

(2007) 02 GUJ CK 0020

In the Gujarat High Court

Case No : Special Civil Application No. 2019 of 2007

Kuwarben Valjiben Parmar

APPELLANT

Vs

Patan Municipality

RESPONDENT

Date of Decision : 28-02-2007

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 3, 5
Constitution of India, 1950 — Article 12, 14, 16, 226, 39
Contract Act, 1872 — Section 23
Gujarat Municipalities Act, 1963 — Section 260, 271(1)
Industrial Disputes Act, 1947 — Section 25G, 25H

Citation : (2007) 02 GUJ CK 0020

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

Bench : Single Bench

Advocate : BP Gupta, for the Appellant; NV Anjaria, for the Respondent

Judgement

H.K. Rathod, J.—Heard the learned advocates appearing for the respective parties.

2. Brief facts of the present case are that the petitioner was appointed on compassionate ground as Sepoy Jakat Mehkam on 6.2.1996 as the husband of the petitioner expired while in service in the year of 1994 and since then, the petitioner is discharging her duties with utmost sincerity and honesty. The date of birth of the petitioner is 1.3.1952. Therefore, the petitioner will be completing the age of 55 years on 28.2.2007. The respondent has passed an order dated 30.11.2006 at Annexure-A, whereby, the petitioner has been given notice of three months and the petitioner's service are to be treated as terminated w.e.f. 28.2.2007. The above said order has been passed by invoking Rule 5 of the Rules framed u/s 271(1) of the Gujarat Municipalities Act, 1963. According to service condition, the petitioner is entitled to remain in service upto the age of 60 years as petitioner is working in Class-IV category. But, respondent is compulsorily retiring the petitioner on her attaining the age of 55 years without assigning any reasons.

3. Learned advocate, Mr. Gupta, relying upon the decision of this Court in SCA No. 3235/2006 with CA No. 2677/06 dated 14.7.2006, submitted that similar order has been passed by the respondent in case of Valiben J. Bhanji, whose service was also terminated under Rule 5 of the Rules framed u/s 271(1) of the Gujarat Municipalities Act, 1963, challenged in aforesaid petition, wherein, this Court has set aside the termination order and directed the respondents to reinstate the petitioner in service. Against which, LPA No. 1078 of 2006 was filed by the respondent which has been admitted by the Division Bench of this Court. He also submitted that the order which has been passed by this Court (Coram : Akil Kureshi, J.) as above that petitioner Valiben Jethabhai is reinstated by the respondents in service and at present, she is working with the respondents. Meaning thereby that during the pendency of that petition, she was in service and she remain continued in service. Meaning thereby that the order passed by this Court in aforesaid SCA has been implemented by the respondents as there is no stay granted by the Hon'ble Division Bench of this Court in LPA No. 1078 of 2006 on the ground that petitioner is reinstated by the respondents and working with the respondents having near date of superannuation. He also submitted that the decision given by this Court is squarely covered the case of petitioner so long the appellate Court reverse it. He also submitted that respondent being the State authority should have to respect the order passed by this Court unless and until it is stayed by the higher authority. The State authority should not waste the amount of public exchequer unnecessarily without any justification only to have legal fight between unequal. He also submitted that petitioner was appointed on the ground of compassionate appointment, is having a different status, position and her service should not have to be terminated in the guise of Rule 5 of the Rules framed u/s 271(1) of the Gujarat Municipalities Act, 1963 and, therefore, he submitted that when the petitioner is having more than strong prima facie case in her favour and balance of convenience is also in her favour on the ground that if petitioner remain continued in service, then, she will receive the salary after doing the work and she will not get any pie without work. He also submitted that in case of respondent authority should have to engage some other employee in place of petitioner, they should have to pay the salary to other employee and in case petitioner succeeds, they have to pay double salary for one post and one work. Therefore, balance of convenience is in favour of petitioner. He also submitted that if the interim relief is not granted in favour of petitioner, then, it amounts to irreparable loss caused to the petitioner. He emphasized that a moment service of petitioner terminated or interim relief refused, then, the petitioner will loose her status and position in the society. This was not the service condition incorporated by the respondent at the time of recruitment of the petitioner nor it was informed to the petitioner by the respondent when petitioner was appointed on compassionate ground. Therefore, according to learned advocate, Mr. Gupta for the petitioner, all of sudden action has been taken which was not visualized and estimated by the petitioner from the respondent State authority. The said action of respondent is contrary to legitimate expectation of the petitioner. Therefore, premature termination / retirement

under Rule 5 will create a problem for the petitioner to maintain the family for subsequent years without salary. In absence of salary, to maintain the family that itself is enough to satisfy irreparable loss caused to the petitioner, because in absence of salary it is very difficult for the petitioner to maintain the family and also it adversely affects the education and maintenance of the children and other responsibility which have arisen by passage of time. He also submitted that it is very easy for the respondent State authority because nobody is having any responsibility and no officer or any President or office bearers should have to pay a single pie in case when petitioner is succeeded in the present petition. Therefore, he submitted that in such kind of litigation by State authority, difficulty of the individual employee must have to be taken care by this Court while exercising the power under Article 226 of the Constitution of India. He also submitted that State authority may not suffer because ultimately at the most it is a question of financial burden but, for the petitioner, it adversely affects to her livelihood which amounts to violation of Article 21 of the Constitution of India. Therefore, he submitted that petitioner has dissatisfied that if interim relief is not granted, then, it amounts to irreparable loss caused to the petitioner. He relied upon the decision of the Apex Court in case of *M. Gurudas and Ors. v. Rasaranjan and Ors.* reported in 2006 (7) Supreme 289. The relevant observations are in Para. 22 which are quoted as under:

