'watchman' in FCI. Reiterating further, respondents have stated that petitioners are performing their duties in FCI as security guards under employment of Nasik District Security Guards Board and not as 'watchman' of FCI. Therefore, petitioners cannot seek regularization of service in FCI.

14. After the petitioners filed rejoinder to the reply affidavit of respondent Nos.3 to 6, respondent Nos.3 to 6 have filed affidavit in sur-rejoinder. While reiterating the statements made in the reply affidavit it is asserted that petitioners were never engaged by FCI in any capacity except that petitioners were engaged in the capacity of 'watchman' through the agency of Nasik District Security Guards Board. Petitioners do not have any employer and employee relationship with respondent Nos.3 to 6.

14.1. Referring to the reliefs sought for in the writ petition, it is stated that one of the reliefs claimed is for relaxation of upper age limit and educational qualification. In this connection, it is stated that petitioners

had filed a writ petition before the Nagpur Bench of this Court being Writ Petition No.4543 of 2017 seeking relaxation of age and qualification while considering their case for recruitment to the post of 'workman' in FCI. This Court *vide* order dated 11.01.2018 took note of the fact that grievances raised by the petitioners are pending before the Central Government Industrial Tribunal. All the petitioners had crossed the age of 40. Some of them had even crossed the age of 50. Criteria in the advertisement were not fulfilled by the petitioners. Claim of the petitioners that criteria pertaining to age and qualification should be relaxed *qua* the petitioners was turned down by the Court. Declining to grant any relief to the petitioners, the writ petition was disposed of.

14.2. In any event, there is no question of regularization of the services of the petitioners.

15. Respondent Nos.7 to 16 have also filed a common reply affidavit. They have stated that they were selected and thereafter appointed after following the due selection process. They also joined their duty with effect from 28.01.2019 and are presently serving at FCI, Manmad Depot. Altogether 47 candidates were selected and subsequently appointed. Explaining further it is stated that following the written test in terms of the advertisement, respondent Nos.3 to 6 had published a list of 561 successful candidates shortlisted for the physical endurance test which took place from 19.03.2018 to 22.03.2018. Thereafter respondent Nos.3 to 6 had published provisional list of 151 selected candidates. The final list of 47 selected candidates was published on 18.01.2019 followed by appointment order(s).

15.1. Respondent Nos.7 to 16 have denied all the contentions made by the petitioners, further submitting that the writ petition so filed is without any merit and is liable to be dismissed.

16. Mr. Desai, learned senior counsel for the petitioners has referred

to the various averments made in the writ petition and submits that petitioners' case for regularization deserves due consideration by the respondents. He has also placed reliance on a decision dated 01.11.2017 passed by the High Court of Himachal Pradesh, Shimla in **CWP No.2451 of 2017, Tek Chand Vs. Union of India**, and submits that case of the petitioners may be remanded back to the authorities to be considered afresh in the light of the circular dated 16/17.05.2013. Referring to the prayer portion of the writ petition, learned senior counsel submits that following the developments which have taken place since filing of the writ petition, this Court under Article 226 of the Constitution of India can certainly mould the reliefs. Relying upon the judgment of the Supreme Court in *Dwarka Nath Vs. Income Tax Officer*, **AIR 1966 SC 81**, he submits that Article 226 of the Constitution of India is couched in comprehensive phraseology and confers a wide power on the High Courts to do justice. In addition to the prerogative writs, High Courts can issue directions, orders or writs other than the prerogative writs which enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of our country.

16.1. Proceeding further Mr. Desai has also pressed into service decision of the Supreme Court in *M. V. Elisabeth Vs. Harwan Investment and Trading Private Limited*, **AIR 1993 SC 1014**, to submit that High Courts in India are superior courts of record. They have inherent and plenary powers. Unless expressly or impliedly barred and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction including the jurisdiction to determine their own powers. He, therefore, submits that in the facts and circumstances of the case, Court may consider passing appropriate order or direction so that grievances of the petitioners are redressed.

17. Mr. Bhate, learned counsel for respondent Nos.1 and 2 submits that Union of India as such has no role to play in the present dispute as

petitioners are seeking recruitment and / or regularization of service in FCI. Therefore, the contesting respondents are the FCI and its officers.

18. Mr. Arshad Shaikh, learned counsel for respondent Nos.3 to 6 has submitted a comparative statement of pleadings and submits therefrom that there are inherent contradictions in the statements made by the petitioners. Viewed in the above context, the writ petition presents disputed questions of fact which may not be gone into in a writ proceeding under Article 226 of the Constitution of India. On the one hand, petitioners claim to be working as security guards under respondent Nos.3 to 6 and thus are workmen in terms of section 2(s) of the Industrial Disputes Act, 1947, but on the other hand they say that they were appointed as home guards as per provisions of the Bombay Home Guards Act, 1947 discharging their duties under the Home Guard Commandant. As a matter of fact, petitioners are security guards deployed through the agency of Nasik District Security Guards Board which is the regulatory authority under the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981.

