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**(2001) 12 GUJ CK 0021**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 6110 of 1991

Amarsinh Madhavji Chauhan — APPELLANT

Vs

State of Gujarat — RESPONDENT

**Date of Decision :** 05-12-2001

**Acts Referred:**
Constitution of India, 1950 — Article 37, 38, 39

**Citation :** (2002) 92 FLR 919 : (2002) 22 GLH 158

**Hon'ble Judges :** H.K. Rathod, J

**Bench :** Single Bench

**Advocate :** C.H. Vora, for the Appellant; Purnanand and Co. and H.S. Munshaw, for the Respondent

**Final Decision :** Dismissed

## Judgement

H.K. Rathod, J.—Heard learned advocate Mr.C.H.Vora appearing on behalf of the petitioner and Ms.Shraddha Trivedi, learned AGP appearing on behalf of the respondent No.1 so also Mr.Jayesh Barot, learned advocate for Mr.H.S.Munshaw on behalf of the respondent No.3. Though notice of Rule has been served on the respondent No.2 but no one remained present on behalf of the respondent No.2.

2. In the present petition, Rule has been issued by this Court on 19th December, 1991 and interim relief was refused by this Court on 17th February, 1992. Affidavit-in-reply are filed on behalf of the respondent Nos.1 & 3, whereas no reply has been filed on behalf of the respondent No.2.

3. It is most pertinent to note that this is a case of gross exploitation of the employee who is working as a Watchman with the respondent authorities. The facts of this case shows that the petitioner has been appointed as Watchman by the respondent No.3 by order dated 1st July, 1974 on temporary basis. A copy of the appointment order dated 1st July, 1974 is placed on record. Initially the petitioner was working for respondent No.3 - District Development Officer, District Panchayat - Kachchh at Bhuj and thereafter with effect from 1st May,

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1978 the petitioner has been taken up by the respondent No.2. During the service of the present petitioner, service of the petitioner was terminated on 31st August, 1984 by the respondents. However, said order of termination was challenged by the petitioner before the Civil Court, Kachchh at Bhuj. That said Civil Suit has been fully decreed in favour of the petitioner by judgment and order dated 10th January, 1989 and Civil Court come to the conclusion that termination order which has been passed against the present petitioner is illegal and bad and therefore, set aside said order with direction to grant all benefits to the present petitioner. Today, learned advocate Mr.C.H.Vora has placed on record the decision of the Appeal given by the Extra Assistant Judge, Bhuj in Civil Regular Appeal No.21 / 1989 filed by the State Government and other respondent. That said appeal also came to be dismissed by Appellate Court on 2nd January, 1996. It is the case of the petitioner that after decision rendered by the Civil Court, the petitioner has been reinstated in service and continuously working with the respondents. Thus, the petitioner was appointed in the year 1974 on 1st July, 1974 on temporary basis and on that occasion, his daily wage was fixed at Rs.4/- as per the order of appointment dated 7th July, 1974. What is disheartening to note that this daily wage of Rs.4/which was admittedly fixed at the time of appointment on 1st July, 1974, is continued even in the year 2001. Learned advocate Mr.Vora after having instruction from the counterpart has made a statement before this Court that presently also the petitioner is getting daily wage at the rate of Rs.4/only. The petitioner has been in continuous service from the year 1974 upto 2001 but despite this, his services have not been regularised by the respondent authorities. Therefore, real grievance of the present petitioner is that there is inaction on the part of the respondent authorities in not absorbing the petitioner as permanent employee and not giving regular pay scale which is available to the Class IV post of watchman as permanent employee. The grievance of the present petitioner is that similarly situated other persons working on the post of watchman are receiving regular salary though the petitioner has been working from the year 1974 upto 2001 till date, the petitioner has not been regularly absorbed by the respondent authorities, therefore, his request made by the petitioner to direct the respondents to absorb the present petitioner on permanent basis and also to pay regular salary to the petitioner in the post of Watchman.