22. While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue. (See : *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, , *Dalpat Kumar and Another Vs. Prahlad Singh and Others*, , *United Commercial Bank Vs. Bank of India and Others*, *M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others*, *Bina Murlidhar Hemdev and Others Vs. Kanhaiyalal Lokram Hemdev and Others*,

3.1 He submitted that in view of the aforesaid observations made by the Apex Court, the petitioner has more than strong prima facie case as well as challenge to termination order is a bonafide challenge on the part of the petitioner and issue raised by the petitioner is being a triable as well as serious question has been raised by the petitioner. Therefore, he submitted that interim relief may be granted in favour of petitioner, so the compassionate appointment given by respondent with an object at least that may be continued in favour of petitioner till to reach the age of normal retirement 60 years as per Rule 3(e).

4. Learned advocate, Mr.N.V.Anjaria, appearing on behalf of respondent, submitted that the order passed by this Court in SCA No. 3255 of 2006 has been challenged by the respondent authority in LPA No. 1078 of 2006 wherein no interim relief has been granted because that petitioner was in service and near to

retirement. He submitted that granting interim relief in favour of petitioner it amounts to granting of full relief to the petitioner, therefore, such relief should not have to be granted by this Court. He relied upon the decision in support of aforesaid submission in case of Bank of Maharashtra Vs. Race Shipping and Transport Co. Pvt. Ltd. and another, Learned advocate, Mr. Anjaria, relied upon the aforesaid decision where observations made by Apex Court in Para.12 that practice of granting interim relief which practically gives the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations is deprecated. He also relied upon another decision in case of Union of India and Ors. v. AIR Commodore S.K. Mishra reported in 1999 SCC (L&S) 949. and submitted that in case of retirement on superannuation stayed by way of interim order of Court not justified. The Apex Court has observed that respondent would have retired from service in November,1997 but, by virtue of the direction of the Division Bench dated 8.12.1997, he has been permitted to continue in service. It was not proper. A direction like impugned one in the present case is not normally to be granted at the interim stage because in the event the employee succeeds in his case, he can always be granted relief even for the period during which he was out of service. He also relied upon the decision in case of State of UP and Ors. v. Desraj reported in 2007 1 SCC 258. In the aforesaid decision also, the Apex Court has observed that relief which can be granted only at the final hearing of the matter, should not ordinarily be granted by way of interim order. He also emphasized page-97 and 98, wherein, this Court has not granted any interim relief in identical cases being SCA No. 25331 of 2006 and 25755 of 2006 by order dated 6.12.2006 and 11.12.2006. On relying upon the aforesaid two orders passed by this Court wherein the similar order of termination challenged by that petitioner but, question of granting interim relief does not arise because same was not pressed at the relevant time by the learned advocate appearing on behalf of the petitioner. In two cases, this Court has not refused interim relief as it was not pressed by petitioner of that cases. Therefore, it cannot be considered to be identical cases. By relying upon these two orders on the ground that in identical matter, this Court has not granted earlier stay, therefore, in this case, this Court should not have to be granted stay. Except that, he has not made any other submissions and relied upon any other authority (decisions) in support of his submissions.

5. I have considered the submissions made by both the learned advocates appearing for the respective parties and also considered the averments made in petition and reply filed by the respective parties and also considered the annexures annexed to petition and have also considered the decisions which have been relied upon by them. The decision which has been relied by learned advocate, Mr.Anjaria, of the Apex Court, nowhere it is decided by the Apex Court that High Court should not have to grant at all interim relief. The principle has been decided and discussed to the extent that in normal and ordinary

circumstances, the High Court should not have to pass interim order which amounts to granting of full relief. But, discretion of this Court under Article 226 has not been taken away by any of the decisions of the Apex Court. Looking to the facts of this case, the order of termination dated 30.11.2006 is passed where due to financial difficulty and implementing the policy of minimizing expense of the State Government, the service of the petitioner has been terminated on 28.2.2007 after completion of 55 years age under Rule 5 of the Rules framed u/s 271(1) of the Gujarat Municipalities Act, 1963. The petitioner was appointed on compassionate ground. It was not a normal recruitment made by respondent authority. Therefore, the petitioner is having a different status to remain in service not governed by ordinary service Rules which are applicable to the other employees, those who have been recruited under the Recruitment Rules. The petitioner is having a separate category who has been appointed on the policy of giving compassionate appointment to the dependent of the deceased employee. The decision of this Court in SCA No. 3235 of 2006 dated 14.7.2006 where the question has been at length examined by this Court (Coram : Akil Kureshi, J.), therefore, relevant discussion made in para.21 to 25 are relevant which are almost decided the similar issue covering the case of present petitioner, therefore, quoted as under:

