IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 4848 of 2017

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI : Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

LAKHAMSHI GOVINDJI HARIA SCHOOL
Versus
KIRIT BHUPATBHAI BHATT & 1 other(s)

Appearance:
MR NIRAV R MISHRA(6140) for the Petitioner(s) No. 1
MR GHANSHYAM B PATEL(3170) for the Respondent(s) No. 1
MR. HEMAL SHAH(6960) for the Respondent(s) No. 1
MS ASMITA V PATEL(5356) for the Respondent(s) No. 1
RULE SERVED(64) for the Respondent(s) No. 2

CORAM:**HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI**

Date : 29/05/2020

CAV JUDGMENT

1. This petition is filed under Articles 226 and 227 of the Constitution of India, in which, the petitioner has prayed that the award dated 17.12.2016 passed by the Labour Court in Reference (T) No.163 of 2004 be quashed and set aside.

2. Heard learned advocate Mr.Nirav Mishra for the

petitioner and learned advocate Ms.Asmita Patel for respondent No.1.

3. The factual matrix of the present case is as under:

3.1 It is stated that as per the case of respondent No.1, he was serving as Peon in the petitioner School from 04.04.1994 till the date of his alleged termination in the month of December, 1998. As the services of respondent No.1 came to be terminated, he raised a dispute which was referred to the Labour Court, Jamnagar. The statement of claim was filed by respondent No.1 and the petitioner filed written statement wherein the petitioner has raised preliminary objection on the ground of maintainability of the said dispute. It was contended in the said application filed by the petitioner that there is a delay of approximately six years in raising the dispute and, therefore, the same is not maintainable.

3.2 It is stated that the Labour Court by way of the impugned award partly-allowed the Reference and, thereby, the petitioner herein is directed to reinstate respondent No.1 on his original post with continuity of service i.e. from the date of Reference with 30% backwages for the said period. The petitioner, therefore, filed the present petition.

3.3 Learned advocate Mr.Mishra mainly contended

that there was a delay of approximately six years in raising the dispute and, therefore, the Labour Court ought not to have granted reinstatement with continuity of service and 30% backwages from the date of filing of the Reference. It is submitted that respondent No.1 has not explained the delay in raising the dispute and, therefore, in absence of any explanation rendered by respondent No.1, the Labour Court ought to have rejected the Reference filed by respondent No.1.

3.4 Learned advocate Mr.Mishra referred the documents placed on record including the statement of claim, written statement, preliminary objection raised by the petitioner, the depositions of the witnesses and, thereafter, submitted that in the facts and circumstances of the present case, the direction issued by the Labour Court is required to be quashed and set aside.

3.5 Learned advocate Mr.Mishra has placed reliance upon the decisions rendered by the Honourable Supreme Court in the cases of ***Prabhakar Vs. Joint Director Sericulture Department*** reported in ***2015(15) SCC 1*** and ***Bharat Sanchar Nigam Limited Vs. Bhurumal*** reported in ***2014(7) SCC 177.***

3.6 Learned advocate Mr.Mishra has placed reliance upon the order dated 11.06.2018 rendered by the learned Single Judge of this Court in Special Civil Application No.5260 of

2015 wherein similar type of issue was raised and, thereafter, submitted that the said order is confirmed by the Division Bench of this Court in Letters Patent Appeal No.1432 of 2018 vide order dated 29.11.2018.

3.7 Learned advocate for the petitioner alternatively contended that at the most, lumpsum compensation can be awarded to respondent No.1 in the facts and circumstances of the present case.

4. On the other hand, learned advocate Ms.Asmita Patel appearing for respondent No.1 has opposed this petition and submitted that the petitioner has not taken contention with regard to the delay in the written statement filed before the Labour Court and, therefore, it is not open for the petitioner to raise such contention before this Court. Learned advocate has referred the affidavit-in-reply filed by respondent No.1 and, thereafter, submitted that no error is committed by the Labour Court while passing the impugned award and, therefore, this petition be dismissed.

4.1 Learned advocate Ms.Patel has placed reliance upon the order dated 01.05.2018 passed by the Division Bench of this Court in Misc. Civil Application No.1 of 2017 in Letters Patent Appeal No.906 of 2016.

5. Having heard learned advocates appearing for the parties and having gone through the material placed on record, it has emerged that as per the case of respondent No.1, he was working as a Peon

in the petitioner School since 04.04.1994 and it is alleged that the petitioner has terminated the services of respondent No.1 in December, 1998 without complying the mandatory provisions of the I.D. Act. Respondent No.1 has raised a dispute for the first time on 02.08.2004 i.e. after a period of approximately six years from the date of alleged termination. Thus, in the present petition, this Court has to examine whether the Labour Court was justified in giving direction to the petitioner to reinstate respondent No.1 with continuity of service and 30% backwages from a particular date. For deciding the said issue, at this stage, this Court would like to refer the decision rendered by the Honourable Supreme Court in the case of ***Prabhakar Vs. Joint Director Sericulture Department (supra)***. The Honourable Supreme Court has observed in Paragraphs-41 and 42 to 46 as under:

> *"41. Thus, in those cases where period of limitation is prescribed within which the action is to be brought before the Court, if the action is not brought within that prescribed period the aggrieved party looses remedy and cannot enforce his legal right after the period of limitation is over. Likewise, in other cases even where no limitation is prescribed, but for a long period the aggrieved party does not approach the machinery provided under the law for redressal of his grievance, it can be presumed that relief can be denied on the ground of unexplained delay and laches and/or on the presumption that such person has waived his right or acquiesced into the act of other. As mentioned above, these principles as part of equity are based on*

principles relatable to sound public policy that if a person does not exercise his right for a long time then such a right is non-existent.