4. On behalf of the respondent No.1, affidavit-in-reply has been filed to the effect that the petitioner was appointed on daily wage purely on adhoc basis at the rate of Rs.4/- per day and the appointing authority was District Development Authority, Kachchh at Bhuj. The Rural Industrial Project came into effect with effect from 1st May, 1978 for General Amenities Center was transferred to Reha District Industrial Center. It is further contended that since no activity going on from the Central Government and it was not possible to continue rural industrial project but the petitioner was continued because of the interim order passed by this Court as well as other Court. According to the respondent No.1 that no activities can be carried out and requirement of services of the petitioner is not

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there and therefore, the petitioner has no right to continue in service and not entitled to claim absorption and the petitioner was continued in service on account of protection granted by the Court. Considering the affidavit-in-reply filed by the respondent No.3, wherein it is submitted that the petitioner was required to work in the then Gram Udhyog Branch of District Panchayat but later on due to the administrative actions and reshuffle, said Gram Udhyog Branch of the District Panchayat was merged with the District Industries Centre at Bhuj with effect from 1st May, 1978 along with record, furniture etc. and since then the entire Gram Udhyog Centre, Bhuj and the District Panchayat has nothing to do with the said office of the General Manager, District Industries Centre which is under the administrative control of supervision of Industries Commissioner of State Government. Therefore, respondent No.3 is not having any knowledge and information about further developments in the subject matter.

5. I have considered the submissions of the learned advocates on behalf of the respective parties. Perusal of the material on record reveals that the petitioner who was appointed on 1st July, 1974 as daily wager at the rate of Rs.4/- per day and he remained in service upto 31st August, 1984. Thereafter, the services of the petitioner came to be terminated and said action which was challenged by the petitioner and ultimately, he succeeded before the Civil Court and even before the appellate forum and consequentially, the petitioner continued in services. These are undisputed facts which are on record. In light of these facts, when the petitioner is not receiving regular salary for the post of Watchman who is working since the year 1974 and he remained continued in service at the rate of Rs.4/- per day, which in clear terms, amounts to clear exploitation of the petitioner by the public authority. It is also pertinent to note that this petition is pending before this Court for more than 9 years, despite this also, the case of the petitioner has not been considered by the respondent authority for absorption of the petitioner or paying him regular salary to the petitioner. ?In above background of the facts, certain observations made by the Apex Court in case of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., are relevant with the facts of the case and therefore, observations made in para-12, 22 and 23, 28 and 29 are quoted as under :-

"12. We may not go by the labels, Let us reach the hub. And the same is that the dichotomy of sovereign and non-soverign functions does not really exist, it would all depend on the nature of power and manner of its exercise, as observed in para 23 of NAGENDRA RAO''S CASE [ 1994 Air SCW 3753 ]. As per the decision in this case, one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such action in Courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace or war, foreign, affairs, power to acquire and retain territory, are functions which are indicative or external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State if immune from being used in such matters. But then, according to this decision

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the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non sovereign powers has largely disappeared.

22. We have given out due thought to the aforesaid rival contentions and, according to us, the object of the State Act, inter alia, being prevention of certain unfair labour practices, the same would be thwarted or get frustrated if such a burden is placed on a workman which he cannot reasonably discharge. In our opinion, it would be permissible on facts of a particular case to draw the inference mentioned in the second part of the item, if bandlis, casuals or temporaries are continued as such for years. We further state that the present was such a case inasmuch as from the materials on record we are satisfied that the 25 workmen who went to Industrial Court of Pune [ and 15 to Industrial Court, Ahmednagar ] had been kept as casuals for long years with the primary object of depriving them the status of permanent employees inasmuch as giving of this status would have required the employer to pay the workmen at a rate higher than the one fixed under the Minimum Wages Act. We can think of no other possible object as, it may be remembered that the Pachgaon Parwati Scheme was intended to cater to the recreational and educational aspirations also of the populace, which are not ephemeral objects, but par excellence permanent. We would say the same about environment-pollution-care work of Ahmednagar, whose need is on increase because of increase in pollution. Permanency is thus writ large projects, persons are kept in jobs on casual basis for years the object manifests itself; no scrutiny is required. We, therefore, answer the second question also against the appellants.

