IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5479 of 2006
with
SPECIAL CIVIL APPLICATION NO 5483 AND 5485 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SANGITABEN MANILAL YADAV - Petitioner(s)
Versus
PRESIDENT & 2 - Respondent(s)

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Appearance :
MR PR NANAVATI for Petitioner(s) : 1,MR BS KHATANA for Petitioner(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1,
MR MEHUL SHARAD SHAH for Mehsana Nagarpalika.
Mr. L.B. Dabhi, AGP for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 28/04/2006

ORAL JUDGMENT

Heard learned advocate Mr. G.D. Acharya for Mr. P.R. Nanavati for petitioners and Mr. L.B.

Dabhi, learned AGP for respondent NO. 3 and Mr. Mehul Sharad Shah for respondent Mehsana Nagarpalika in all these three matters.

Rule. Service of Rule is waived by learned AGP Mr. L.B. Dabhi on behalf of respondent NO. 3 and by learned advocate Mr. Mehul Sharad Shah on behalf of respondent Nagarpalika. In the peculiar facts and circumstances of the case, these petitions have been taken up for final hearing with the consent of the learned advocates for the parties.

Facts of these three petitions are as under :

Special Civil Application NO. 5479 of 2006 :

Petitioner **SANGITABEN MANILAL YADAV was working in Nagalpur Gram Panchayat as computer operator. According to the petitioner, she is qualified for the post of computer operator. Application was made by the petitioner to**

Nagalpur Gram Panchayat for the said post on May 28, 2004. The Panchayat has passed resolution no. 23 in the books of the Nagalpur Gram Panchayat. Accordingly, petitioner was appointed by Panchayat. Nagalpur Gram Panchayat subsequently became Nagalpur Municipal Borough. Pursuant to the resolution of the State Government dated 14th February, 2006, it merged with Mehsana Nagarpalika and immediately on 17th February, 2006, services of petitioner were orally terminated by Mehsana Nagarpalika. Petitioner is challenging said order of termination before this court.

Special Civil Application NO. 5483 of 2006 :

Petitioner is Ranchhodbhai Ganeshbhai. Petitioner is physically handicapped person and his disability is declared to be 40 % as per certificate of the office of the Superintendent General, Mehsana dated 17th November, 1990. Petitioner made an application to Nagalpur Gram

Panchayat as supervisor of bore operator and accordingly, said Gram Panchayat appointed him on 9th August, 2002 by passing resolution in the books of gram panchayat vide resolution no.51.Appointment order was issued by said gram panchayat on 10th August, 2002 which is at page 18 in the said petition. Appointment given to petitioner is ad.hoc. Thereafter, by notification dated 10th August, 2005, Nagalpur Gram Panchayat became Nagalpur Municipal Borough and then it has been merged with Mehsana Nagarpalika pursuant to notification of the State Government dated 14th February, 2006 and thereafter, services of petitioner were orally terminated in February, 2006 which is under challenge through this direct petition.

Special Civil Application NO. 5485 of 2006 :

Petitioner is Pavankumar Manubhai Patel. He was appointed by said Gram Panchayat for the post of clerk vide resolution dated 27th

June, 2003 and thereafter,services of petitioner were orally terminated on 28th February, 2006 by Mehsana Nagarpalika. This termination is challenged by petitioner before this court through this direct petition.

Pursuant to notice issued by this court, respondents appeared before this court through their counsel. Affidavit in reply is filed on behalf of respondent NO. 2 against which rejoinder has been filed by petitioner. Similar contentions have been raised by respondent no. 2 in its reply in other petitions. Respondent No.2 has denied averments made by petitioners in memo of petition and it is stated that the petitioner was appointed as peon by order dated 27th June, 2003 on daily rate and by resolution dated 31st May, 2004, he was appointed as recovery clerk. According to the appointment or resolution, services can be terminated at any time without issuing notice or assigning any

reason whatsoever. Services of the petitioners were not required by Mehsana Nagarpalika and, therefore, petitioners were relieved from work. Petitions in their present form are not maintainable as petitioners are having alternative remedy under the machinery of the ID Act, 1947. This Court cannot exercise extra ordinary powers under Article 226 of the Constitution of India. Daily rated employees are not covered under section 25F of the ID Act, 1947. Section 2(oo) (bb) of the ID Act, 1947 is applicable, therefore, compliance of section 25F is not necessary. Petitioners are having no case and, therefore, petitions are required to be dismissed.