21. It can thus be seen that the petitioner was engaged by the respondent Municipality with a reasonable degree of certainty of tenure. She was holding a permanent post and she was a regular permanent incumbent on the said post. Unless her services were terminated through valid process of law, she had the right to continue in service till crossing the age of superannuation. Such an employment could not have been brought to an end abruptly by seeking to exercise powers under Rule 5 of the said Rules by giving notice of three months without assigning any reasons. Permitting the respondent to resort to such powers in the background of the present case would amount to permitting the respondent to terminate the lien of an employee though the post is still in existence. As long as the post continues, the regular incumbent thereon could not have been terminated without any reason. Perhaps, it was open for the Municipality to abolish the post if so found necessary due to financial constraints, in which case, however, the rule of last-come-first-go would operate. Not only u/s 25-G and 25H of the Industrial Disputes Act in case of a workman of an industry, such right flows also from the equality clause enshrined under Articles 14 and 16 of the Constitution of India and would be available to non-workmen also as long as they are employed by the State or its instrumentalities. Thus by resorting to retire an employee compulsorily upon crossing the age of 55 years, what is effectively done by the respondent Municipality is to curtail her lien without abolishing the post and also to resort to termination on the premise of requirement of reduction in the staff without following the principle of last-come-first-go. Unless there are special reasons to retain the junior in preference to the senior, such an action cannot sustain the test of Articles 14 and 16 of the Constitution.

22. There is yet another reason why the action cannot be sustained. For downsizing the staff, it is open for the Municipality to provide for a voluntary retirement scheme. Such voluntary retirement, however, cannot be enforced in the guise of exercise of powers under Rule 5 of the said Rules, which as noted earlier, is confined to certain contingencies. Otherwise, in place of voluntary retirement scheme, compulsory retirement scheme will become operative which is not envisaged under the service rules governing the petitioner.

23. In conclusion, I find that the action of the respondent was wholly impermissible and unsustainable. There is absolutely no dispute about the contention of the petitioner that her service has always been totally satisfactory. There has been no complaint about her performance in service. To require a Class IV employee to retire before the normal age of superannuation only on the ground that though her services may be outstanding, her performance may be glorious, she must surrender three years of service since the Municipality has consciously decided to send her or those who have crossed the age of 55 years home would be wholly impermissible and unsustainable in the eye of law.

24. In fact, the respondent has somewhat dichotomically suggested in the reply that the petitioner who was working as Safai-kamdar had attained 55 years of age and was considered a dead-wood. It is further stated that Safai-Kamdar are required to perform the duties of cleaning the roads, gutters, to pick and collect garbage from the roads and streets in the town and with advancing age, the nature of work has harsher effect on such class of employees and in most of the cases like that of petitioner, it leads to decline in human efficiency and the Municipality had to compel such employees to work under force. The stand of the Municipality is perplexing, to say the least. It has nowhere come on record that with advancing age, the performance or the efficiency of the petitioner had gone down. No material has been placed on record to substantiate this stand. The service record of the petitioner is not shown to be suffering from any deterioration. In fact, it is not even the case of the Municipality that a proper exercise of examining the service performance of the petitioner was undertaken which revealed that she had reached the stage of inefficiency. In case of the petitioner on what basis did the Municipality reach such a conclusion is also not stated. Without appraisal of the service record of the petitioner the Municipality has reached such a conclusion only on the basis of conjecture. Additionally, the underlying message of this contention would be that the respondent would hire a younger, fitter and fresher hand. This by itself would negate the professed purpose of reducing the staff size. Thus, quite apart from completely lacking in material to support such a contention, I find that the stand of the Municipality runs counter to its main thrust of argument that regardless of the efficiency of the employee and regardless of his/or service record, the Municipality intends to terminate the services of one and all upon crossing the age of 55 years. The general statement made in this regard would convince me that the Municipality intends to reduce the age of retirement of such employees through an executive fiat without amending the Rules. Surely, this is wholly impermissible.

25. In the result, I find merit in the petition. The impugned notice of termination is therefore quashed. Rule is made absolute accordingly with no order as to costs.

5.1 This Court has, in case of Doshi Fatechand Morarji v. Jamnagar Municipal Corporation reported in 2002 (1) GLH 50, considered the absolute power of termination where same Rule 5 interpreted. The relevant para.9 of the said decision is quoted as under:

9. Rule 5(a) on the basis of which the impugned order has been passed, the petitioner has been sought to be dismissed by the respondent Corporation is reproduced as under:

5(a). Jamnagar Municipality may require any servant to retire at any time on or after He/She attains the age of 55 years on giving him/her three month's previous written notice without assigning any reason.

b. Any servant may retire on or after attaining the age of 55 years voluntarily after giving atleast three months previous notice to the Municipality.

Above Rules 5(1) and (b) shall apply to all classes of servants except Class IV Servants.