23. The final point which needs our determination is regarding the reliefs granted by the Industrial Court, which is to make the workmen, in both the matters, permanent with all benefits of a permanent worker, which would include payment of wages etc. at the rate meant for a permanent worker.

28. In so far as the financial string on State exchequer is concerned, which submission is sought to be buttressed by Shri Dholakia by stating that in the Forest Department itself the casual employees are about 1.4 lacs and if all of them were to be regularised and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighborhood of Rs.300 crores a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorem. We have neither been impressed by the first nor frightened by the second inasmuch as we do not intend that the view to be taken by us in these applies should apply, proprio vigore, to all causal labourers of the Forests Department or any other Department of the Government.

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29. We wish to say further that if Shri Bhandare''s submission is taken to its logical end, the justification for paying even minimum wages could wither away, leaving any employer, not to speak of model employer like the State, to exploit unemployed persons. To be fair to Shri Bhandare it may, however, be stated that the learned counsel did not extend his submission this far, but we find it difficult, to limit the submission of Shri Bhandare to payment of, say fair, wages, as distinquished from minimum wages. We have said so, because if a pay scale has been provided for permanent workmen that has been done by the State Government keeping in view its legal obligations and must be one which had been recommended by the State Pay Commission and accepted by the Government. We cannot deny this relief of permanency to the respondents - workmen only because in that case they would be required to be paid wages meant for permanent workers. This right flows automatically from the relief of regularisation to which no objection can reasonably be taken, as already pointed out. We would, however, observe that the relief made available to the respondents is not one which would be available ipso facto to all the casual employees either of the Forests Department or any other Department of the State. Claim of casual employees for permanency or for higher pay shall have to be decided on merits of their own cases.

6. Similarly, view taken by this Court in case of C.D. CHAUHAN & ORS. V RESERVE BANK OF INDIA AND ANOTHER reported in 32 [2] GLR 1192, wherein relevant Head Notes portion of para 4,5 and 7 are quoted as under :-

"In case of the petitioners it is stated that their names are sponsored by employment exchange, Ahmedabad. Their names were sent on the requisition of the Reserve Bank of India for the posts of Mazdoors which belong to Cl.IV in the service of the Bank. Persons desirous of being employed were required to submit their application in the prescribed application form and such application for inter alia required details regarding age, educational qualifications, previous experience etc. pursuant to such applications candidates were called for personal interview and based on their age, educational qualifications and performance at the personal interview they were selected for being waitlisted for the post of Tikka Mazdoors and after their selection they were called upon to undergo medical fitness examination, and after they have been found medically fit they were waitlisted in the waiting list of daily wage mazdoors. [para-4]

The question that arises is as to how daily wage [tikka] Mazdoors are differently or adversely situated, vis-a-vis, regularly employed Mazdoors of the respondent - Bank. Is mode of their recruitment different ? Are qualifications prescribed for the post different ? Are daily wage Mazdoors in any way ineligible or disqualified for being absorbed as regular mazdoors ? Are they rejected by any selection committee in the process of selection ? These few questions require to be answered, and the very mode of recruitment [stated in paragraph 4 ] makes it clear that the answer to all the questions is in the negative. The daily wage [tikka] mazdoors should possess the minimum educational qualification, namely

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Standard IV to VII passed and the petitioners when they applied for the post of daily wage [ tikka ] mazdoors did possess that qualification. The educational qualification for the post of regular mazdoor is not stated to be different. On the date of their application or their initial recruitment they were not overaged. They are not in any manner found to be ineligible inasmuch as the selection committee has selected them. In fact they have been waitlisted and they have been continuously offered work on daily wage basis since 1984 till the date they filed the petition. Even after filing of this petition they have been offered work on daily wage basis as tikka mazdoors. [para-5]

