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**(2008) 11 GUJ CK 0014**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 1325 of 2001**

Kantikumar Balubhai Katharia

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

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**Date of Decision : 20-11-2008**

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation : (2008) 3 GLH 796**

**Hon'ble Judges : R.M. Doshit, J;K.M. Thaker, J**

**Bench : Division Bench**

**Advocate : R.J. Oza for Petitioners 1, for the Appellant; Trusha Patel, Asst. Government Pleader for Respondent(s) 1 - 4, for the Respondent**

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## **Judgement**

R.M. Doshit, J.—The learned Single Judge (Coram: Mr. Justice Jayant Patel) has, by order dated 16th October, 2005, referred this petition to the Larger Bench. Hence, this petition is notified before us. The petitioner - a night watchman appointed under the Assistant Commissioner of Sales Tax, Surat has preferred the present petition under Article 226 of the Constitution of India to challenge the order of termination of service made on 31st January, 2001 by the appointing authority and the order dated 1st February, 2001 made by the concerned sales tax officer to relieve the petitioner from service.

2. By order dated 29th September, 1992, the petitioner was appointed as contingency paid night watchman in the pay scale of Rs. 90-110 on purely temporary basis. The terms and conditions of his appointment provided, inter alia, that "his service can be terminated at any time without assigning any reasons on administrative basis." It appears that the petitioner continued to serve as night watchman and was paid out of contingency till his service was terminated on 31st January, 2001. The order of termination of service read thus,

"With reference to condition No. 1 of the order and the letter at sr. No. 2, referred hereinabove, temporary Night Watchman Shri Kanlibhai Balubhai Kataria is hereby removed from the service w.e.f. 31.1.2000 afternoon as his services

are not required."

3. The challenge to the aforesaid order of termination of service is two fold. First, the impugned order has been made in violation of provisions contained in Rule-33 of the Bombay Civil Services Rules, 1959 (hereinafter referred to as "the Rules") and that, the petitioner has been meted discretionary treatment inasmuch as another watchman Shri H.K. Purohit, junior to the petitioner, was continued in service. The contention is that the Rule-33 of the Rules permit the State Government to terminate the service of a temporary employee by giving a notice in writing or by paying pay and allowances in lieu of notice. The petitioner's service was terminated without any notice or without paying him notice pay. The order of termination is, therefore, vitiated.

4. The petition is contested by the State Government. In the counter affidavit made by one Shri N.C. Andharia, Assistant Commissioner of Sales Tax, Surat it is stated that Shri H.K. Purohit was appointed as a watchman in accordance with the recruitment rules; whereas the petitioner was a contingency paid part time watchman. The fact that the petitioner has not been given notice or pay in lieu of notice as envisaged by Rule-33 of the Rules has not been denied.

5. The petition came up for hearing before the learned Single Judge (Coram: Mr. Justice Jayant Patel). The learned Single Judge, by order dated 16th October, 2005, observed that, "As such, in view of the aforesaid decision reported in Raj Kumar Vs. Union of India (UOI) and Others, of the Apex Court having not brought to the notice of the Division Bench and in view of the later decision of the Apex Court, it would be just and proper to refer the matter to the Bench as it may be ordered by the Hon"ble the Chief Justice on administrative side...."

6. Learned advocate Mr. Oza has appeared for the petitioner. He has submitted that the Rules similar to Rule33(1) of the Rules have been interpreted by the Hon"ble Supreme Court time and again. The consistent view is that in absence of notice, the pay and allowance for the notice period shall be paid along with the order of termination. In support of his submission, he has relied upon the judgments of the Hon"ble Supreme Court in the matters of Senior Superintendent, R.M.S., Cochin and Another Vs. K.V. Gopinath, Sorter, , Raj Kumar Vs. Union of India (UOI) and Others, , Management Of MCD Vs. Prem Chand Gupta and Another, and the judgment of this Court in the matter of Sub-Divisional Soil Conservation Officer, Idar & Another v. M.M. Saiyed 11990(1) GLR 495J. He has submitted that contrary view has been taken by the Hon"ble Supreme Court in the matter of Raj Kumar Vs. Union of India (UOI) and Others, . In view of the peculiar language used in the relevant rules, the said judgment shall not apply to the facts of the present case.

7. Ms. Patel has appeared for the respondent - State Government. She has relied upon the judgment in the matter of Raj Kumar Vs. Union of India (UOI) and Others, . She has submitted that the view expressed by the Hon"ble Supreme Court in the matter of Raj Kumar Vs. Union of India (UOI) and Others, has been

expressly overruled in the above judgment *Raj Kumar Vs. Union of India (UOI) and Others*, . She has also relied upon the judgment of the Hon'ble Supreme Court in the matters of *Rakesh Kumar Singh Vs. Committee of Management, Raibarali*, and *Brij Mohan Singh v/s. Union of India and others*, (2002) 9 SCC 453 .