42. On the basis of aforesaid discussion, we summarise the legal position as under:

42.1 An industrial dispute has to be referred by the appropriate Government for adjudication and the workman cannot approach the Labour Court or Industrial Tribunal directly, except in those cases which are covered by Section 2A of the Act. Reference is made under Section 10 of the Act in those cases where the appropriate Government forms an opinion that 'any industrial dispute exists or is apprehended'. The words 'industrial dispute exists' are of paramount importance unless there is an existence of an industrial dispute (or the dispute is apprehended or it is apprehended such a dispute may arise in near future), no reference is to be made. Thus, existence or apprehension of an industrial dispute is a sine qua non for making the reference. No doubt, at the time of taking a decision whether a reference is to be made or not, the appropriate Government is not to go into the merits of the dispute. Making of reference is only an administrative function. At the same time, on the basis of material on record, satisfaction of the existence of the industrial dispute or the apprehension of an industrial dispute is necessary. Such existence/apprehension of industrial dispute, thus, becomes a condition precedent, though it will be only subjective satisfaction based on material on record. Since, we are not concerned with the satisfaction dealing with cases where there is apprehended industrial dispute, discussion that follows would confine to existence of an industrial dispute.

42.2 Dispute or difference arises when one party make a demand and other party rejects the same. It is held by this Court in number of cases that before raising the industrial dispute making of demand is a necessary pre-

condition. In such a scenario, if the services of a workman are terminated and he does not make the demand and/or raise the issue alleging wrongful termination immediately thereafter or within reasonable time and raises the same after considerable lapse of period, whether it can be said that industrial dispute still exists.

42.3 Since there is no period of limitation, it gives right to the workman to raise the dispute even belatedly. However, if the dispute is raised after a long period, it has to be seen as to whether such a dispute still exists? Thus, notwithstanding the fact that law of limitation does not apply, it is to be shown by the workman that there is a dispute in praesenti. For this purpose, he has to demonstrate that even if considerable period has lapsed and there are laches and delays, such delay has not resulted into making the industrial dispute seized to exist. Therefore, if the workman is able to give satisfactory explanation for these laches and delays and demonstrate that the circumstances discloses that issue is still alive, delay would not come in his way because of the reason that law of limitation has no application. On the other hand, if because of such delay dispute no longer remains alive and is to be treated as "dead", then it would be non-existent dispute which cannot be referred.

42.4 Take, for example, a case where the workman issues notice after his termination, questioning the termination and demanding reinstatement. He is able to show that there were discussions from time to time and the parties were trying to sort out the matter amicably. Or he is able to show that there were assurances by the Management to the effect that he would be taken back in service and because of these reasons, he did not immediately raise the dispute by approaching the labour authorities seeking reference or did not invoke the remedy under Section 2A of the Act. In such a scenario, it can be treated that the dispute was live and

existing as the workman never abandoned his right. However, in this very example, even if the notice of demand was sent but it did not evoke any positive response or there was specific rejection by the Management of his demand contained in the notice and thereafter he sleeps over the matter for number of years, it can be treated that he accepted the factum of his termination and rejection thereof by the Management and acquiesced into the said rejection.

42.5 Take another example. A workman approaches the Civil Court by filing a suit against his termination which was pending for number of years and was ultimately dismissed on the ground that Civil Court did not have jurisdiction to enforce the contract of personal service and does not grant any reinstatement. At that stage, when the suit is dismissed or he withdraws that suit and then involves the machinery under the Act, it can lead to the conclusion that dispute is still alive as the workman had not accepted the termination but was agitating the same; albeit in a wrong forum.

42.6 In contrast, in those cases where there was no agitation by the workman against his termination and the dispute is raised belatedly and the delay or laches remain unexplained, it would be presumed that he had waived his right or acquiesced into the act of termination and, therefore, at the time when the dispute is raised it had become stale and was not an 'existing dispute'. In such circumstances, the appropriate Government can refuse to make reference. In the alternative, the Labour Court/Industrial Court can also hold that there is no "industrial dispute" within the meaning of Section 2(k) of the Act and, therefore, no relief can be granted."

6. In the case of ***Bharat Sanchar Nigam Limited Vs. Bhurumal (supra)***, the Honourable Supreme Court has observed in Paragraphs-29, 33, 34 and 35 as under:

"29. The learned counsel for the appellant referred to two judgments wherein this Court granted compensation instead of reinstatement. In the case of BSNL vs. Man Singh[1], this Court has held that when the termination is set aside because of violation of Section 25-F of the Industrial Disputes Act, it is not necessary that relief of reinstatement be also given as a matter of right. In the case of Incharge Officer & Anr. vs. Shankar Shetty [2], it was held that those cases where the workman had worked on daily wage basis, and worked merely for a period of 240 days or 2- 3 years and where the termination had taken place many years ago, the recent trend was to grant compensation in lieu of reinstatement.

