**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 12834 of 2018****FOR APPROVAL AND SIGNATURE:****HONOURABLE MRS. JUSTICE M. K. THAKKER**

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Approved for Reporting	Yes	No
	Yes	

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AHMEDABAD MUNICIPAL CORPORATION**Versus****SADGUNBHAI SEMULBHAI SOLANKI**

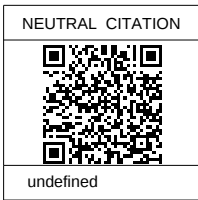
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Appearance:**MR HS MUNSHAW(495) for the Petitioner(s) No. 1****MR NIRAV C SANGHAVI(5950) for the Respondent(s) No. 1**

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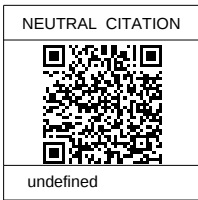
CORAM: HONOURABLE MRS. JUSTICE M. K. THAKKER**Date : 24/12/2024****ORAL JUDGMENT**

1. Rule returnable forthwith. Learned advocate Mr.Nirav Singhavi waives service of notice of Rule on behalf of respondent.
2. This petition is filed under Article 226 and 227 of the Constitution of India thereby, challenging the award passed by the learned Labour Court, Ahmedabad in Recovery Application No.558 of 2013 dated 23.01.2018



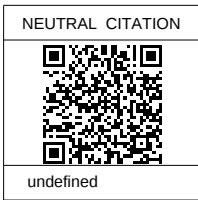
whereby, the application preferred by the respondent came to be allowed and the petitioner was directed to pay arrears of leave encashment of Rs.1,63,620/- with cost of Rs.1,000/-.

3. It is case of the petitioner that respondent herein was having education qualification of SCC pass and was offered the work in the year 1975 and he worked upto 01.04.1981. Thereafter, appointment of the respondent was made on the post of Turner with effect from 01.01.1982 in the pay scale of 266-350. As respondent failed to clear departmental exam he was reverted to the post of Helper in the year 1986 and was placed in the pay scale of 196-231. Thereafter, his appointment was made as Junior Clerk from 09.01.1989 and was granted pay scale of 950-1500. Again he was reverted back to the post of Helper from 04.01.1993 due to not passing the departmental exams instead of having appeared in three attempts and again he was placed in the day scale 750-940. The respondent filed Civil Suit being SCA No.771 of 1993 before the learned Civil Court, Ahmedabad against the reversion order and due to interim relief his service was continued on the post of



Junior Clerk, the suit was finally disposed of on 28.09.2012 with a direction to the Authority to consider the case of the respondent sympathetically within a period of two months and thereafter, the respondent was continued to the post of Junior Clerk up to 04.01.1993. It was decided by the petitioner that respondent be given one chance to appear in the departmental examination which is to be held on November, 2012 but the respondent voluntarily gave up the opportunity in writing and in view of the same, respondent was reverted to the post of Helper vide order dated 05.03.2013 and was placed in the pay scale 4440-7440 with a grade pay of Rs.1300/-.

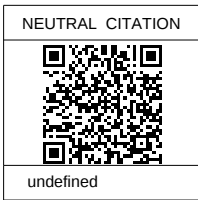
- 3.1. On the next day i.e on 06.03.2013 he tendered resignation voluntarily without depositing of notice pay for one month informing that he proposed to be retired with effect from 07.03.2013, that resignation remained unattended and thereafter, on 09.10.2013 and 08.11.2013 he was informed to deposit amount of notice pay however, the respondent remained failed in depositing the same. In absence of the notice pay the resignation remain unaccepted. However, the



respondent failed to report on duty and ultimately attained the age of superannuation on 30.04.2014. As respondent remained unauthorizedly absent from 06.03.2013 to 30.04.2014 his application for benefit of leave encashment for the period of ten months amounting to Rs.2,82,703/- was remain unattended. The recovery application came to be filed before the learned Labour Court being no.588 of 2013 praying to grant the benefit of leave for the period of 10 months which came to be allowed by the learned Labour Court and the same is subject matter of challenge before this Court.

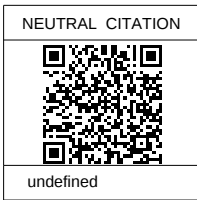
4. Heard learned advocate Mr.H.S.Munshaw for the petitioner-Corporation and learned advocate Mr.Nirav Singhavi for the respondent-workman.