8. It is not in dispute that the petitioner had been appointed as a night watchman in the year 1992 and was paid out of contingency. Though it is specifically averred that the petitioner was appointed after regular recruitment it has not been denied. Earlier, the petitioner had filed Special Civil Application No. 5192 of 1998 with a specific prayer to regularize his service. The learned Single Judge has in the above referred order dated 16th November, 2005 observed that "Further, as observed earlier the post itself is a contingent night watchman, it means, a temporary post and can not be termed as permanent post of night watchman. Not only that but even after the proceedings of Spl.CA. No. 5192/ 98 the petitioner did make the representation for regular appointment as night watchman and as per the decision dated 11.10.2000, true copy whereof is produced at Annexure "F", it has been observed that the temporary post can not be converted into permanent post and therefore the petitioner is allowed to resume duties as contingency paid night watchman and the said decision dated 11.10.2000 is not challenged by the petitioner prior to filing of the present petition."

9. In the present petition, the petitioner has challenged the above referred orders dated 31st January, 2001 and 1st February, 2001 and has prayed for the relief, "to permit the petitioner to hold the post of night watchman and further be pleased to direct them to give the petitioner salary in the regular pay scale with all other consequential benefits of arrears, stepping up in pay including promotional benefits, etc." Nevertheless, the State Government has not come forth with any case why the petitioner was appointed as contingency paid night watchman. Whether the petitioner has been paid salary in the regular pay scale, if not, why he has not been paid the salary in the regular pay scale. In absence of a denial or any other material on record, we shall have to accept the averments made by the petitioner.

10. The first question before us is. whether the service of the petitioner was validly terminated in. exercise of powers conferred by Rule-33(1) of the Rules. Clause - (a) of Rule - 33(1) of the Rules empowers the appointing authority to terminate the service of a temporary Government servant at any time by notice in writing given to him. Clause - (b) thereof provides for the period of such notice. Proviso thereof provides for payment of pay plus allowances for the period of notice in lieu of notice. It reads thus, "Provided that the service of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowance for the period of the notice at the same rates at which he was drawing pay and allowances immediately before the termination of his service, or as the case may be, for the

period by which such notice falls short of the notice period."

11. The phrase "forthwith by payment"-appearing in the aforesaid proviso has been subject matter of consideration by this Court in the aforesaid matter of Sub-Divisional Soil Conservation Officer, Idar & Another v. M.M. Saiyed [1990(1) GLR 495] and by the Hon"ble Supreme Court in the above referred matter of Senior Superintendent, R.M.S., Cochin and Another Vs. K.V. Gopinath, Sorter, . The view taken is that it is mandatory to give notice. In absence of notice, it is mandatory to pay pay and allowances for the period of notice along with the order of termination. We are of the opinion that the said opinion is binding to us and we also agree with the said opinion. In the matters of Raj Kumar Vs. Union of India (UOI) and Others, and Rakesh Kumar Singh Vs. Committee of Management, Raibarali, the rule under consideration, though similar, was not identical in para materia. The relevant rule read thus, "Provided that the services of any such Government servant may be terminated forthwith and on such termination the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates at which he was drawing them immediately before the termination of the services or as the case may be for the period by which such notice falls short of one month."

12. Under the rule under our consideration, the termination of service can be effected only by payment of pay and allowances for the notice period. In other words, the duty has been imposed upon the appointing authority to pay in lieu of notice the pay and allowances to a Government servant at the time of termination of service. Under the later proviso, such duty has not been imposed upon the appointing authority but an entitlement has been conferred upon the servant concerned. We are, therefore, of the opinion that the phrase "by payment to him" used in proviso to rule 33( 1)(b) of the Rules enjoins the appointing authority to pay the pay and allowances in lieu of notice to the Government servant along, with the order of termination of service.

13. In the present case, indisputably, neither the petitioner was given notice of termination, nor was he paid pay and allowances in lieu thereof. We are, therefore, of the opinion that, as held in the above referred judgments, the failure to pay to the petitioner the pay and allowances along with the order of termination of service has vitiated the order of termination. We, therefore, hold that the termination of service of the petitioner by order dated 31st January, 2001 is illegal, null and void. The petitioner is entitled to reinstatement in service i.e. as contingency paid night watchman. We also hold that on his reinstatement in service as contingency paid night watchman, the petitioner will be entitled to the pay and allowances in the pay scale approved for the post of night watchman. As to the period from the date of termination of his service i.e. 1st February, 2001 till he is reinstated in service in accordance with this direction, we invoke the principle of "No Work No Pay." We direct that the said period shall be treated as extraordinary leave without pay. We, further, direct that the petitioner shall be reinstated in service as contingency paid night watchman as early as

possible but not later than 1st January, 2009. In the event. the respondents fail to reinstate the petitioner in service latest by 1st January, 2009, the petitioner will be entitled to the pay and allowances in the regular pay scale with effect from 1st January, 2009. Rule is made absolute in the above terms with cost. Registry will send the writ forthwith.