Today, on behalf of the petitioner, affidavit in rejoinder has been filed relying upon the notification dated 10th August, 2005 and certain conditions have been incorporated in the notification. Learned advocate Mr. Mehul Sharad

Shah has submitted that the said notification has been subsequently cancelled by the State Government and, therefore, it is not applicable to the facts of this case.

Learned advocate Mr. Mehul Sharad Shah submitted that the petitioner is not having any prima facie case, section 25F is not applicable as the case is covered by section 2(oo) (bb) of the ID Act. Petitioner was appointed as daily wager and not completing 240 days service and, therefore, no relief should be granted in favour of petitioners. He also emphasized that Mehsana Nagarpalika has no work for petitioners and, therefore, order of termination were passed. He relied upon following four decisions :

(1) Haryana State ECCW Store Ltd. And another versus Ram Niwas and another, reported in (2002) 5 SCC 654.

(2) Himanshukumar Vidyarthi and others versus State of Bihar and others, AIR 1997 SC 3657.

(3) Karjan Municipality versus Shashikant Kamalakar Shukla reported in 2004 (3) GLH 23.
(4) Halvad Nagarpalika & Anr. Versus Jani Dipakbhai Chandravadanbhai & Ors., reported in 2003 (4) GLR 3229.

Learned advocate Mr. Acharya submitted that from the date of appointment, all petitioners were working continuously without any break. In none of the resolutions, appointments were made as daily rated but appointments were made as Hangami. From the date of appointment till the date of termination, no break in service is pointed out and each petitioner has completed 240 days continuous service as required under section 25B of the ID Act, 1947. He also submitted that section 25F is applicable and it has not been complied with by the Respondent Mehsana Nagarpalika. He also submitted that alternative remedy is not an absolute bar in filing of the petition to challenge the order of termination

before this Court. He also submitted that before terminating services, no show cause notice or an opportunity was given to petitioner by the nagarpalika. Therefore, according to him, these are undisputed facts on record which would not require leading of any evidence and undisputed questions of fact are involved and, therefore, present petitions are maintainable and the services of workmen were terminated on the principle of hire and fire by the Mehsana Nagarpalika without considering the adverse impact thereof which would be upon the workmen whose services have been terminated without considering impact of such termination on their families, and livelihood how they will maintain themselves and their families and, therefore, Mr. Acharya submitted that the orders of termination are required to be set aside as violative of section 25F of the ID Act, 1947. He also submitted that the non compliance of section 25F of the ID Act, 1947 is apparent on the face of it

as it is not the case of respondent Mehsana Nagarpalika that it has ever complied with such provisions, on the contrary, Mehsana Nagarpalika has come out with the case that sec.25F would not be attracted as section 2(oo)(bb) is applicable.

I have considered the submissions made by the learned advocates for the parties and have also perused the record of each petition. I am considering the resolution in case of special civil application no. 5485 of 2006. It is the resolution at page 13, dated 27th June, 2003 appointing petitioner Pavankumar M. Patel as Hangami Peon. That resolution was passed and thereafter, that service remained continue as Hangami Peon. Salary was paid as Hangami Peon, according to the pay register and muster roll produced by the petitioner. Subsequently, he was posted and appointed as clerk and that muster is at page 38

In Special Civil Application NO. 5483 of 2006, order of appointment dated 10th August, 2002

is at page 18. Petitioner is appointed as supervisor of bore operator, as hangami. It is necessary to be noted that this petitioner Shri Ranchhodbhai Desai is physically handicapped person having disability of 40% as certified by certificate dated 7th November, 1990. When a person is physically handicapped or disable person, then, such person is entitled for the protection of **The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) coming into force on February 7, 1996. However, that aspect of the matter has also not been examined by the respondent Mehsana Nagarpalika while terminating services of this physically handicapped petitioner. Apart from that, petitioner in this case has produced muster roll.**

In Special Civil Application No. 5479 of 2006, petitioner Sangeetaben Jadav was appointed by Nagalpur Gram Panchayat by resolution dated

28th May, 2004 as computer operator hangami w.e.f. 1st May, 2004. No doubt in all the resolutions passed by the erstwhile Nagalpur Gram Panchayat, specific condition has been incorporated that their services are subject to termination at any time without assigning any reason. This condition was emphasized by the learned advocate Mr. Shah and has submitted that as per this condition, Mehsana Nagarpalaika is having right to terminate service at any time without call/reason, therefore, notice not necessary.

