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Decided on :-13.05.2022
Duration :- 09 yrs. 01 m. 01 days.

In the Labour Court before the Presiding Officer

Mr. L.M. Rathod, Judge

At Bhavnagar



REF (L.C.B.) No. 33/2013

Second Party:-

Ashvinsinh Balvantsinh Jethva,

R/o. Block No. 424, Karmachari Nagar, Fulsar,
Bhavnagar.

C/o. Rastriya General Workers Union,
Vadva, Chavdi Gate, Nr. Kalubhai Panvala,
Bharvadvada, Bhavnagar.

V/s.

First Party:-

1. Range Forest Officer Shri (Extension),

Forest Department, Annexi Building, Bahumali Bhavan,
Bhavnagar.

2. District Forest Officer Shri

Forest Department,

Bahumali Bhavan, Annexi Building,
Bhavangar.

Sub:- Reference u/s. 10(1)(c) of the I.D. Act, for

Adjudication

For the Second Party Union Rep.	:- Mr. P.N. Patel
For the First Party Id. AGP	:- Mrs. G.P. Jadeja

--:: Award ::--

1.1. The present reference has been referred to this court for adjudication by the Deputy Labour Commissioner, Bhavnagar u/s 10(1) of Industrial Dispute Act, 1947 (Act, 1947 for brevity) under vide order No. K.H./ 2247/ S.H.M.C./ B.S.A./A.J.B./I.D.R. 01/2013, dtd. 04.04.2013 along with schedule hereunder;

--:: Schedule ::-

“ શ્રી અશ્વિનસિંહ બળવંતસિંહ જેઠવાને તેમના નવેમ્બર-૨૦૦૮ થી પડેલા રોજ ભરપાઈ કરી સળંગ નોકરીથી મુળ જગ્યાએ કામે પુનઃ લઈ લેવા જોઈએ કે કેમ ?

2. In pursuance of the reference notice vide exh. 2 for the adjourned date 03.05.2013 was issued which got duly served to the parties and in pursuance thereof the second party appeared through Union Representative Mr. P.N. Patel and submitted statement of claim vide exh. 4, whereas the first party appeared through Id. AGP Ms. Y.M. Pandya and submitted Appearance Pursish vide exh. 3 and written sattement vide exh. 8. Thereafter the first party appeared through Mrs. G.P. Jadeja vide exh. 25.

2.1. The second party by filing the statement of claim has submitted that;

a) He was rendering services as a skilled workman-watchman for the last 17 years in the first party no.1 institute and latest he was at Vartej Round drawing latest daily wages of Rs. 154-20 and his services was continuous. He has further submitted that his services came to be terminated by oral order

since November-2008 without any notice, notice pay or retrenchment compensation.

b) He has further submitted that after his termination he frequently made oral and written representation to the first party but he was not taken back and therefore legal advice raised industrial dispute after resorting to legal advice. He has further submitted that the first party continued junior workmen after his termination and thereby committed breach of the provisions of Sec. 25(F), (G) and (H) of the I.D. Act, 1947, Rules 80, 81 and 82 of the I.D. Gujarat Rules, 1966 which are mandatory in nature and therefore the second party has *prima facie* case.

c) He has further submitted that there are new branches emerged and there is grant also and work is available with the first party and therefore the first party must hire the services of the second party who is senior and experienced workman and it is beneficial to the first party because the order of back wages which may be passed in this matter would create burden without work done by the second party and therefore if the second party is reinstated huge burden of back wages can be lessened and it is duty of the first party department to see to it, as such the reference on hand is valid and reasonable.

d) He has further submitted that he is unemployed and he could not get work even if earnest assiduous efforts to get the same were made. He is a man with family and he is ready and willing to resume duty pending litigation. The service record of the second party has remained untainted and clean, he has rendered services at different places in Vartej Round i.e. Sidsar, Vadukat Road, Vartej, Vartej Village Forest, Shampara, Vartej-Shihor Road and also worked

along with other officers in resolving issues.

e) He has further submitted that the act of his termination by the first party is illegal, unreasonable and unjust and therefore *inter alia* prays in para-11(1 to 3) to declare his termination illegal and reinstate him on his original post with continuity of service, full back wages and consequential benefits and costs of litigation.

f) The second party also moved application vide exh. 10 for production of documents but the first party failed to submit reply thereof and consequently right to submit reply/objection of the production application came to be closed under order vide exh. 15(a). This application came to be allowed and the first party is ordered to produce the documents pertaining to attendance statements of last twelve months immediately preceding the date of termination i.e. November-2008 along with seniority list and also ordered to submit affidavit to that effect in the event of inability to produce the same. The first party does not seem to have produced the documents as ordered nor submitted affidavit to that effect.