4.1. Learned advocate Mr.Munshaw submits that despite detailed written statement filed before the learned Labour Court containing that due to non payment of notice pay his application for resignation was not accepted and therefore, he would not be entitled for the benefit of leave encashment from 06.03.2013 to 30.04.2014. Learned advocate Mr. Munshaw submits that workman has not worked from 06.03.2013 to

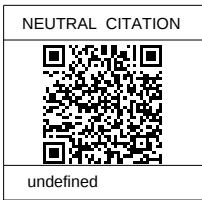


30.04.2014 though he was not permitted to resign and despite 2 notice were addressed intimating to deposit one month notice pay but neither the payment was made nor he resumed the duties. Learned advocate Mr.Munshaw submits that learned Labour Court has committed error in exercising jurisdiction under section 33(c)(2) without having adjudicated the dispute before the learned court or without being recognized by the Corporation. Learned advocate Mr.Munshaw submits that in view of the continuous absentism from 06.03.2013 to 30.04.2014 no question of balance of leave remains and therefore, award passed releasing the benefit of leave encashment requires to be set aside. Learned advocate Mr.Munshaw submits that Corporation being public ex-checker would cause heavy monetary burden and therefore, impugned order requires to be set aside. Learned advocate Mr.Munshaw submits that in view of the above submissions, the present petition be allowed and impugned order be set aside.

4.2. Per contra, learned advocate Mr.Nirav Singhavi appearing for the workman submits that the application

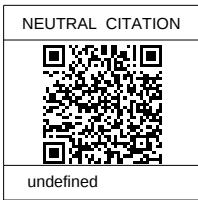


dated 07.03.2013 remain unattended and in the application which is annexed with the memo of the petition reflects that readiness was shown in the event of approval of resignation to pay the notice pay of one month, two months or three months. Learned advocate Mr.Nirav Singhavi submits that all the terminal benefits were paid considering his date of retirement is 07.03.2013 and gratuity was also ordered to be paid by the learned Controlling Authority from 07.06.2013 i.e on completion of period of three months of the date of application. Learned advocate Mr.Nirav Singhavi submits that being aggrieved by the order passed by the learned controlling authority appeal came to be filed by the present petitioner which was also rejected and thereafter amount was granted by the present petitioner in the account of the respondent. Learned advocate Mr.Nirav Singhavi submits that as per the service regulation, BCSR, on completion of the 90 days of filing the application for resignation he was deemed to have been retired from the service. Learned advocate Mr.Nirav Singhavi submits that as neither the application dated 07.03.2013 was allowed signed



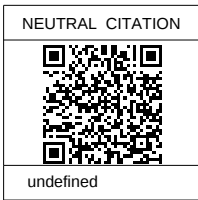
rejected therefore, no question arise for payment of notice period. Learned advocate Mr.Nirav Singhavi submits that as per the certificate issued by the petitioner Corporation which was produced below Exh. 15/1 there were 299 leaves credit in leave card of the respondent therefore, no question arise for recognize of the claim and the respondent having pre-existing right to claim of the aforesaid leave period. Learned advocate Mr.Nirav Singhavi submits that learned Labour Court after assigning detailed reasons has been awarded reference in filed by the present petition therefore, same is required to be confirmed and the petition is required to be dismissed.

5. Having considered the rival submissions made by the learned advocates for the respective parties and having perused the reasons assigned by the learned Labour Court, it transpires that the present respondent was serving on the post of Junior Clerk and has made an application for voluntarily resignation on 07.03.2013. As per the rules up to three months he has to wait and if no reply is given by the Corporation then he deemed to have been retired from the service. On referring the



application dated 07.03.2013, it transpires that the respondent has informed that as he attained the age of 57 years and because of his physical inability and social responsibility he proposed to retire from the service with immediate effect. It was informed that his resignation be accepted from 06.03.2013 and he is ready to deposit notice pay 1, 2 or 3 months whichever period informed by the Corporation in the view of acceptance of resignation.

- 5.1. On 19.10.2013 i.e after period of 7 months first communication was addressed by the petitioner Corporation to deposit one months notice pay of Rs.9,090/- and it was informed that only on depositing the said notice the pay he would be permitted to voluntarily retire. Again on 08.11.2013 similar communication was addressed however, respondent has not given any response to the said communication. The recovery application came to be filed by the respondent on 17.06.2013 claiming that his application for voluntarily resignation dated 07.03.2013 remain unattended and therefore, as per the service regulation of BCSR, after 90 days he deemed to have been retired

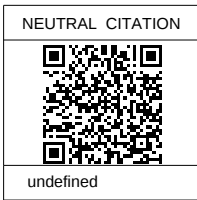


from the service. He stated that his 90 days came to be completed on 07.06.2013 and therefore, his ten months leave which remained credit in the leave card be encashed and he may be awarded the amount of Rs.2,82,703.84 considering the total period of leave of 300 days. The objection was raised with regard to the non maintainability of application under section 33(c)(2) of the I.D.Act. For ready reference section 33(c)(2) is required to be referred hereinbelow:

“(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government; 1 [within a period not exceeding three months:

[Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.]”