In view of these factual aspects examined by this Court, it is clear that none of the petitioners were appointed as a daily wager employee but they were appointed in the post of Hangami. Thereafter, further resolution was passed by Nagalpur Gram Panchayat in respect of all the petitioners by appointing on consolidated salary.

In Special Civil Application NO. 5485 of 2006, petitioner – Pavankumar was appointed on consolidated salary, means, fixed salary, therefore, not daily wager. Therefore, contention raised by Mr.Mehul Sharad Shah that all the petitioners were appointed as daily wagers is incorrect as contrary to record as each of the petitioners were appointed on ad.hoc basis, at fixed salary. Therefore, considering these factual aspects emerging from the record, none of the appointments / resolutions of erstwhile Nagalpur Gram Panchayat suggests duration of appointment, period of appointment. There is no term of contractual appointment incorporated in the orders of appointment.There is no condition incorporated that the contract is required to be renewed by the panchayat from time to time, therefore,these are three cases wherein Hangami Appointments on fixed salary were made which is emerging from the record and not the contractual or periodical appointment and

further, it only bears condition that the services of these petitioners are subject to termination at any time without assigning any reason whatsoever. Such condition is unilaterally incorporated by the employer and the workmen are having no choice. While offering employment, employer would be in dominating position to dictate the terms and the workman would be having no choice and such conditions are contrary to the mandatory statutory provisions. It is settled principle of law every action of public body/authority should have to be justified in law. In view of these facts, since the petitioners were not daily wager, therefore, contention raised by the learned advocate Mr.Mehul Sharad Shah that section 25F will not apply cannot be accepted. Such terminations are covered by the definition of section 2(oo) of the ID Act, 1947, being retrenchment. Further, the contention that the case is covered by section 2(oo)(bb) cannot be accepted as none of the

appointment is contractual or periodical appointment, therefore, termination of each petitioner is amounting to retrenchment requiring the respondent Mehsana Nagarpalika to comply with sec. 25F of the ID Act, 1947. In view of the undisputed facts emerging from record, from the date of appointment till the date of termination, uninterrupted service, continuous service of more than 240 days in a year preceding the date of termination of each petitioner, petitioners are satisfying the requirements of section 25-B(1) & (2) and then, Nagarpalika has not followed mandatory provisions of section 25F of the ID Act, 1947 and it is not the case of respondent Mehsana Nagarpalika that they have ever followed sec. 25F of the ID Act, 1947. On the contrary, it is their specific case that it is not necessary for them to comply with sec.25F. In case of a workman who has completed continuous service of 240 days as per section 25B (2) and in case of workman who has remained in continuous service

for more than one year as required under section 25B(1), employer is required to comply with section 25F before terminating services of such workman and non compliance thereof would render such termination void ab initio. That aspect has been examined by the apex court in case of Mohanlal versus Management of M/s. Bharat Management of Bharat Electronics Ltd. reported in AIR 1981 SC 1253. Apex court examined section 25-B (1) and (2) and effect of non compliance. Relevant discussion made by the apex court in para 16 and 17 is reproduced as under:

> **16. Appellant has thus satisfied both the eligibility qualifications prescribed in Section 25F for claiming retrenchment compensation. He has satisfactorily established that his case is not covered by any of the excepted or excluded categories and he has rendered continuous service for one year. Therefore, termination of his service would constitute retrenchment. As precondition for a valid retrenchment has not been**

satisfied the termination of service is ab initio void, invalid and inoperative. He must, therefore, be deemed to be in continuous service.

