

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

WPA 9698 of 2022

Nur Islam Daptari

-Vs-

The State of West Bengal & Ors.

For the Petitioner:	Ms. Pampa Dey (Dhabal), Adv.,
For the respondent No.6:-	Mr. Shyamal Kumar China, Adv.,
For the State:-	Mr. Santanu Kumar Mitra, Adv. , Mr. Amartya Pal, Adv.

Heard on: 22 June, 2023.

Judgment on: 5 July, 2023.

BIBEK CHAUDHURI, J. : –

1. On 11th March, 2020, the Sub-Divisional Controller (Food and Supplies), Diamond Harbour, South 24 Parganas published a notification being Memo No.380 inviting the application from intending Self-Help Groups, Registered Co-operative societies, Semi Government Organization, Individuals, Group of Individuals as an entity for filling up the vacancy of FPS dealership at village Chandnagar within Gram Panchayat and Post Officer Patra under Diamond Harbour-II Block. On the basis of such notification, the petitioner submitted his application for dealership before the concerned authority on 16th October, 2020 annexing all the documents as per the notification dated 11th March, 2020.

2. It is also submitted by the petitioner that he had all eligibility criteria, like godown, covered space and other requirements. He also had the qualification and financial capacity for being appointed as FPS dealer of the area. Though, the petitioner filed application for FPS dealership the state respondents sat tight over the matter which resulted in filing a mass petition on 23rd May, 2022 before the District Controller (Food and Supplies), South 24 Parganas. Subsequently, the District Controller (Food and Supplies), South 24 Parganas selected the respondent No.6 on the basis of the inquiry reports and comparative chart as submitted by the Sub-Divisional Controller (Food and Supplies), Diamond Harbour. It is found from the said comparative chart that the respondent No.6 Sujjan Ghosh fulfilled all eligibility criteria as mentioned in the vacancy notification and other stipulations laid down in GO No.1706FS. Therefore, he was recommended for granting licence for FPS Shop in respect of the above named village.

3. It is further contended by the petitioner the respondent No.6 has no suitable godown within the advertised area. The size of the godown does not correspond with the minimum measurement as per the eligibility criteria. There is no covered space in front of the said godown and also in front of the shop to accommodate at least 20 people. Moreover, the respondent No.6 is an employee of Kolkata Police. It is also alleged by the petitioner that the respondent No.6 did not obtain any no objection certificate from the competent authority and also no permission for

construction of a godown from the concerned gram panchayat. Therefore, the petitioner has filed the instant writ petition for the following relief:-

- (a) A writ in the nature of Mandamus commanding the respondents, their agents, servants, and associates and each one of them not to give any effect or further effect of approval for Re-notification of FPS vacancy under notification no. 380/Sc/F&S/DH/2020 dated 11.03.2020 for filing up the vacancy of FPS dealership at village- Chandnagar, P.O+G.P- Patra, P.S- Diamond Harbour-II, Block- Diamond Harbour-II, District- South 24 Parganas in favour of respondent no.6 by the Respondent authorities and further commanding the Respondents to withdraw/cancel and rescind the purported approval for Re-notification of FPS vacancy of respondent no.6 issued by the Respondent no.5 herein being annexure P-5 of this Application;
- (b) A writ in the nature of Certiorari directing the concerned respondents authorities to transmit and produce all relevant records of the case to this Hon'ble Court so that proper justice may be administered by quashing and setting aside the purported approval for Re-notification of FPS vacancy of the respondent no.6 as FPS dealership at the location as envisaged in annexure P-1 of this writ application and quashed and set aside the purported letter dated 23.5.2022 issued under Memo no.471/SC/FS/DH/22 by the Sub-Divisional Controller (F&S), Diamond Harbour, South 24 Parganas being annexure P-5 of this Application and quash and set aside the same;
- (c) A Rule NISI in terms of prayers (b) and (c) and make the Rule absolute after hearing the parties
- (d) An order of injunction restraining the respondents no.1 to 5 from giving any effect or further effect of the purported selection of Respondent no.6 restraining them from taking any further steps for appointing the Respondents no.6 as FPS dealership for the location as envisaged in annexure P-1 of this Application till the disposal of the Rule;

(e) Any other order or orders, writ or writs and /or direction or directions as your Lordships may deem fit and proper;

(4) The Sub-Divisional Controller (Food and Supplies), Diamond Harbour, respondent No.4 herein has filed a report in the form of affidavit as directed by this Court vide order dated 10th August, 2022. It is reiterated by the respondent No.4 that as per vacancy notification an applicant must have a suitable godown within the advertised area for storage of food grains and running the dealership as per the guideline issued by the Department of Food and Supplies vide GO No.1707-FS dated 21st July, 2014. In the said GO minimum size of the godown along with the covered space adjacent to the godown to be used for office purpose and for FPS automation are mentioned. It is also stipulated that the applicant must have bank balance of at least Rs.5 lakhs as working capital both on the date of application as well as one year preceding the date of application. Another important guideline is that the applicant should not be employed in any government/semi-government organization/School and should not be elected member of any panchayati raj institution/urban local body.