2.2. Ms. Pandya submitted written statement vide exh. 8 wherein he has denied the averments of the statement of claim as being baseless and far from truth.

a) She has further submitted that the second party was not permanent workman doing work of permanent nature in continuous manner in the first party institute but worked intermittently on daily wage on need basis as and when work would arise. The work in the first party institute is purely temporary, for specific period and seasonal which is notified by the

Government through resolution of Forest and Environment Department dtd. 22.12.1999 and copy thereof is produced on record. He has further submitted that the second party voluntarily ceased to come on duty. The junior workmen to second party have not been continued nor new workmen hired. The second party is required to prove as to for what period he worked and when he was terminated and who were his co-workmen. The second party has averred as to continuance of junior workmen but does not mention their names, place of work and as to how they were junior to him. The second party has made vague statement which is not specific and therefore the first party could not gather intention of the second party.

b) She has further submitted that on completion of work in the first party institute services of workmen not required. The services of the second party was hired on need basis and the workman gets relieved from duty at the end of the day and there was not any assurance given for the work on the next day.

c) She has further submitted that working in the first party is being done under the Scheme or Project based which is limited to specific period and the second party was hired on need basis subject to the period of Scheme or Project and availability of work. The project or scheme automatically come to an end on expiry of specified period and grant. Further the second party voluntarily ceased to come to duty.

d) She has further submitted that the second party was rendering duty as a daily wager purely on temporary basis subject to availability of work. He initially joined the duty since 01.07.1992 and he had not worked for 240 days in any year since 1992 and he ceased to come to duty since 2008.

e) She has further submitted that the second party was being daily wager hired on need basis and discontinuance from duty does not amount to retrenchment within the meaning of Sec. 25(F) of the I.D. Act, 1947, which is held in *Himashukumar Vidhyarthi & Brothers v/s. State of Bihar, decided in Spl. L.P.(Civil) 7957/96* decided on 26.03.1997 by the hon'ble Supreme Court. The hon'ble High Court of Gujarat also held that forest department is not an Industrial Establishment in Spl.C.A. no. 3639/1998.

f) She has further submitted that the second party raised the dispute after long delay and therefore is liable to be dismissed. He has further submitted that the second party rendered sporadic and intermittent services as a daily wager purely as casual labour there is no question arise as to his reinstatement and payment of retrenchment compensation and back wages as held by the hon'ble Supreme Court in S.L.P. (Civil) No. 7957/1996.

g) Therefore, *inter alia* prays to dismiss the reference on hand with costs.

3. **Evidence on the side of the parties :-**

3.1. **Documentary evidence on the second party :-**

Mark	Particulars	Date
20	Copy written submission made to the first party by the second party	07.03.2006
21	Copy of written submission made to government	05.08.2008
22	Copy of reply by MLA	24.10.2008
23	Copy of reply by MLA	07.03.2009
24	Copy statement of details of workmen of the first Party institute procured under RTI	

3.2. **Oral evidence on the side of the second party:-**

Exh.	Particulars	Date
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15	Affidavit of examination-in-chief of second party Ashwinsinh Balvantsinh Jethva who was cross-examined by Mr. Jadeja on 02.10.2019	26.11.2018
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3.3. The closing pursish vide exh. 16 submitted on the side of the second party not intending to adduce any further evidence on his side.

3.4. **Documentary Evidence on the side of First Party :-**

Mark	Particulars	Date
9 / 1	Statement of Abstract of Attendance since July-1992 to December-2008 of the Second Party with number of days he worked and wages paid.	

3.5. There is no oral evidence adduced on the side of the first party and therefore right to adduce oral evidence of the first party came to be closed under order below application vide exh. 17.

4. **Arguments** :- Mr. Patel and Mrs. Jadeja advanced oral arguments which are heard and considered at relevant place to avoid unnecessary repetition.

5. **Authorities** :- Mr. Patel and Mrs. Jadeja have not submitted any authorities on their respective sides.