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33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

34. Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of

the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: State of Karnataka vs. Uma Devi (2006) 4 SCC 1). Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35. We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him wee regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."

7. In the case of ***Deputy Executive Engineer Vs. Kuberbhai Kanjibhai*** reported in ***2019(4) SCC 307***, the Honourable Supreme Court has observed in Paragraphs-9, 11 and 12 as under:

"9. Here is also a case where the respondent was held to have worked as daily wager or muster role employee hardly for a few years in R & B of the State; Secondly, he had no right to claim regularization; Thirdly, he had no right to continue as daily wager; and lastly, the dispute was raised by the respondent (workman) before the Labour Court almost after 15 years of his alleged termination.

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11. In view of the foregoing discussion, we are of the considered view that it would be just, proper and reasonable to award lump sum monetary compensation to the respondent in full and final satisfaction of his claim of reinstatement and other consequential benefits by taking recourse to the powers under Section 11-A of the Industrial Disputes Act, 1947 and the law laid down by this Court in BSNL Case.

12. Having regard to the totality of the facts taken note of supra, we consider it just and reasonable to award a sum of Rs.1,00,000/- (Rupees One Lakh) to the respondent in lieu of his right to claim reinstatement and back wages in full and final satisfaction of this dispute."

8. In Special Civil Application No.5260 of 2015, the learned Single Judge of this Court has observed in Paragraph-19 as under:

"19. So far as the first ground against the impugned award is concerned, it is necessary to note that the workman raised the dispute after gross delay of 17 years. The claimant did not offer any explanation for the delay. The claimant failed to make out sufficient cause for raising the dispute after such gross delay.

19.1 Even if the Industrial Disputes Act does not prescribe period of limitation for raising dispute, when the reference is placed before the Court after such gross delay of 17 years (i.e. when the dispute is raised after such gross delay)it is the duty and obligation of the workman to offer explanation for such delay and laches and the workman would be under obligation to at least satisfy the Court with regard to the reason for not raising dispute within reasonable time.

19.2 The dispute which is brought before the Court after such gross delay, would ordinarily, amount to dead dispute and stale claim. Such dead dispute and stale claim would, ordinarily, not be entertained by the Court.

19.3 Therefore, to breathe life in such stale claim and dead dispute and to make it maintainable and to get it adjudicated on merits, the workman should at least offer satisfactory explanation and make out sufficient cause. The Court cannot casually and lightly ignore such gross and inordinate delay. ”

9. In Misc. Civil Application No.1 of 2017 in Letters Patent Appeal No.906 of 2016, the Division Bench of this Court has observed in Paragraph-15 as under:

“15. In the case of Shahaji (supra), the Hon’ble Supreme Court observed that when the refernece was made after 16 years from the date of termination of service of the workman and Labour Court did not entertain the reference on the ground of delay, however, if Labour Court comes to the conclusion that termination was illegal, it could have suitably moulded the relief to be granted to the workman in view of the delay. However, the reference cannot be rejected on the ground of delay.”

10. From the aforesaid decisions rendered by the Honourable Supreme Court as well as this Court, it can be said that the Reference cannot be rejected by the Labour Court only on the ground of delay. Other aspects, such as, whether the dispute still exists or not, are also required to be considered by the Labour Court. It can further be said that if there is a delay, instead of granting reinstatement with continuity of service and backwages, lumpsum compensation can be awarded.

11. Keeping in view the aforesaid decisions, if the facts of the present case as discussed hereinabove are examined, it is revealed that respondent No.1 has worked for a period of four years only with the petitioner School. After the date of alleged termination in December, 1998, respondent No.1 has raised a dispute after a period of almost six years. This Court has also gone through the material including the depositions given by the witnesses and the documentary evidence produced before the Labour Court and, therefore, when the finding recorded by the Labour Court that the petitioner has violated the mandatory provisions of the I.D. Act, no interference is required in the said finding. However, at the same time, looking to the unexplained delay of six years in raising the dispute and filing a Reference before the Labour Court, instead of granting reinstatement with continuity of service and 30% backwages, lumpsum compensation can be awarded to respondent No.1. Respondent No.1 has worked for

four years as discussed hereinabove and he was getting Rs.1,000/- per month in the year 1994 from the date of his appointment till his termination.

12. Looking to the overall facts and circumstances of the present case, the petition is partly-allowed. The impugned award dated 17.12.2016 passed by the Labour Court in Reference (T) No.163 of 2004 is modified to the extent that the petitioner is hereby directed to pay Rs.2,00,000/- (Rupees Two Lakhs Only) by way of lumpsum compensation to respondent No.1.

13. Rule is made absolute to the aforesaid extent.

14. Registry to communicate this order to the concerned person/authority by fax or email.

Sd/-
(VIPUL M. PANCHOLI, J.)

JYOTI V. JANI