(5) All such requirements were duly complied only by the respondent No.6. Other three applicants including the petitioner failed to fulfill the financial ability criteria as stipulated in serial No.6 of the gazette notification and consequent GO No.1706-FS. On 6th January, 2022 all the applicants were directed to submit the supporting bank account details except the respondent No.6, none of the applicants could fulfill the

qualifications as contemplated in the aforesaid instructions. Thus, upon due inquiry, the respondent No.6 was only found to be eligible for the licence under the WBPDS (Maintenance and Control) Order, 2013. The respondent No.4 further stated that the private respondent No.6 mentioned that in his application he used to work as a labour at the relevant point of time. However, in the writ petition, the petitioner alleged that the respondent No.6 works in Kolkata Police. After getting the copy of the writ petition the Deputy Commissioner of Police, Kolkata Police Headquarter was requested by a letter dated 12th August, 2022 to furnish the status of employment of respondent No.6. However the Directorate of District Distribution, Procurement and Supply, Department of Food and Supplies Government of West Bengal has not received any reply yet. The petitioner submitted an exception to the report submitted by the respondent No.4 dated 16th August, 2022 on 1st September, 2022 and practically reiterated the points canvassed by him in the writ petition.

(6) Against the said exception the Sub-Divisional Controller, submitted an objection on 22nd March, 2023. It is further stated by him that for effective adjudication of the instant writ petition, an information was sought for from the Deputy Controller, (Law) Directorate of District Distribution Procurement and Supplies regarding the definition of the term “employment” in the vacancy notice and the current employment status of the respondent No.6. As per the information of the Deputy Director (Law) it is urged by the respondent No.4 that the term “employment” must be read in pari materia with clause 20(iii)(a)(e)

meaning thereby a person holding a post in the establishment of the State Government or Central Government or any authority or body or institution of Local Government establishment or constituted by or under the Constitution or by other law made by the Parliament or a state legislature or by notification issued or order made by the Central Government or a State Government. If a person is not employed under the above provision he cannot be treated as unemployed. It is however admitted by the respondent No.4 that the respondent subsequently came to know that the private respondent No.6 is posted as a civic volunteer under Kolkata Police. A post of civic volunteer is a contractual post which is governed by an agreement between employer and employees and he cannot be treated as a Government servant as he is working on contractual basis. Article 309 of the Constitution of India cannot be attributed in case of Civic Volunteers. Therefore, even if the respondent No.6 is found to be a civic volunteer after grant of licence, his licence is not liable to be cancelled on the ground of his being civic volunteer.

(7) The private respondent No.6 has filed a written objection stating, inter alia, that he has fulfilled all eligibility criteria as per part 2 of the vacancy notification. The petitioner admits that he has been working as a civic volunteer fully on contractual basis under Kolkata Police. He gets honorary on no work no pay basis. He does not get any salary or wage. Civic volunteer get an amount paid by the Government as the person who is working on daily wage basis. The respondent No.6 admits that as a civic volunteer he earns daily wage at the rate of Rs.141.81. His employment

continues for a period of six months and thereafter another batch of candidates replaces the respondent and his batch. In case of civic volunteers there is no master/servant relation between the government and the civic volunteers and the service rendered by respondent No.6 is voluntary in nature. He is not employed in any job.

(8) Having heard the learned Advocates for the parties and on careful perusal of the entire materials on record I like to record at the outset the provision contained in Clause 20(iia) of the WBBDS (Maintenance and Control) Order, 2013. The provision runs thus:-

“(iia) Following person shall not be eligible to apply for a licence of a dealer, namely-

- (a) a person holding a license of dealer or distributor or wholesaler in his name or a person whose relative already has a dealer or distributor or wholesaler license;
- (b) a member of local bodies, local authority, Panchayati Raj Institutions, board or corporation, or Member of Legislative Assembly or a Member of Parliament during his tenure as such capacity;
- (c) a minor or person of unsound mind or an insolvent;
- (d) a person convicted by the court under the Act or in any other criminal proceedings connected with essential commodities;
- (e) a person holding a post in the establishment of any State Government or Central Government or any authority or body or institution of local self-Government established or constituted by or under the Constitution or by any other law made by the Parliament or a State Legislature or by

notification issued or order made by the Central Government or a State Government;

(f) a limited liability partnership;

(g) a corporation or company:

Provided that nothing in this clause shall affect the continuance of existing license of dealer.”

(9) The fate of the instant writ petition depends upon the determination of the question as to whether a civic volunteer is a person falling under sub-clause (e) of Clause 20(iiiia) of WBPDS (Maintenance and Control) Order, 2013.

(10) The question as to whether a homeguard holds a post in the establishment of any State Government came up for consideration before a Special Bench of Allahabad High Court in the case of Rajbir Singh vs. State of U.P & Ors decided on 1st October, 2018. The Special Bench of the Allahabad High Court relied on the decision of the Hon’ble Supreme Court in the case of **State of Assam vs. Kanak Chandra Dutta** reported in **AIR 1967 SC 834**. In paragraph 9 of Kanak Chandra Dutta (supra) it was held by the Hon’ble Supreme Court:-

“9. The question is whether a Mauzadar is a person holding a civil post under the State within Article 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 Article 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. In Article 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. 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 Articles 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. 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."

(11) Taking into account the aforesaid constitutional provisions and the scheme of Home Guards Act, Allahabad High Court held that a home guard shall not be deemed to be holder of a civil post.

(12) The position of a civic volunteer is more vulnerable than a home guard. There is no statutory recognition of the civic volunteers. They work on the basis of daily wage and under the scheme of no work and no pay.

Therefore, they do not hold any civil post under the State Government. In view of the above discussion, I have no other alternative but to hold that the respondent No.6 does not hold any 'post' under the State Government. Therefore, he is entitled to licence of a FPS shop and the decision of the respondent No.4 does not suffer from any illegality and perversity. The decision of the respondent No.4 is not arbitrary, mala fide or in violation of WPPDS (Maintenance and Control) Order, 2013.

(13) For the reasons stated above, I do not find any reason to interfere with the impugned order of granting licence in favour of respondent No.6. The instant writ petition is accordingly dismissed on contest, however without cost.

(Bibek Chaudhuri, J.)