17. The last submission was that looking to the record of the appellant this Court should not grant reinstatement but award compensation. If the termination of service is ab initio void and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits. Undoubtedly, in some decisions of this Court such as Ruby General Insurance Co. Ltd. v. P. P. Chopra. (1970) 1 Lab LJ 63 and Hindustan Steel Ltd., Rourkela v. A. K. Roy, (1970) 3 SCR 343 : (AIR 1970 SC 1401) it was held that the Court before granting reinstatement must weigh all the facts and exercise discretion property whether to grant reinstatement or to award compensation. But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective

order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits. No case is made out for departure from this normally accepted approach of the Courts in the field of social justice and we do not propose to depart in this case.

Thus, observation made by the Hon'ble supreme court is to the effect that the order of termination is *void ab initio* **for want of compliance of section 25F and workman is deemed to be in service and court has to merely give declaration that the order of termination is void. In light of these factual aspects of the matter as narrated above, aforesaid four decisions referred to and relied upon by the learned advocate Mr. Mehul Sharad Shah are not applicable to the facts of the present case. This Court is agreeing with the principles laid down in the said four decisions but factually, these**

decisions are not applicable and are not helpful to respondent Mehsana Nagarpalika.

As regards the contention of Mr. Mehul Sharad Shah that this Court should not entertain these petitions in view of the availability of alternative remedy, this court is of the view that the availability of an alternative remedy does not operate as a bar to challenge such termination order before this court by way of direct petition. In case of UPSSC Ltd. Versus R.S.Pandey, reported in 2005 (107) FLR 729, the apex court has observed that "the court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision or has not been adopted. "

In the case of U.P.S.S.C. Ltd vs. R.S.Pandey and another, reported in 2005 (107) FLR 729 (SC), the Apex Court expressed the following views ;

"There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra virus. It is open to a party aggrieved thereby to move the High Court for quashing a proceedings on the ground that they are incompetent without a part being obliged to be wait until those proceedings run therein full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are and abuse of process of law the High Court in an appropriate case can entertain a writ petition.

Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the

taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L Hinday Narain v. I.T.O. Bareilly, that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies,

unless the High Court finds that factual disputes are involved and would not be desirable to deal with them in a writ petition."

The High Court of Allahabad (1991) (11) LLJ 341) earlier expressed the view that once a writ petition is admitted it would not be proper exercise of jurisdiction to dismiss the same on the ground of alternative remedy and that too where only a small question is involved in the writ jurisdiction. In the case of M/s. Chawla Techno Construction Ltd. and another V. State of U.P. And others, [2006 (108) FLR 351] the Allahabad High Court held as below :

"Now coming the plea of alternative remedy which has been raised on behalf of respondents is to be seen. Section 30 of the Act provides for remedy appeal and this fact is undisputed that against the order impugned appeal can be filed.

Filing of appeal requires fulfillment of various preconditions, and one such condition is deposit of entire amount with the Commissioner. Here at the point of time when writ petition had been filed this Court entertained the writ petition, and original record was also summoned to test the question of jurisdiction. Alternative remedy is not to be treated as an absolute bar when order itself is without jurisdiction and when principles of natural justice has not been complied with. See Whirlpool corporation V. Registrar of Trade Marks, present proceedings discussed above clearly shows that commissioner would have no authority or jurisdiction or even to process the application, without giving notice in Form A to the Commissioner having jurisdiction over the area in which accident took place and the State Government concerned as no notice has been given as such entire proceedings are totally without jurisdiction. Once it has been held that proceedings are without jurisdiction and original

record has been produced and concerned officer has made statement that no notice was served as required then in the facts of present case it would be inappropriate to relegate the petitioner to the forum of alternative remedy.” The H.C. of Allahabad in case of Gulam Murtaza v. State of U.P. And another, [2006 (108) FLR 652], the H.C. Of Allahabad expressed as under :

> **“Recently, in Hindusgtan Steels Works' Corporation Ltd. and another V. Hindustan Steels Works' Corporation Ltd. Employees Union, and U.P.State Spinning Company Ltd. vs. R.S.Pandey and another, Hon'ble Supreme Court has held that where specific remedy is provided, High Court interfere and deviate from the general provision of exhaustion of alternative remedies under Article 226 except when a vary strong case is made out. The law is well entrenched that alternative remedy cannot be by passed and it has to be exhausted before**

approaching the High Court under Article 226 of the Constitution of India, particularly in cases where Labour Court or Tribunal having jurisdiction in the matter have been established. Alternative remedy is absolute bar in the cases where such question of facts is to be decided by adjudication."