There is no justification for denying regular appointment to the petitioners for the post of regular mazdoors. When the petitioners and other identically situated persons were enlisted to work as daily wage mazdoors after undergoing due selection process there was no justification in denying to them the post of regular mazdoors. When the Reserve Bank tried to fill in the posts of regular mazdoors in its regular establishment by giving fresh advertisement and by preparing list of 120 persons in total disregard of the claims of the petitioners for such posts, petitioners knocked the doors of this Court for justice." [para-7]

7. Recently, the Apex Court has also considered this aspect of regularisation in service and also as regular pay scale to such daily wager employees in case of Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others, . Relevant observations made in para-18, 19 and 30 are quoted as under :-

"18. What emerges is, all the respondent workmen are eligible for absorption on the facts of this case subject to any eligible qualification under the rule if any. Though no recruitment rules were filed in the proceedings either before the Tribunal or in the High Court but while proposing the scheme a copy of the recruitment rules for various cadres have been placed before us on behalf of the appellant University. This gives in column No.1 the serial No., in Column No.2 the name of the post, in column No.3 the pay scale, in column No.4 the age limit and in column NO.5 the qualification, serial No.10 deals with Peon and Class IV servants, serial No.13 deals with Operator-cum Mechanic, Serial No.14 deals with Chowkidar, Serial No.25 deals with Plumber and Serial No.33 deals with Carpenter. This shows that recruitment rules did have these post in its ambit about which we are concerned, yet no posts were created. This proposed creation of post is churned out only after this long battle by the workmen as against the appellant. It was not expected from the institutions like the present appellant, especially when it is fully funded by the State Government that this process of absorption should have taken such a long time and to have yielded to it only after this long battle. This legal position is well known not only to the appellant but the State who is funding it, then why to do it only after Courts'' intervention. It is true creation of post does involved financial implication. Hence financial health of a particular institution plays important role to which Courts also keep in mind. The Court does exercise its restrain where facts are such where extent of creation of post creates financial disability. But at this juncture

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we would like to express our note of caution, that this does not give largess to an institution to engage larger number of daily wage workers for long number of years without absorbing them or creating posts which constitutes an unfair labour practice. If finances are short engagement of such daily wage workers could only be for a short limited period and if continuous work is required it could only do so by creating permanent post. If finances are not available, take such work which is within financial mean. Why take advantage out of it at the cost of workers.

"19. One of the questions which is also up for our consideration is, apart from the fact who are to be regularise, what would be payable to these daily wage workers who have completed more than 10 years of continuous service. Submissions for the respondents is, that such daily wage workers should be paid the same minimum scale of pay as admissible to the regularised incumbent based on the principle of Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, was a case of daily rated casual labourers of the P & T department doing work similar to that of the regular workers of the department. This Court held :

" ..... Even though the Directive Principle contained in Articles 38 and 39[d] may not be enforceable as such be virtue of Article 37 but it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination. The State cannot deny at least the minimum pay in the pay scales of regularly employed workmen even though the Government may not be compelled to extend all the benefits enjoyed by regularly recruited employees. Such denial amounts to exploitation of labour. The Government cannot be take advantage of its dominant position and compel any worker to work even as a casual laborer on starvation wages. It may be that the casual laborer has agreed to work on such low wages ..... "

30. According to the State counter if absorption is made from 1-1-1993 of all those who have completed ten years of service as per Tribunal order, the payment towards arrears would be to the tune of 15 crores. Since in the proposed scheme, absorption is from 1st January, 2001, the State has already gained much more than this arrears of more than 15 crores. In this light and in the absence of details being placed before us, we are leaving the extent of creation of the posts on the State Government. We hope and trust, the Government who is the guardian of the people and is obliged under Article 38 of the Constitution, to secure a social order for the promotions of welfare of the people, to eliminate inequalities in status, will endeavor to give maximum posts even at the first stage of absorption, and DDO the same in the same spirit for creating additional posts after enquiry as we are indicating hereunder. It is necessary that the State Government to set up an enquiry to find what further number of additional posts are required for regularising such other daily rated workers, and after assessing it, to create such additional posts for their absorption. This exercise should be done by the State Government within a