6. For the determination of points of determination following issues arise before me, Which are hereunder;

Issue No.	Description
Issue No .1	Whether the first party proves that the delay caused in raising the dispute has rendered the dispute non-existent and stale ?
Issue No .2	Whether the second party proves that he rendered continuous and persistent services in the first party institute within the

	meaning of Sec. 25B of the I.D. Act, 1947 ?
Issue No. 3	Whether the first party proves that the matter on hand falls within the meaning of Sec. 2(oo)(bb) of the I.D. Act, 1947 ?
Issue No. 4	Whether the first party proves that the second party voluntarily abandoned his services ?
Issue No. 5	Whether the second party proves that his termination is illegal and unreasonable ?
Issue No. 6	Whether the second party is entitled to get reliefs as prayed in para-11(1 to 3) ?
Issue No. 7	What Award ?

7. My findings upon such issues are;

Issues	Particulars
Issue No. 1	In Negative
Issue No. 2	In Affirmative
Issue No. 3	In Negative
Issue No. 4	In Negative
Issue No. 5	In Affirmative
Issue No. 6	In Partly Affirmative
Issue No. 7	As per Final Order

8. **Reasons for Decision**

Issue No. 1 :-

8.1. It is pertinent ascertain asto whether the delay caused in raising the dispute has rendered the dispute non-existent and stale.

a) Mrs. Jadeja has argued that the second party raised the dispute after long delay and delay has not been explained to the satisfaction of the court. The second party has admitted in his cross-examination that he has not assigned any reason for delay in raising dispute in 2013 after his termination

said termination in 2009. Therefore is liable to be dismissed.

b) Mr. Patel has argued that the second party has specifically stated in his oral evidence vide exh. 15 that he frequently visited the first party officers and made submissions to take him back and he was assured to be taken back subject to the result of the other workmen who had raised industrial dispute. Therefore, he waited and being ignorant of Law delay has been caused. The second party relied upon the assurance given by the first party and as such the delay has been caused default has been caused and therefore under the circumstances delay is required to be condoned.

c) The first party though not stated in his written argument argued that in view of the provisions of Sec. 2(A)(2) of the I.D. Amendment Act, the second party is required to raise dispute within 45 days of his termination and there is no provision of condonation of delay in Sec. 2(A)(3). Therefore, the present reference being barred by limitation is liable to be dismissed.

d) The second party has further advanced oral arguments with respect to limitation that the amendment carried out in Sec. 2 is applicable to the cases where direct application is made and such an amendment is not applicable to the dispute raised u/s. 10 of the Act, 1947 and no any corresponding amendment is carried out in Sec. 10. Therefore, the argument of issue raised after 45 days is belated one and suffers from period of limitation and this court has not jurisdiction to condone the same, is a misleading argument.

e) It is an argument of the first party that in view of the provisions of Sec. 2(A)(2) of the Act, 1947, the second party should have raised the dispute within 45 days of his termination, but this provision is supplementary and the

workman may get the dispute referred through the appropriate government for adjudication u/s. 10 of the Act, 1947 but in case the appropriate government fails to refer the dispute for adjudication within 45 days from the date of raising dispute then the workman can directly move an application in the Labour Court and such direct application would be treated and adjudicated by the Labour Court as if it were referred by the appropriate government for adjudication. Therefore, the argument of the first party of raising the dispute within 45 days of termination is not valid and can not be accepted.

f) It is true that the Sec. 2(A)(3) provides for raising of dispute u/s. 2(A) (1) of the Act, 1947 within three years from the date of raising of dispute. It is also true that the government of Gujarat has further reduced it to one year. It is also true that there is no provision of condonation of delay under the provisions of Sec. 2(A) but the limitation as prescribed there is not applicable in cases where the dispute is referred by the appropriate government u/s. 10 of the Act, 1947.

g) Therefore, the reference on hand as has been made u/s. 10 of the Act, 1947, referred by the appropriate government and having regard to the provisions of Sec. 10 it reads “at any time” which makes it clear that there is no period of limitation prescribed for raising the dispute and the provision of Limitation Act do not apply thereto. But that does not mean that the appropriate government should make the reference without applying mind, but on arrival of conclusion that any industrial dispute exists or is apprehended.

h) It is fruitful to refer to judgments rendered on the point of delay, *Raghubir Singh v/s. General Manager, Haryana Roadways, Hissar, reported*

in 2014 (10) SCC (Division Bench), the hon'ble Supreme Court Division Bench has observed that there is no period of limitation prescribed and provisions of Limitation Act, applicable to the I.D. Act, 1947 and the Court ought not to dismiss the reference merely on the ground of delay but decide the same on merits and award appropriate relief after considering the issue of delay.