In UP State Bridge Corporation Ltd. And others v. UP Rajya Setu Nigam S. Karmachari Sangh, reported in 2005 (106) FLR 998, it was held that when a very strong case is made out for process as provided under the Statute, High Court can interfere in exercise of the powers under Article 226 of the Constitution of India. Not to entertain writ petition under Article 226 of the Constitution of India on the ground of availability of alternative remedy is considered to be a rule of self-imposed restriction. It is essentially a rule of policy and discretion. High Court is vested with unfettered power of granting

directions, orders or writs and such remedy of writ is absolutely a discretionary remedy and High Court has always discretion to entertain or not to entertain writ petition when alternative remedy is available. Therefore, in view of the observations of the apex court, the contention raised by Mr.Shah is rejected. Looking to the facts of this case, three petitioners were employed as Hangami without specifying duration of appointment by Nagalpur Gram Panchayat and they remained in continuous service without any break for a period of more than 1 and 2 years. Merely because of the notification dated 14th February, 2006, Nagalapur Municipal Borough merged with Mehsana Nagarpalika and Mehsana Nagarpalika terminated services of these three petitioners without assigning any reasons and in breach of the mandatory provisions of section 25F of the ID Act, 1947. It is required to be noted that even no termination order has been given to the petitioners. No reasons have been assigned by

Mehsana Nagarpalika for terminating their services as if these three petitioners are untouchable persons by the respondent Nagarpalika. Termination order disclosing reasons has not been issued but their services have been terminated orally by the concerned officer. This is the conduct and attitude of the public body that they have not taken care to communicate reason for termination. No opportunity given. No compliance of section 25 F prior to termination of their service. Therefore, order of termination of service is violative of mandatory provisions of sec. 25F and also violative of the principles of natural justice.

In so far as the petitioner in Special Civil Application No. 5483 of 2006 namely Desai Ranchhodbhai Ganeshbhai is concerned, he is physically handicapped person having disability to the extent of 40 per cent as per the certificate as discussed herein above. In view of

that, qua that petitioner, termination of his service is also violative of the mandatory provisions of section 47 of the **The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) coming into force on February 7, 1996.**

Section 47 of said 1995 Act provides that;

> **"47. Non discrimination in Government employment.– (1) No establishment shall dispense with or reduce in rank an employee who acquires a disability during his service;**
>
> **Provided that if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits.**
>
> **Provided further that if it is not possible to adjust the employee against any post he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.**

(2) No promotion shall be denied to a person merely on the ground of his disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

[See (1) Delhi Transport Corporation and Rajbir Singh (2003-I-LLJ page 865)(2) Kunal Singh versus Union of India and Another (2003) 4 SCC 524; (3) Union of India v. Sanjay Kumar Jain reported in 2004 AIR SCW 4577; (4) Kuldeep Singh vs Delhi Transport Corporation 2003 I LLJ 672 - Delhi High Court; (5) LIC of India versus Chief Commissioner for Disabilities, Ministry of Social Justice and Empowerment and others 2003 I LLJ 673 Delhi High Court; (6) GSRTC vs Gopal Mohanbhai Patel 2003 (2) GLH 428 Gujarat High Court; (7) University of Rajasthan versus Sarendrakumar Goel 2003 1989 FLR 393 Rajasthan High Court DB.]

Therefore, considering all these legal as well as the factual aspects of the matter, according to my opinion, termination order is bad in law and void ab initio and, therefore, same are required to be quashed and set aside by directing the respondent Nagarpalika to reinstate them without back wages.

In result, these petitions are allowed. Action of the respondent Mehsana Nagarpalika in terminating services of petitioners is quashed and set aside. Respondent Nagarpalika is directed to reinstate present petitioners in service with continuity of service and without back wages for intervening period. Respondent Mehsana Nagarpalika shall reinstate these petitioners in service within one month from today with continuity of service, without fail. Accordingly, these three petitions are allowed. Rule is made absolute in terms indicated herein above. There

shall be no order as to costs.

(H.K. Rathod,J.)

Vyas