18.1. Regarding decision of the Himachal Pradesh High Court in **Tek Chand** (*supra*), Mr. Shaikh submits that similar decision may not be passed as the circular dated 16/17.05.2013 which was the basis of the said decision is no longer in force. That apart, unlike in **Tek Chand's case** (*supra*), here the advertisement has been fully executed as the recruitment process pursuant to the advertisement was concluded following which the selected candidates have been appointed, a few of them have been subsequently arrayed as respondent Nos.7 to 16.

18.2. Mr. Shaikh has submitted compilation of documents wherefrom he contends that contentions of the petitioners are thoroughly misplaced and are liable to be rejected.

18.3. Finally he has referred to and relied upon the following decisions

of the Supreme Court:-

- a. *Steel Authority of India Vs. National Union Waterfront Workers*, **(2001) 7 SCC 1**;
- b. *Nitinkumar Nathalal Joshi Vs. Oil and Natural Gas Corporation Limited*, **(2002) 3 SCC 433**; and
- c. *Secretary, State of Karnataka Vs. Umadevi*, **(2006) 4 SCC 1**.

19. Mr. Adsule, learned counsel for respondent Nos.7 to 16 submits that he would adopt the arguments of Mr. Shaikh. According to him, there is no merit in the writ petition which should be dismissed.

20. Submissions made by learned counsel for the parties have received the due consideration of the Court.

21. Before advertng to the reliefs sought for by the petitioners it would be apposite to briefly set out the relevant facts as pleaded.

22. According to the petitioners they are working as 'watchman' (security guard) in the establishment of respondent No.5 since a long time, many of them since the year 2009. However, petitioners have also pleaded that they were selected and appointed as home guards under the Bombay Home Guards Act, 1947. They are discharging their duties as 'watchman' (security guard) at the establishments of respondent Nos.3 to 5 as per directions and orders of the Home Guard Commandant. They contend that they are entitled to a consideration for regularization of their services in the post of 'watchman' (security guard) in FCI. At the same time, petitioners have also stated that their names were registered with the Security Guards Board, Nasik constituted under the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981.

23. Instead of regularizing the service of the petitioners, respondent No.4 issued an advertisement dated 03.08.2017 for filling up 187 posts of security guards. This advertisement is under impugment in the

present proceeding. The basic ground of challenge to the advertisement is that without considering the case of the petitioners for regularization of their services, the advertisement was issued. It is also the contention of the petitioners that respondent No.4 did not take into account circular dated 16/17.05.2013 issued by respondent No.3 laying down the guidelines for recruitment to the post of 'watchman' (security guard) whereby relaxation in the upper age limit and academic qualification was provided for serving security guards like the petitioners.

24. It may be mentioned that after publication of the advertisement in the newspapers, the recruitment process was undertaken. It comprised of two stages i.e., written test followed by physical endurance test for qualifying purpose. At the end of the written test, a total of 561 candidates were shortlisted for physical endurance test which took place from 19.03.2018 to 22.03.2018. The above list was further pruned and a provisional list of 151 selected candidates was published. The final list of 47 selected candidates which included respondent Nos.7 to 16 was published on 18.01.2019. Thereafter, appointment orders were issued following which the selected candidates including respondent Nos.7 to 16 had joined duty with effect from 28.01.2019. They are presently serving at FCI, Manmad Depot.

25. Admittedly, petitioners do not fulfill the criteria laid down in the advertisement dated 03.08.2017. In such circumstances, petitioners have contended that FCI authorities ought to have granted them age as well as qualification relaxation. In this connection they have relied upon FCI Circular dated 16/17.05.2013. The said circular laid down operative guidelines for recruitment to the post of 'watchman'. While stressing upon the need to immediately start the process for filling up vacancies in the post of 'security guard' in the FCI, the following guidelines were laid down:-

“3(i) The ex-contractual security guards who were working in FCI and wherever there is obligation cast upon FCI pursuant to Court Judgments (which have attained finality); FCI will give

preference to such erstwhile contractual Watch & Ward personnel by giving relaxation in respect of upper age limit and academic qualification other than technical qualification at the time of recruitment. The field offices shall ensure strict compliance of such Court Orders.”

26. Response of respondent Nos.3 to 6 to the above is that petitioners never worked as Class IV employees of FCI. That apart, they do not have any bond or contract with FCI. Therefore, there is no privity of contract between the petitioners and FCI. In other words, petitioners are neither contractual nor ex-contractual security guards working in FCI. Petitioners are under the agency of Nasik District Security Guards Board constituted under the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981. Nasik District Security Guards Board has been providing security services to FCI from 01.05.2014 onwards and this is how petitioners are being deployed as security guards in FCI, Manmad. Since petitioners were not in contractual employment with FCI, circular dated 16/17.05.2013 would not be applicable. Further, contention of respondent Nos.3 to 6 is that the said circular dated 16/17.05.2013 is no longer in force, the same having been kept in abeyance for want of approval of Government of India.