i) In the judgment rendered in *Prabhakar v/s. Joint Director, Sericulture Department, reported in 2015 (III) CLR 937*, the Division Bench of the hon'ble Supreme Court has held that there is no period of limitation prescribed for raising dispute though discretion is to be exercised while making reference that as to whether dispute is existing or apprehended.

j) Having considered the rival contentions, evidence on record and settled legal position asto delay in raising the dispute would not warrant dismissal of reference particularly when the dispute is alive and existing. There is no provision of limitation prescribed for raising industrial dispute and the provisions of the Limitation are not applicable and the appropriate government has power to refer the same at any time provided after exercising discretion asto whether dispute exists or is apprehended. The appropriate government is required to make preliminary inquiry to ascertain asto whether dispute exists or is apprehended and on arriving at opinion that the dispute exists or apprehended then only dispute is to be referred. The appropriate governed ought not to refer the dispute where inordinate delay made the dispute non-exists and no sufficient explanation is given for the same. The Court is required to adjudicate the reference on merits although there is delay

caused in raising dispute.

k) Further having assimilated afore discussed legal position with the facts of the case on hand as per contention of the first party that the dispute has been raised in the year 2013 when alleged termination took place in the year 2009. The second party has stated in his oral evidence vide exh. 15 in para-8 that pursuant to his termination he frequently visited the first party and he was given assurance subject to result of the cases initiated by other workmen and as such delay has been caused. He has further stated in para-18 that he made frequent written and oral submissions to the officers of the first party namely Mr. Borichsa, Forester, Mr. Panjumaal till 2009 and to Mr. Manubhai Dodiya, Incharge RFO till 2010 and thereafter to Mr. Mahipatsinh Gohil, RFO and as such delay has been caused. The first party does not seem to have taken denial as to frequent written and oral submissions made to the abovesaid officers in the cross-examination of the second party nor any refutation evidence oral or documentary evidence is produced on record. It is duty of the first party to produce refutation evidence particularly when the reliance is placed upon the statement by the second party and such record is expected to be in custody of the first party. The first party could have examined abovesaid officers of the first party as witness and refuted the averment made by the second party. The first party has failed to adduce oral evidence on record and as such the averment of frequent submissions written as well as oral made by the second party and assurance given by the first party officers have remained un rebutted and therefore the averment of the second party as to frequent oral and written submissions made and assurances given by the first party stand proved.

Therefore, the second party can be said to have relied upon the assurances given and did not exercise his right to raise dispute under the influence of assurance given by the first party. Therefore, as the delay has been caused by reason of assurance given and reliance placed there upon the second party can not be said to have raised the industrial dispute belatedly as he has sufficiently explained the delay caused by explaining the same. Therefore, the dispute raised belatedly in the matter on hand does not render the dispute non-existent and stale as dispute was alive and in existence at the time of raising the dispute. Therefore, for the reasons assigned hereinabove the first party fails to prove that the delay caused in raising the dispute has rendered it non-existent and stale. Therefore, Issue No. 1 is held in "Negative".

8.2. Issue No. 2 :-

- a) It is pertinent to ascertain as to whether the second party rendered continuous and persistence services in the first party institute within the meaning of Sec. 25B of the I.D. Act, 1947.
- b) Mr. Patel has argued that the second party was rendering services as a skilled workman-watchman for the last 17 years in the first party no.1 institute and latest he was at Vartej Round drawing latest daily wages of Rs. 154-20 and his services was continuous. He has also stated in his oral evidence that he rendered continuous and persistent services as a protected workman-watchman since 01.07.1992 and as such he worked for 240 days or more in each year of his entire service. The attendance record produced pursuant to the production order is incomplete and therefore it can not be said to have been fully complied with and as such adverse inference is required to be drawn.

Therefore, the second party succeeds to prove to have worked for 240 days or more of each year of his entire service within the meaning of Sec. 25B.

c) Mrs. Jadeja has argued that second party was not permanent workman doing work of permanent nature in continuous manner in the first party institute but worked intermittently on daily wage on need basis as and when work would arise. He had never worked for 240 days or more in any year in his entire service. The statement of attendance is produced on record to prove that his services was not continuous and persistent but sporadic and intermittent.