A bare reading of this rule would show that this rule confers unbridled powers on the Municipality to require the municipal servant to retire at any time on or after he/she has attained the age of 55 years by giving 3 months written notice without assigning any reason. The Rule making Authority has not declared its policy as to how the power under this rule is to be exercised. There may be number of employees who attain the age of 55 years, out of those employees who is to be subject to retirement at the age of 55 years has not been provided. There is no guideline in this rule and in absence of any criteria or guidelines and in absence of the legislative policy, the rule confers absolute powers without providing any criteria or guidelines for exercising power unlike the rules as they are in other various services including the Bombay Civil Services Rules, 1959. It does not even speak of `public interest". Whereever the statutory rules provided for compulsory retirement not by way of punishment but on completion of certain period of qualifying service or attaining a particular age such rules invariably include criteria with regard to the public interest on inquiry of proficiency etc and the validity of such rules has been upheld by the Court in number of cases. In the instant case, whereas he validity of the rule has not been subjected to any challenge in the petition, it is not necessary for this Court to go into the validity of the rule on the ground that it confers an unbridled power to give compulsory retirement at the age of 55 years. However, the matter doesn't end here. Even if it is assumed that the respondent Corporation had the power to retire a servant at the age of 55 years by 3 months written notice without assigning any reasons, the question is that even if an authority is possessed of a power whether such power has been exercised in a reasonable manner or it has been exercised in an arbitrary or capricious manner. In the instant case, no material whatsoever has been placed on record in any form by the respondent Corporation so as to justify

compulsory retirement of the petitioner. Even if the rule does not provide any guidelines or criteria and provides that the concerned authority may retire any servant at any time on after attaining the age of 55 years by giving 3 months notice without assigning any reason, it goes without saying that out of more than one employee who attained the age of 55 years, any one employee or more than one employees are chosen to be subjected to the action under Rule 5(a) so as to retire at the age of 55 years, there must be some basis and material for taking a decision that his retirement at the age of 55 years as against the normal age of super annuation of 58 years was warranted. The question as to who should be retired at the age of 55 years or thereafter before attaining the age of 58 years and who should be allowed to be continued till the age of 58 years i.e. the normal age of super annuation can't be left at the sweet will and caprice of the authorities so as to pick and choose. In the instant case, the petitioner had made a categorical averment in Para 4 of the petition that he had put in 37 years of meritorious service, was obedient, sincere and hard working throughout his career. Such a categorical averment has been denied in the affidavit in reply dated 17.4.2001. The contents of Para 4 of the petition and the reply thereto as given by the respondent Corporation are quoted as under:

4. The petitioner 4. Referring to further says and submits paragraphs 4,5 & 6 of the that as stated above, he petition, I say that all joined the service of the benefits have been given Corporation on 7.1.51 and to the petitioner and, without any break in therefore, he has no service he puts 37 years right to make grievance further says and submits about the same. that as stated above, he joined the service of the Corporation on 7.1.51 and without any break in service he puts 37 years of meritorious service in the respondent corporation. He was obedient, sincere and hardworking throughout his career.

5.2 The similar view also taken by the Division Bench of Madras High Court in case of Management of Madras Fertilizers Ltd., rep. By its Chairman and Managing Director, Madras v. Madras Fertilizers Ltd. Officers" Association, rep. by its The Management of Madras Fertilizers Limited Vs. Madras Fertilizers Ltd., Officers" Association, The relevant observations is quoted as under.:

Policy Clause 12(a) Management"s power to terminate services of a permanent employee by giving 3 months" notice in writing or 3 months" pay plus D.A. - Indian Contract Act, Section 23 W.P. By respondent challenging validity of Clause 12(a) contending said clause opposed to public policy, allowed In appeal, appellant admittedly a Public Sector Undertaking, an instrumentality of State The service rules framed by it to be tested on the anvil of Article 14 of the Constitution Contract of employment and service rules which give absolute and arbitrary power to the Management to terminate the services of employees, illegal Impugned order declaring Clause 12(a) of the MFL Service Policy null and void, in tune with law laid down by Apex Court.

The Apex Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, held that a clause providing for

termination of the services of a permanent employee by serving a three months' notice on him or paying three months' salary in lieu of notice, is arbitrary and unreasonable and also violative of Directive Principles contained in Articles 39(a) and 41 of the Constitution. The said Rule was also held to be void u/s 23 of the Contract Act, as being opposed to public policy.

In *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* 1991 I LLJ 385 the Constitution Bench of the Apex Court held such Government Company or Public Corporation being State instrumentalities are State within the meaning of Article 12 of the Constitution and as such they are subject to the observance of fundamental rights embodied in Part III as well as to conform to the Directive Principles in Part IV of the Constitution. In other words, the Service Regulations or Rules framed by them are to be tested by the touchstones of Article 14 of the Constitution. Furthermore, the procedure prescribed by their Rules or Regulations must be reasonable, fair and just and not arbitrary, fanciful and unjust.

It was held in those judgments that the contract of employment and the service rules which gave absolute and arbitrary power to terminate the services of the employees were illegal.

The appellant has admitted to the fact that it is a Government Company. Therefore, it is crystal clear that the appellant is a public sector undertaking and hence the decisions rendered by the Apex Court in *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, and *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, are applicable to the facts of this case.

Hence the order of the learned Judge in W.P.No.381 of 1992 dated 26.7.1999 declaring Clause 12(a) of MFL Service Policy as null and void is only in tune with the law laid down by the Apex Court.

RATIO DECIDENDI

The contract of employment or the Service Rules in a Government Company which give absolute and arbitrary power to the Management to terminate the services of its employees, in violation of Article 14, and the Directive Principles under Articles 39(a) and 41 of the Constitution would be illegal, being arbitrary, discriminatory and without any guidelines for the exercise of such power. Such power would also be opposed to public policy u/s 23 of the Contract Act and hence null and void.