27. Having regard to the stand taken by the respondents, we are of the view that challenge made by the petitioners to the impugned advertisement may not be legally sustainable. Other than the above two grounds, petitioners could not point out any legal infirmity in the impugned advertisement. That apart, petitioners having not participated in the selection process, being admittedly ineligible, it may not be open to the petitioners to challenge the selection process including selection of respondent Nos.7 to 16 and their consequential appointments. It is not the case of the petitioners that the recruitment process suffered from serious anomalies putting a question mark on the selection of respondent Nos.7 to 16. In such circumstances, Court is not inclined to interfere with the impugned advertisement dated 03.08.2017 and the

consequential selection.

28. Additionally, we would like to point out that there appears to be dispute on facts between the petitioners on the one hand and respondent Nos.3 to 6 on the other hand as to the employment status of the petitioners. While petitioners have contended that they are working as 'watchman' (security guard) under respondent Nos.5 and 6, they have also pleaded that they are working as home guards in the establishments of respondent Nos.3 to 5 having been selected and appointed as such under the Bombay Home Guards Act, 1947. On that basis, petitioners have contended that they are 'workmen' as defined under section 2(s) of the Industrial Disputes Act, 1947 and that they had completed 240 days of service in each calendar year. It is in the above context that petitioners have put forward their demand for regularization.

28.1. On the other hand, according to respondent Nos.3 to 6 petitioners are not working as Class IV employees of FCI. They are also not contractual or ex-contractual employees of FCI. There is no privity of contract between petitioners and FCI. Thus at the threshold itself the facts are disputed. However, there appears to be some unanimity in that part of the factual narration which says that petitioners are registered with Nasik District Security Guards Board constituted under the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 and it is the Nasik District Security Guards Board which is providing the petitioners as security guards to FCI, Manmad.

29. It goes without saying that in a proceeding under Article 226 of the Constitution of India, it would not be appropriate to enter into a determination of facts and thereafter examine the claim of the petitioners for regularization or challenge to the impugned advertisement. It is trite law that a proceeding under Article 226 is meant for enforcement of an existing legal right and not for the establishment of a legal right.

30. As already pointed out above, petitioners have not been able to point out any legal infirmity in the selection and appointment of respondent Nos.7 to 16. If that be so the writ court would not be inclined to interfere with such selection and appointment.

31. Regarding the plea of regularization of services of the petitioners is concerned, after the declaration of the law in **Umadevi** (*supra*) by the Constitution Bench of the Supreme Court, we are afraid no such direction can be issued in a proceeding under Article 226 of the Constitution of India save and except in situations covered by the exceptions carved out in **Umadevi** (*supra*) itself and explained in subsequent decisions. As per the exceptions, Union of India, State Governments and their instrumentalities should take steps to regularize as a one time measure the services of those employees who were irregularly appointed in duly sanctioned vacant posts and who had worked for ten years or more in those posts without the cover of orders of courts or tribunals. Admittedly, petitioners were appointed after the judgment in **Umadevi** (*supra*) and do not qualify under the exceptions.

32. Insofar the two decisions relied upon by Mr. Desai i.e., **Dwarka Nath** (*supra*) and **M. V. Elisabeth** (*supra*) are concerned, there is no dispute to the propositions of law laid down in the said two decisions. There can be no two opinions about the plenary powers of the High Courts under Article 226 of the Constitution of India but such wide powers are required to be exercised in accordance with law and not in derogation of the law, certainly not by giving a go by to the principles of law laid down by the Supreme Court.

33. Having said that, we may refer to the provisions of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981, which is an Act for regulating the employment of private security guards employed in factories and establishment in the State of Maharashtra and for making better provisions for their terms

and conditions of employment and welfare, through the establishment of a Board therefor, and for matters connected therewith. Section 3 provides for framing of scheme(s) by the state government for ensuring regular employment of security guards. In the case of **Steel Authority of India Limited** (*supra*) which dealt with three issues arising out of the Contract Labour (Regulation and Abolition) Act, 1970 including the question of automatic absorption of contract labour upon issuance of notification under section 10(1) of the said Act, Supreme Court held that in cases of claims to absorption or regularization of service, the appropriate authority to go into such issues will be the industrial tribunal / court as determination of such claims would require inquiry into disputed questions of facts which cannot conveniently be made by High Courts in exercise of jurisdiction under Article 226 of the Constitution of India. At this stage we may note that Nagpur Bench of this Court in Writ Petition No.4543 of 2017 did not entertain a similar grievance by observing that such grievances were pending before the Central Government Industrial Tribunal. Therefore, it would be open to the petitioners to approach the competent industrial tribunal / court for redressal of their grievance *vis-a-vis* regular employment in the establishment of the principal employer. In the event of such an industrial adjudication, the same shall be decided on its own merit and in accordance with law.

34. *Status-quo* order passed on 27.02.2019 shall continue for a further period of three months from today.

35. Subject to the observations made above, we are not inclined to entertain the writ petition. Writ petition is accordingly disposed of. However, there shall be no order as to costs.

(MADHAV J. JAMDAR, J.)

(UJJAL BHUYAN, J.)