d) It is fruitful to refer to the judgment rendered in *Ranip Nagar Paika v. Babuji Gabhaji Thakore and Ors. reported in 2007 (13) SCALE 436*, wherein the apex court has observed that the burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the *factum* of being in employment of the employer. Further referring the judgment rendered in *R.M. Yellati v. The Asst. Executive Engineer* wherein the hon'ble a three judges bench of the apex court has taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in given year. In para-17 it is observed that, this burden is discharged from the workman on adducing cogent evidence, both oral and documentary. In para-21, it is held that "mere affidavits or self-serving statement made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year".

e) It is fruitful to refer to judgment rendered in *Deputy Executive Engineer R & B Department Surendranagar v. Nanjibhai Dayabhai* reported in 2012(5) GLR 4054, wherein the hon'ble high Court of Gujarat has observed that the initial burden to prove continuous service of 240 days lies upon the workman.

f) In the judgment rendered in *Sub-Divisional Engineers, Irrigation Project, Yavatmal v. Sarang Marotrao Gurnule & Ors.*, reported in 2008(iii) CLR 38, the Hon'ble High Court has observed that the burden is on workman to prove that he had put in continuous service of more than 240 days in a year and employer is not expected to prove the negative and therefore burden to prove continuous service within the meaning of Sec. 25B can not be imposed on the employer. Further it is held that workman has to tender 'cogent evidence' by stepping in the witness box and offering himself for cross-examination thus allowing truth of his version to be tested.

g) In the matter on hand the second party has averred to have rendered duty in the first party institute as a protected workman-watchman since 01.07.1992 doing work of permanent nature on permanent basis. He has corroborated this fact in his oral evidence vide exh. 15 and in his cross-examination has categorically stated that he worked in Range Forest Office since 01.07.1992 till 01.11.2008 but no written appointment letter was given to him. He has also stated that he was working in the road side nursery as a chowkidar whereas he has admitted that no documentary evidence is produced to show his service since 1992 to 2008. The second party has stated in his oral evidence that the first party has not produced complete record of his attendance in compliance to the production order. The second party appears to

have moved production application vide exh. 10 and my predecessor Presiding Officer appear to have partly allowed the same and ordered the first party to produce the attendance record of the last 12 months immediately preceding the date of termination i.e. November-2008 and seniority list of the workmen. The first party appears to have produced abstract of attendance of the second party vide exh. 9 since July-1992 to December-2008 but not the complete record of attendance of the second party nor has produced attendance registers for verification. The second party has also produced documents after procuring the same from the custody of the first party under the R.T.I. Act, wherein application vide exh. 20 dtd. 07.03.2006 appears to have been moved by the second party to regularized him on the post of watchman wherein he has specifically stated that he has been rendering services as a watchman since 1992 and therefore he should be regularized. The first party has not disputed or refuted the document of exh. 20 wherein continuous services since 1992 has been stated by the second party. The second party can be said to have discharged initial burden by way of averments, evidence and adverse inference and therefore the first party is required to refute the same with the aid of evidence oral and documentary. Mere denial of continuous and persistent service of the second party can not be said to have refuted the averment which is discharged by the second party by way of sufficient evidence. The attendance record produce vide exh. 9 is not complete record but only abstract of attendance. Further the first party has not complied with the production order nor submitted affidavit showing inability to produce the same and therefore under the circumstances adverse inference is required to be

drawn, for it can be reasonably contemplated that the complete record as to attendance of the second party is within the custody of the first party and it is duty to produce the same irrespective of the fact it is called for or not rather in the matter on hand the documents have been called for but the first party appears to have withheld it for the reasons best known to it. Therefore the best evidence having been withheld and adverse inference is required to be drawn. Therefore, for the reasons assigned hereinabove the second party succeeds to prove to have worked for 240 days in each year of his entire service within the meaning of Sec. 25B. Therefore, Issue No. 2 held in “Affirmative”.

Issue No. 3 :-

8.3. It is pertinent to ascertain as to whether the matter on hand falls within the meaning of Sec. 2(oo)(bb) of the I.D. Act, 1947.

a) Mrs. Jadeja has argued that the work in the first party institute is purely temporary, for specific period and seasonal which is notified by the Government through resolution of Forest and Environment Department dtd. 22.12.1999 and copy thereof is produced on record. She has further argued that the working in the first party is being done under the Scheme or Project based which is limited to specific period and the second party was hired on need basis subject to the period of Scheme or Project and availability of work. The project or scheme automatically come to an end on expiry of specified period and grant. Therefore, argues that the second party got automatically released from work on expiry of the specific period and/or project and as such his said termination does not amount to retrenchment within the meaning of Sec. 2(oo)(bb) of the I.D. Act, 1947.