5.3 This Court has examined the question of interim relief in identical cases of termination in case of *Patel Chhatrasinh Gokulbhai v. District Primary Education Officer* in SCA No. 20020 of 2006 dated 31.10.2006. Relevant Para.15 and 16 are relevant, therefore, quoted as under : S15. Question of grant of mandatory interim relief was considered by this Court in case of *Haraish K. Borisagar v. State of Gujarat* and Ors. reported in 2004 (1) GCD 750 (Gujarat) (Coram :

Hon"ble Mr. Justice H.K.Rathod). Relevant discussion made by this Court in the said decision would squarely apply to the facts of this case. Therefore, relevant paragraph 14, 15, 17 and 18 are reproduced as under:

14. The whole defence of the Gondal municipality is that they have acted on the basis of the directions issued by the Regional Director of Municipalities, Rajkot by his order dated 10th July, 2001. The powers which have been exercised by the Director of Municipalities Rajkot u/s 260 of the Gujarat Municipalities Act, 1963 which is giving powers in case, if, in the opinion of the Director, the number of persons who are employed by a municipality as officers or servants, or whom a municipality proposes to employ or the remuneration assigned by the municipality to those persons or to any particular person is excessive the municipality shall, on the requirement of the Director reduce the number of the said persons or the remuneration of the said person or persons. Thus, the Regional Director of Municipalities, Rajkot has, in exercise of these powers u/s 260 of the Gujarat Municipalities Act, 1963, issued the letter dated 10th July, 2001 to the Gondal Municipality. Now, if the proviso to the said Section 260 of the Act is taken into consideration, it provides that the Municipality may appeal against any such requirement to the State Government whose decision shall be conclusive. Thus, the proviso to the said Section 260 of the Act provides appeal against such decision if it is aggrieved by such order of the Director u/s 260 of the said Act.

Meaning thereby, that these powers are required to be exercised by the Director a moment such contingency arises as specified in the said section. There is no limitation prescribed by the statutory provisions that these powers are required to be exercised within the particular time from the date on which such contingency arose in the Municipality. Therefore, when the Gondal Municipality has pointed out that these petitioners initially appointed prior to 15 to 20 years as a daily wagers and continued them, as such, for more than 15 to 20 years and meanwhile all the petitioners are confirmed by the Staff Selection Committee of the Gondal Municipality, till then, the Director of Municipalities has remained silent. These facts must have been noticed or must be within the knowledge of the Regional Director of Municipalities, Rajkot. However, no action, whatever being irregular appointment of the petitioners, has been initiated from the inception of their appointment as a daily wagers. Why the action has not been taken immediately ? Why the powers have not been exercised immediately or within the reasonable period by the Regional Director of Municipalities ? Normally statutory powers are required to be exercised within the reasonable period. The law on this point is settled. The reasons behind it is that not to take any action or to exercise the powers within the reasonable period, then, meanwhile, affected parties would have materially altered their position and irreparable injury would be caused to them if the actions are taken at the belated stage, after unreasonable period. That is why the law provides that such an action has to be taken immediately or within the reasonable period.

15. In the facts of this case, it prima facie appears that the Regional Director of Municipalities, Rajkot has not exercised such powers u/s 260 of the Gujarat Municipalities Act, 1963 immediately or within the reasonable period. If the appointment of the petitioners were made before about fifteen to twenty years without following any procedure, contrary to the Government Circular and Resolution and without prior permission of the Finance Department, then, why immediate action has not been taken by the Regional Director of Municipalities who is the statutory authority as these facts were open and known to the said statutory authority. Therefore, not to exercise such statutory powers within the reasonable period and after lapse of 15 to 20 years, during the interim period, whole scenario has been changed, the employee who was appointed as a daily wager and thereafter was confirmed having some legitimate expectation from the employer namely statutory authority that now he will remain continue in service as a permanent employee till the date of his superannuation. In such circumstances, such statutory powers are required to be exercised within the reasonable period as per the view taken by this Court in case of Ranchhodbhai Lallubhai Patel v. State Of Gujarat and Ors. reported in 1984 (2) GLR 1225 wherein it has been observed by this Court in para 4 of the said decision as under:

But the said statutory powers like any other statutory powers have to be exercised within reasonable time. If that concept is kept out, any statutory powers would be exercised after a number of years or decades. In the meantime, the affected parties would have materially altered their position and irreparable injury would be caused to them and it would be impossible to put the clock back. If such powers can be exercised after unduly long delay.

In the same decision, it has also been observed by this Court as under:

The exercise of power has to be justified on the facts of each case and if on the facts of a given case, it is found that the exercise of power after lapse of sufficiently long period between the impugned transaction and date of exercise of that power would be arbitrary and unreasonable due to the fact that in the meanwhile parties had changed their position irretrievably oblivious of any possibility of future action by the authorities functioning under the Act or on account of prolonged inaction on the part of these authorities and any attempt to put the clock back, would result in irreparable injury to the concerned parties, then such exercise has to be treated to be unjust and illegal.