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period of six months. The submission on behalf of the respondent is that those who are not regularised and are continuously working for 10 or more years with minimum of 240 days in each calender year, they should be paid minimum pay scale as admissible to an incumbent regularised on similar post doing similar work instead of minimum wages as prescribed by the Government. The dispute thus is, whether such workers to be paid minimum daily wage as Government prescribes as per the scheme or pay them the minimum pay scale admissible to such regularised worker without increment and other benefit. This Court in one set of decisions have said to regularise them in one block and pay them the same minimum pay scale as admissible to a regular employee as in; Surinder Singh and Another Vs. Engineer-in-chief, C.P.W.D. and Others, , U.P. Income Tax Department Contingent Paid Staff Welfare Association Vs. Union of India (UOI) and Others, , 1998 State of Punjab v. Devinder Singh, 1998 [9] SCC 595, Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., and in other cases to absorb in a phased manner under a scheme which depends on the facts of each case. In Mool Raj Upadhyaya Vs. State of H.P. and Others, , this Court approved a scheme under which the daily wage workers whether skilled or unskilled who have not completed 10 years of service was to be paid daily wage at the rates prescribed by the Government of H.P. from time to time for daily wage employees falling under Class III and IV till they are appointed regularly. Strong reliance is placed on behalf of the University on this case and also, looking to the fact that it has not impressive source of its own, being an Agricultural University, depending on the State fund, we hold they should be paid minimum wages as prescribed by the Government from time to time as proposed under the scheme. We approve both clauses 2 and 3 on the facts and circumstances of this case. In fact, in seeking minimum pay scale to such daily rated workers as admissible to a regular employee is based on the principle of `equal pay for equal work''. It is pertinent to refer, in this case the observations of the High Court :

".... Workmen are not claiming equal pay for equal work but they are claiming permanent status as Class IV employees as they are working and have gained more than sufficient experience in their work ... "

8. Above referred decisions are relevant and squarely applicable for deciding the question of regularisation and absorption of such daily wager those who are working since long and not receiving regular salary from the Government Department. In such circumstances, this Court can direct the respondents to regularise the services of the petitioner with regular pay scale with particular date. But instead of issuing such directions straightaway, according to the opinion of this Court, let this injustice now to be cured and rectified by the respondents themselves. Therefore, injustice caused to the petitioner which persists since the year 1974 even upto date in the year 2001, it is even difficult to imagine for this Court that at the remuneration of Rs.4/per day, how the petitioner was and is able to maintain him and his family during all these years of his service. Therefore, in light of the facts and circumstances discussed

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hereinabove, it is directed to the petitioner to file and submit a detailed representation to the Secretary, Industries and Mines and Energy Department, Sachivalaya, Gandhinagar and to the General Manager, District Industries Centre at Bhuj within period of one month from the date of receving the copy of this order. As and when such representation of the petitioner is received by the Secretary, Industries and Mines and Energy Department, Sachivalaya, Gandhinagar and to the General Manager, District Industries Centre at Bhuj, both the authorities are directed to consider the representation of the petitioner in respect of claim of the regularisation of his service on the basis of the Government Policy and also to consider the services of the petitioner for regularisation of pay scale for the post of Watchman. While considering and examination of grievance of the petitioner, both the respondents are directed to take into account of the observations of the Apex Court referred to above and considering all the aspects of the matter, pass appropriate orders in accordance with law within period of two months from the date of receiving such representation from the petitioner. It is also directed to both respondents to pass speaking order and they will communicate such orders immediately to the petitioner without any delay.

9. In light of above observations and directions, present petition stands disposed of accordingly. Rule is discharged accordingly with no order as to costs. However, it is observed that in case of any adverse order if passed by the respondents, it is open to the petitioner to revive the present petition by merely filing a note before the Registry of this Court. Direct Service is permitted.

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