b) Mr. Patel has argued that the second party was rendering services as a skilled workman-watchman for the last 17 years in the first party no.1 institute and latest he was at Vartej Round drawing latest daily wages of Rs. 154-20 and his services was continuous. He rendered work of permanent work on permanent basis. The second party has corroborated this fact in his oral evidence vide exh. 15 and has categorically stated in para-3 that he rendered duty at as a protected workman-watchman since 01.07.1992 at different under the first party no.2 and such work was of permanent nature and his services was not hired for specific scheme, specific project, specific purpose or time and the work which was being done by him is still continued. He has also denied in his cross-examination that the activities carried on by the Forest Department of nursery is under a specific project and for specific period and subject to sanction of grant from the government. He has also denied that he ceased to come on duty on expiry of such project.

Sec. 2(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) ----

(b) ----

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(c) ----

c) Having perused the evidence on record, rival contention and legal position thereabout the first party has raised contention of specific project with

specific purpose and period within the meaning of Sec. 2(oo)(bb) if the I.D. Act, 1947 and on expiry of such project the workman gets automatically released from work and such release from work does not amount to retrenchment for non-renewal of contract of service. Therefore, burden lies upon the first party to prove the contention raised but the contention of specific project for specific purpose and on expiry thereof it was not further renewed is not supported by any oral or documentary evidence. The first party has not adduce any oral or documentary evidence in support of such contention. The first party could have examined witness and produced documents of such project for specific purpose or period and it was expired on a certain date and it was not further renewed but there is not iota of evidence in support of such contentions and therefore it remains mere an uncorroborated contention and as such the first party could not discharge the burden of specific contract for specific project for specific period and it was not renewed after its expiry. Therefore, the first party miserably failed to prove asto how the provisions of Sec. 2(oo)(bb) of the I.D. Act, 1947 get attracted. Therefore, for the reasons assigned hereinabove Issue No. 3 is held in “Negative”.

Issue No. 4 :-

8.4. It is pertinent to ascertain asto whether the second party voluntarily abandoned his services.

a) Mrs. Jadeja has argued that on expiry of the project the second party voluntarily ceased to come on duty. Therefore, under the circumstances he does not derived any right of reinstatement or raised dispute of illegal

termination.

b) Mr. Patel has argued that the second party had been rendering services as a protected workman-watchman since 01.07.1992 in the first party no.1 institute and latest he was at Vartej Round drawing latest daily wages of Rs. 154-20 and his services was continuous. He rendered work of permanent work on permanent basis. The second party has corroborated this fact in his oral evidence vide exh. 15 and has categorically stated in para-3 that he rendered duty at as a protected workman-watchman since 01.07.1992 at different under the first party no.2 and such work was of permanent nature and his services was not hired for specific scheme, specific project, specific purpose or time and the work which was being done by him is still continued. He has also denied in his cross-examination that the activities carried on by the Forest Department of nursery is under a specific project and for specific period and subject to sanction of grant from the government. He has also denied that he ceased to come on duty on expiry of such project. The first party has not produced any documentary evidence or examined any witness in support of such contention. Therefore, it is not possible to ascertain as to whether the work which was being done by the second party was under a specific project and for specific period and on its expiry it was not further renewed. The second party has specifically stated in his oral evidence that the work which was being done by him is still continued and there is no contention on the side of the first party that the work which was being done by the second party is not still continued and is not being taken from other workmen.

c) Further when it is contended by the first party that the second party

voluntarily abandoned his services burden lies upon the first party to prove the same. If it is believed for the sake of arguments that the second party ceased to come on duty which amounts to voluntarily abandonment of his service, it is duty of the first party to call for the second party by way of registered letter inviting him to report on duty and in the event of failure to report on duty, the first party ought to have conducted departmental inquiry against the second party and on being found guilty of unauthorized absenteeism amounting to voluntary abandonment of service appropriate punishment could have been inflicted. It is not the case of the first party that pursuant to voluntary cessation to report on duty the second party was invited to do so and he failed to report on duty and consequently departmental inquiry was conducted against him and as a result he was terminated from service. Therefore, the first party miserably failed to discharge the very burden of voluntary abandonment of service. Therefore, for the reasons assigned hereinabove the Issue No. 4 is held in “Negative”.