17. When apparently this Court feels with prima facie decision to terminate the services of 111 employees after a period of fifteen to twenty years merely having a direction dated 10th July, 2001 from the Regional Director of Municipalities, Rajkot are apparently found irrational, arbitrary and contrary to the principles of natural justice and even contrary to the provisions of the Bombay Civil Service Rules. In such circumstances, when the termination orders which are under challenge, mere issuance of "Rule" would be giving mere hope to the petitioners that this Court will examine the legality, validity and propriety of the action of

termination as and when the court will have some time and meanwhile they should have to remain without job, without work, without wages and to starve during such intervening period with their family. Therefore, when this Court is having prima facie opinion that the basic requirements have not been followed by the Gondal Municipality and the Regional Director has exercised the powers u/s 260 of the Act after unreasonable delay which has resulted in to termination of the services of the petitioner, then, this Court cannot shut its eyes or shirk its responsibility to protect the livelihood and existence of such 111 employees and their family members. In such circumstances, sheer legalistic approach will create havoc in the life of the petitioners. In such circumstances, it is the duty of this Court to protect the legal and constitutional right of the petitioners while exercising the powers under Article 226 of the Constitution of India on the basis of the prima facie considerations of the facts of this case in light of the settled law in reference to the facts of this case to prevent injustice which has been caused to the petitioners by the respondents, statutory authority. In such circumstances, what is the role of the judiciary, that aspect has been examined by the Hon"ble apex court in case of Rupa Ashok Hurra v. Ashok Hurra reported in 2002(3) GLR 2138. The apex court has observed that

The role of judiciary to merely interpret and declare the law was the concept of by gone age. It is no more open to debate as it is fairly settled that the Court can so mould and lay down the law formulating principles and guidelines as to adapt and adjust to the changing conditions of the society, the ultimate objective being to dispense justice. In the recent years, there is a discernible shift in the approach of the final Courts in favour of rendering justice on the facts presented before them, without abrogating but bypassing the principles of finality of the judgment.

It has also been observed as under:

Readjustment in a changing society, a readjustment of legal norms demanded by a changed social context. This need for adapting law to new urges in society brings home the truth of the Holmesian aphorism that "the life of the law has not been logic, it has been experience" (Oliver Wendell Holmes : The Common Law), and again when he declared in another study (Oliver Wendell Holmes : Common Carriers and the Common Law 1943 (9) Curr LT 387, 388) that "the law is forever adopting new principles from life at end", and "sloughing off" old ones at the other.

Therefore, in view of the above discussion and considering the facts of the present case, I am of the opinion that prima facie, there is unreasonable delay on the part of the Regional Director of Municipalities Rajkot in exercising the powers u/s 260 of the Gujarat Municipalities Act as the petitioners were appointed before about fifteen to twenty years as daily wagers and were subsequently made permanent by the Gondal Municipality and thereafter, the action has been taken u/s 260 of the Act at this belated stage. Such an action has to be taken and such powers has to be exercised within reasonable period

which has not been done in this case.

18. Therefore, in view of above discussion, according to my opinion, the questions and controversy involved in this group of petitions requires to be examined by this Court and hence, deserves to be entertained. In the aforesaid background, considering the facts of this group of petitions and the affidavit-in-reply and the condition of the employees who were working with the respondent Gondal Municipality since more than 15-20 years, now, left into lurch to face litigation of challenging the termination order, in my opinion, this Court requires to interfere on the issue of interim relief. Therefore, in these circumstances, if this Court merely issue Rule in this group of matters, all these matter will remain pending before this Court for quite long time looking to the backlog of number of matters pending before this Court awaiting final hearing as per the submissions of the learned advocates for the petitioners. Another possibility which could not be ignored at this stage that if this Court is not considering the grant of interim relief at this juncture and even after a lapse of five ten years, the order of termination is set aside, then also the State Authority shall have to bear huge financial loss by paying the arrears of salaries to each petitioner during the course of passage of such time and it may also happen that the respondent Municipality will not be able to pay such huge amount if the financial status further deteriorates more deepen and this possibility could not be ignored in the event if the termination orders impugned would be set aside by this Court even after lapse of few number of years. On the other hand, the condition of the employees will also deteriorate without regular salaries and without any work and wages during such future passage of time and as a result thereof, they may not be able to maintain their families. This does not end here. In the event of mere admission of these matters by issuing Rule, not only the petitioners and their families will have to suffer lot, but the children and their education will suffer adversely and the petitioners will be left with many other problems so on and so forth, as well as responsibility and down trend in his status in the society. This makes a lot of difference in the individual capacity. If a person is in service, in the even to need, the neighbour will not hasten in giving Rs. 100/- but if not in service, even the neighbour will turn up their face for offering Rs. 100/- to a person not in service and this is very obvious that if a person is in service and / or employment, he will certainly get help and assistance from the society, otherwise, will certainly find it extremely difficult to survive in the society in these hard days. Now, if the reverse situation is anticipated in favour of the respondent municipality, it can be assumed the respondent municipality shall have to pay salaries to the terminated employees against the work that may be discharged by the employees for the respondent municipality. Ultimately, the respondent municipality would be paying the salaries to the petitioners against the work done by the employees. But to decide and choose the best course available to this Court at this stage, the later option is better considering and anticipating the future passage of time uptill final hearing in the matter. It may also be appreciated that when this Court, prima facie, found that the order of