5.2. Learned Labour Court relying on the certificate issued by the Corporation dated 27.06.2012 produced below mark 15/1 came to the conclusion that there is a pre-



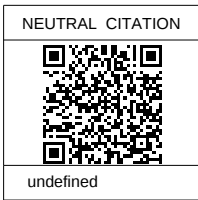
existing right in the favour of the respondent and in view of the recognition of the claim by the Corporation, the application under section 33(c)(2) is maintainable

6. This Court is of the view that as the certificate below mark 15/1 is not disputed by the petitioner Corporation it cannot be said that there is no pre-existing right and therefore, learned Labour Court has rightly held that application is maintainable under section 33(c)(2) by the I.D.Act. The other contention with regard to the non payment of the one month notice pay is considered then it is undisputed fact that application dated 07.03.2013 remained unattended and only after seven months communication was addressed with regard to the payment of one month notice pay. At this stage, Rule 49(1)(2) of the GCSR, 2002 is required to be referred which is reproduced hereinbelow:

“49. Voluntary retirement on completion of twenty five years' qualifying service:

(1) A Government employee at any time after completion of twenty-five years' qualifying service, may, by giving notice of not less than three months in writing to the appointing authority, retire from service;

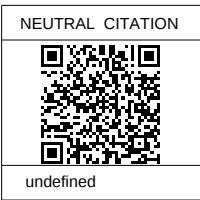
(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority;”



Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

7. As per the service regulation, within a period of 90 days, the communication has to be sent to the respondent with regard to the acceptance or rejection of the application. However, for seven months there was no intimation given to the respondent.

7.1. The gratuity case which was filed by the respondent was also awarded in favour of the respondent by holding that respondent would be entitled for the gratuity amount considering the date of retirement i.e 07.06.2013. Though above order is challenged before the higher forum but is ultimately accepted by the petitioner Corporation and amount is paid to the respondent workman. So far as the claim of unauthorized leave from 07.03.2013 to 30.04.2014 is concerned, it is undisputed that there is no departmental proceedings initiated claiming that this period would be considered unauthorized leave or any intimation was addressed to the respondent to resume duty immediately in absence of deposit of one month notice pay. Claim of



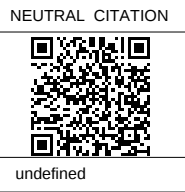
the petitioner that he did not pay the one month notice pay is also misconceived as from the application dated 07.03.2013 itself it clarifies that respondent has shown his willingness to deposit this amount in the event of acceptance of application. As there was no acceptance for the period of three months no necessity arose for payment of one month notice pay. At this stage, for determining issue with regard to leave encashment period Rule 22 of GCSR, 2002 as well as Rule 63 is required be referred which is reproduced hereinbelow:

“22.Leave at credit to cease on removal or resignation:

(1) Except as provided in rule-63 and this rule, any claim to leave to the credit of a Government employee, who is dismissed or removed or who resigns from Government service, ceases from the date of such dismissal or removal or resignation, as the case may be.

(2) A temporary Government employee who is discharged due to shaliction of establishment and re-employed, the leave at his credit bhall be carried forward provided employed, the leaveservice or the break in service not exceeding thirty days is converted into joining time with or without pay.

(3) A Government employee, who is removed or dismissed from service but is re-instated on appeal or revision. shall be entitled to count his service prior to dismissal or removal, as the case may be, for leave.



63. Leave beyond the date of compulsory retirement or quitting of service :

(1) Except as provided hereinafter, no leave shall be granted to a Government employee beyond -

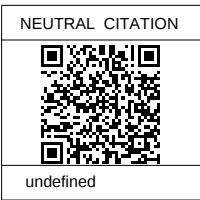
a) the date of his compulsory retirement, or

b) the date of his final cessation of duties, or

c) the date of his resignation from service.

(2) Where the service of a Government has been extended in the public interest beyond the date of his compulsory retirement, he may be granted earned leave, subject to maximum of three hundred days.”

8. As the claim of the respondent is based on certificate issued by the Corporation produced below mark 15/1 it cannot be said that learned Labour Court has committed error in awarding the reference in favour of the respondent. Leave encashment is akin to salary which is property and depriving a person of his property without valid statutory provision is violation of the provision of Constitution of India. If an employee has earned the leave and employee has chosen to accumulate his earned leave to his credit then encashment becomes his right and in absence of any authority that right cannot be infringed by the petitioner Corporation. Considering



the same, this Court deems it fit to dismiss the petition being devoid of merits and confirm the order passed by the learned Labour Court in Recovery Application No.558 of 2013 dated 23.01.2018.

9. Resultantly, this petition is dismissed. Rule is discharged.
10. Stay if any granted, shall be vacated.

ARCHANA S. PILLAI

(M. K. THAKKER,J)