Issue No. 5 :-

8.5. It is pertinent to ascertain as to whether the termination of the second party is illegal and unreasonable.

a) Mr. Patel has argued that the second party was rendering services as a skilled workman-watchman for the last 17 years in the first party no.1 institute and latest he was at Vartej Round drawing latest daily wages of Rs. 154-20 and his services was continuous. He has further submitted that his services came to be terminated by oral order since November-2008 without any notice, notice pay or retrenchment compensation. The first party has raised contention

of hiring services of the second party purely as temporary daily wagger on need basis and as such no question of his reinstatement, retrenchment compensation and back wages arrives and it does not amount to retrenchment. Whereas the second party has corroborated the fact of statement of claim in his oral evidence vide exh. 15 that he rendered duty as a protected workman-watchman since 01.07.1992 and his services was continuous and persistent and he was terminated by oral order without any notice, notice pay or retrenchment compensation. Therefore, as the services of the second party was being continuous within the meaning of Sec. 25B he could not be terminated without following the procedure as required u/s. 25F. Therefore, his termination amounts to illegal retrenchment.

b) Having perused the evidence on record, rival contention and legal position thereabout when the services of the second party is held to be continuous and persistent within the meaning of Sec. 25B of the I.D. Act, 1947. It is imperative upon the employer to follow the procedure as required u/s. 25F. The provisions of Sec. 25F are sine quo non and non compliance thereof prior to termination of the employee amounts to illegal termination. The second party has specifically raised contention that he was terminated by oral order since 01.07.1992 without notice, notice pay or retrenchment compensation. He has corroborated this fact in his oral evidence vide exh. 15, whereas the first party in its reply vide exh. 8 has stated that the second party merely being a temporary casual workman question of his reinstatement with continuity of service and full back wages does not arise. The first party appears to have relied upon the judgment rendered in Spl. Leave

Petition(Civil) No. 9757/1997 but no copy thereof produce on record. The contention raised by the first party of hiring services of the second party on specific project for specific period and voluntary abandonment service do not get substantiated whereas the contention of continuous and persistent services on the side of the second party got substantiated and therefore the second party can not be said to have been terminated within the meaning of Sec. 2(oo) (bb) where such termination does not amount to retrenchment and the second party has not voluntarily abandoned his services and when his services was continuous and persistent within the meaning of Sec. 25B duty is cast upon the employer to observe the provisions of Sec. 25F while terminating the employee which is not done in the matter on hand. Therefore, the termination of the second party is held to be illegal and unreasonable. Therefore, for the reasons assigned hereinabove the second party succeeds to establish his termination illegal and unreasonable therefore the Issue No. 5 is held in “Affirmative”.

c) Mr. Patel has also argued that after the termination of the second party juniors were continued and new recruitment has been made but the second party has not been called for reemployment. The first party has not prepared and published seniority list while terminating the second party and as such committed breach of the provisions of the Sec. 25G, H and Rules-80,81 & 82.

d) Having perused the evidence on record, rival contention and legal position thereabout the employer is required to terminate the junior most workman if it is required to be terminated any workmen within the meaning of Sec. 25G. The second party has contended the junior workmen have been

continued after his termination. The second party has specifically stated in his oral evidence vide exh. 15 in para-18 that the workmen junior to him were continued after his termination namely Rekhaben, Maniben, Anjuben, Hansaben, Jayaben, Darshnaben, Tejalben, Savitaben, etc. whereas he has admitted in his cross-examination that he has no any documentary evidence to show that junior workman to him were continued as stated ago after his termination. He has also admitted that no documents have been produced to show that those documents have been regularized. The second party appears to have produced documents vide exh. 24 procured under the R.T.I. Act which is the list of workman as on December-2006 of the first party institute. On perusal thereof the second party is shown at Sr. No. 13 with place of work at Nari Road, date of initial joining 01.07.1990 and daily wages Rs. 92-90/-. Therefore, it is clear that the first party must have the seniority list of such workmen but has not produced and thereby best evidence is withheld from coming on record. Therefore, the second party proves that juniors to him have been continued after his termination which amounts to violation of Sec. 25G.

e) The second party has also raise contention that new appointment was made but he was not called for reemployment. Having perused the documents of vide exh. 24 the name of the second party appears at Sr. No. 13 and employees vide Sr. No. 15, 17, and many more have been appointed after him in different nurseries falling within the jurisdiction of the first party. The second party has also argued that there is a policy of inter nursery transfer and therefore the workmen of other nurseries of the first party in the Bhavnagar district who are junior to the second party have been appointed/recruited after

his termination but the second party was not called for reemployment which amounts to violation of the Sec. 25H. The first party has not produced the seniority list of the workmen and the list of workmen procured and produced vide exh. 24 by the second party from the custody of the first party under the R.T.I. Act is not a seniority list and it can reasonably be contemplated that such list is maintained in the first party institute but prevented from being produced on record and as such adverse inference is required to be drawn. Therefore, the second party succeeds to prove violation of Sec. 25H and Rules-80,81 & 82.