termination dated 3rd June, 2003 effective from 12th June, 2003 is bad and illegal on all three counts discussed above and obviously, against the spirit of principles of natural justice and therefore, in such situation, considering the prima facie case in favour of the petitioners, as also, anticipating the situation of the employees without job in future time and on the other hand, the situation of the respondent municipality and the other social aspects like education of the children of the petitioners, their social status and liability and responsibility in the society as a whole in absence of the wages and such mental agony and the financial liability to fight and contest the litigations, these can be said to be irreparable loss which cannot be compensated in terms of money, if in case, this Court cannot grant any interim relief in favour of the petitioners. Moreover, on the aspect of balance of convenience also much weigh in favour of the petitioners. Therefore, considering the fact that only one month and eleven days have elapsed after effecting the order of termination on the petitioners and there is no much delay by now, for grant of interim relief in favour of the petitioners. Thus, in view of above discussion and keeping in mind the interest of both these parties, if the employees petitioners are ordered to be taken back in service and the respondents municipality is directed to pay them salaries against the work till final decision in the matter, would certainly meet the ends of justice at this stage of admission of the matters and grant of interim relief upto the stage of final hearing.

Against the aforesaid decision, appeal being Letters Patent Appeal No. 806 of 2003 was filed by the respondent Gondal Municipality and the Division Bench of this Court (Coram : Hon"ble Chief Justice and Hon"ble Mr. Justice J.N. Bhatt) dismissed said appeal by order dated 16.12.2003. That order is reproduced as under:

This matter arises out of an interim order dated 23.7.2003 passed by the learned Single Judge in Special Civil Application No. 7886 of 2003 and others. This is interim in nature but reasoned, with which we do not propose to interfere with, more so when Rule has been made returnable in main matters in third week of January, 2004. Therefore, looking to the fact that this is likely to be disposed of in third week of January, 2004 or around this period dependent on assistance by learned Counsel for parties, this appeal is dismissed. Interim order shall stand vacated. Civil Application No. 5703 of 2003 is disposed of accordingly. Notice discharged. Section 14. Recently, apex court in case of Minu Kumari and Anr. v. State of Bihar reported in 2006 (3) GLR page 2013 observed as under in para 19:

19. The section does not confer any new power on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with

procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in section which merely recognises and preserves inherent powers of the High Courts. All Courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest* (when the law gives a person anything it gives him that also without which it cannot exist). While exercising powers under the section, the Court does not function as a Court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone Courts exist. Authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent abuse. It would be in abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers Court would be justified to quash abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

6. In view of the aforesaid observations of this Court in similar case where the notice of termination has been set aside by this Court. Against which, no doubt, LPA is admitted but, no stay has been granted by the Division Bench of this Court. Therefore, the order passed by this Court in aforesaid petition has been implemented and that petitioner is continued in service. In light of this background, what would be the stand of the model employer - state authority is to be examined by this Court whether the stand taken by the respondent is correct or not. The decision has been taken by respondent to terminate the service of petitioner on the ground to minimize the expenses, financial crises and difficulty qua class-IV employee, who may be *safai kamdar* or a peon or a *chowkidar*. The respondent Municipality is not able to bare the burden of class-IV employee who has completed 55 years age and his service has been terminated on the ground of financial crises, difficulty and minimize the expenses. In one case, if respondent authority has lost and no stay has been obtained from the Division Bench of this Court, then, naturally independent objective conduct should have to be answered by the respondent State authority not to terminate the service of other similarly situated employee so long the Division Bench is not deciding or examining the question raised by respondent pending before this Court. In spite of that, not to wait upto the decision of the Division Bench on the similar issue to take the decision again to terminate the service of a class-IV employee on the same ground of financial difficulty and constraint and minimizing the expense. I fail to understand whether expenses will be minimized

or increased because of legal litigation between the parties. It is not being an ordinary and normal circumstances looking to the aforesaid facts. When one decision is in favour of petitioner in a identical case and that petitioner is continued in service and no stay is operating against that judgment, then, naturally, the petitioner is entitled being more than prima facie case, amounts to remain continued in service till at least LPA is decided by the Division bench of this Court. Therefore, with respect to the decision which has been relied by learned advocate, Mr. Anjaria, the Apex Court has observed that relief which can be granted only at the final stage, should not ordinarily be granted by way of interim order. But looking to the facts of the present case when one decision in favour of petitioner is already implemented by the respondent, even though the steps have been taken by respondent State authority to terminate the service of petitioner on the same circumstances and on the same ground, therefore, according to my opinion, this judgment is not applicable to the facts of this case. In respect to the second decision of Apex Court reported in 1999 SC (L&S) 949 , the facts are different altogether because there was normal retirement of the employee concerned and after normal retirement, by interim order, he was permitted to remain continued in service which was found by the Apex Court not proper. This was not the case in present facts of this case because here the normally the age of retirement is 60 years as per Rule 3(e) but, exercising the power under Rule 5, termination order has been passed at the age of 55 years unwarranted, unexpected and without any valid justification. Therefore, the facts of this case is not similar to the present case. Therefore, this decision is also not applicable to the facts of this case. Third decision which has been relied upon by learned advocate, Mr. Anjaria reported in Bank of Maharashtra Vs. Race Shipping and Transport Co. Pvt. Ltd. and another, the the Apex Court has observed that interim relief granted for no better reason than that of prima facie case has been made out without being considered the balance of convenience and public interest and other consideration. In this case, this Court is considering all the relevant consideration and the petitioner is having more than prima facie having bonafide challenge of the petitioner and raising a serious and triable issue in the petition. Therefore, this Court has considered the balance of convenience in favour of petitioner on the ground that petitioner is working in class-IV category. If the interim relief is not granted by this Court, then, somebody else has to be appointed by the respondent authority and to other person, respondent authority should have to pay the salary and ultimately, if the petitioner succeeds, then, respondent authority should have to pay the salary and other consequential benefits to the petitioner also. So in light of that balance of convenience is in favour of petitioner and if interim relief not granted, then, irreparable loss will be caused to the petitioner on the ground that he lost the job in between age of retirement. Difficulty of the petitioner to maintain the family and responsibility, loose the status and position in the society. It will make difference for employee who is in service and not in service in society. The value of the person is also decided on the basis of the status of the person. If interim relief is granted by this Court, it will not cause any irreparable loss to the respondent because the