Issue No. 6 :-

8.6. It is pertinent to ascertain as to whether the second party becomes entitled to be reinstated when his termination is held to be illegal and unreasonable.

a) Mr. Patel has argued that the termination of the second party is illegal and unreasonable. The reliefs as prayed in para-11(1 to 3) are to be allowed and the second party is to be reinstated on his original post with continuity of service and full back wages.

b) It is settled position of law that merely the termination is held in contravention of Sec. 25F does not make the workman entitled to be reinstated. The court is required to take in to consideration hosts of factors like nature of appointment, manner and method of appointment, length of service etc. In the matter on hand the second party has rendered duty as a daily wage earner for about 17 years. The age of the second party has not been stated anywhere except the complaint made before the Asst. Labour Commissioner, Bhavnagar.

wherein it is stated to be 45 years as on 28.12.2012. Therefore the present age of the second party arrives around 54 years and having regard to the date of retirement of the watchman which is 60 years the second party has still 6 years service to render. The second party was terminated on November-2008 and he has remained away from work from last 14 years but having regard to nature of work which is watchmanship which does not demand any special skill, training and knowledge. Further it has not from record that the second party is not fit to render duty whereas he has shown willingness to assume his duty. Therefore, under the circumstances it seems expedient to reinstate the second party on his original post. When the second party reinstated on his original post the continuity of service will normally followed. Therefore, the second party also becomes entitled to get benefits of continuity of service since the date of his termination.

c) Further it is to be ascertained as to whether back wages is to be awarded to the second party. It is fruitful to refer to the judgment rendered in *Haryana Roadways v. Raghunath Singh*, reported in 2005(5) SCC 596, and in *U.P. State, Brassware Corporation v. Uday Narayan Pandey*, reported in 2006(10 SCC 472, wherein the hon'ble Supreme Court has laid down ratio that back wages is not a natural consequence, but burden lies upon the workman to prove that he remained unemployed after retrenchment. He does not become entitled for back wages automatically merely on issue of legality of retrenchment is decide in his favour. Further, while deciding the issue of back wages the court is required to take into account the efforts put in by the workman to find new work, his qualification, possibility of availability of work, length of service

and financial condition of the employer. The court is to ascertain the amount of back wages after exercising discretion judiciously. In the matter on hand the second party has stated in his oral evidence that he made many efforts to find work after the date of termination but he could not succeed and therefore he has remained unemployed. He has also stated in his cross-examination he has remained unemployed. Further having regard to the nature of work which is watchmanship which does not demand any special qualification, skill, training and knowledge and probability of availability of such work in open market is more. Further the second party has family and he has admitted his liability to maintain his family. Therefore, the second party cannot be said to have remained unemployed throughout the period but can be said to have been partially gainfully employed. Therefore, it would not be just, proper and reasonable to grant full back wages but 20% back wages from the date of termination. Further having regard to delay caused in raising dispute does not make him entitled to get the back wages as well as benefit of continuity of service for the given period. Therefore, issues no. 6 is held in 'Partly Affirmative', and final order as to issue no. 7 is passed hereunder;

∴ FINAL ORDER ∴

- 1. The present reference is hereby partly allowed.**
- 2. The second party – Ashwinsinh Balvantsinh Jethva, is hereby ordered be reinstated on his original post with continuity of service since 04.04.2013 and the period from the date of termination till the date of raising of**

the dispute shall be treated *as dias non* for the purpose of continuity of service and back wages.

- 3. The second party is entitled to get 20% back wages from the first party from the date of raising dispute i.e. 04.04.2013.**
- 4. The first party is also ordered to pay Rs. 1,500/- to the second party towards costs.**
- 5. The first party is hereby ordered to comply with the abovesaid order within 30 days from the date of publication thereof.**
- 6. The present reference be sent to Labour Commissioner, Bhavnagar for publication.**

Place: Bhavnagar.

Date : 13.05.2022

(Lalitkumar Meghjibhai Rathod)
Presiding Officer, Court No. 1
(UID Code No. GJ00844)