respondent shall have to continue the petitioner in service, the petitioner will receive the amount of salary after doing the work and there is nothing adverse pointed by the respondent against the petitioner in respect to her conduct, service record and compassionate appointment which has been granted. The petitioner remain in continue service upto the age of normal retirement. So, ultimately, it is in the interest of the State authority that one identical case decided against the State authority and no stay has been granted by the Division Bench of this Court, then, they should not have to pass any further order of termination against any similarly situated employee and they should have to wait upto the decision of the Division Bench of this Court. Therefore, according to my opinion, the petitioner has established more than prima facie case raising serious and triable issue before this Court and, therefore, considering the balance of convenience in favour of petitioner and irreparable loss caused to the petitioner, if interim relief is not granted, according to my opinion, the view taken by the Apex Court in case of M.Gurudas (Supra) page-22 where the Apex Court has considered that while granting interim relief apart from finding out prima facie case Court should have to consider the balance of convenience, all the facts and also irreparable injury which might be suffered by the plaintiff if the prayer for injunction is to be refused and Court should also consider the bonafide of the plaintiff and serious question and triable issue has been raised by the plaintiff, then, the Court should grant interim relief if all aforesaid criteria are satisfied by the petitioner. The Apex Court has considered other decisions on the subject in Para.22. Therefore, considering this decision of Apex Court as referred in Para.22, according to my opinion, that petitioner has established more than prima facie case, there is a challenge to the order of termination is bona fide; the petitioner was appointed on compassionate ground, not expected to terminate the service without her fault in between retirement date; no such condition incorporated while appointing to the petitioner. Service Rules are applicable but such powers to be exercised for genuine purpose which ultimately in the interest of the State authority and not to exercise by way of terminating the service of class-IV employee. If the interim relief is refused, then, the petitioner has to suffer irreparable loss or injury because she may not be able to maintain the family and not able to discharge the responsibility which has been arisen during the course of this period. The education and maintenance of the children will also suffer or other circumstances petitioner may not be able to discharge her liability and petitioner has lost the status and position in the society for all respect and in comparison to that if petitioner is continued in service for some period till the matter is decided by this Court or Division Bench of this Court in identical case, will not adversely or irreparably loss caused to respondent. The balance of convenience in favour of the petitioner as salary will be received by the petitioner after doing the work or performing the work and in her place, no other employee should have to be employed if the petitioner continued in service, otherwise ultimate result would be respondents shall have to pay double salary for one post which may not be accurate with their policy of minimizing expenses. Therefore, petition is required to be examined by this Court.

6.1 The question is whether the termination of the present petitioner will in any way helpful to the respondent to reduce or decrease the financial crisis or minimize expenses, is also required to be tested by this Court. On 6.2.1996, the petitioner was appointed as Sepoy Jakat Mehkam. The termination is dated 28.2.2007 which comes to more than 11 years continued service of petitioner. Along with the termination order, the respondent shall have to pay terminal benefits to the petitioner immediately. If that amount is lying with the respondent, then, respondent can utilize that amount by way of earning the interest on the said amount which will also be helpful to the respondent for making payment of salary to the petitioner. Along with the termination order, if terminal benefit is required to be paid by respondent authority then, that much amount has to be a loss due to the termination of the petitioner caused to respondent. The monthly salary of the petitioner round about Rs. 5000/- or so amount. The interest earned from the terminal benefit per month comes to more than Rs. 2000/- roughly, then, for rest of the amount of salary which is to be paid, if the petitioner is continued in service, how it will adversely affect the financial position of the respondent State authority and how respondent State authority minimize expenses by saving rest of amount not paying to the petitioner and how it will improve the financial constraint or condition of the respondent.

7. Rule, returnable in 2nd week of July,2007.

8. Interim relief in terms of Para.13(D). Direct service is permitted.

9. Learned advocate, Mr. Anjaria, is directed to communicate the interim order passed by this Court today to the respondent authorities immediately.

10. This interim order has been passed by this Court considering the strong prima facie case of the petitioner. This Court has not examined the merits of the matter. At the time of final hearing, the Court may not influence by observations made in the aforesaid order and it will not come in the way of respondent while examining the merits of the matter. These observations are purely on the basis of record based on strong prima facie case of the petitioner.