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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 17th July 2006

No. 7522—Ii/1(S)-23/2002-L. E.–In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 26th July 2006 in Industrial Dispute Case No. 59 of 2002 of the Presiding Officer, Labour Court, Sambalpur to whom the industrial disputes between the Management of Indian Aluminium Company Limited, represented by the General Manager, At/P.O. Hirakud, dist. Sambalpur and its workman Mr. Rajesh Kumar Kar, C/o Shri Gopinath Kar, Qr. No. B-F/9 (Near O.S.E.B. Guest House), P.O. University College of Engineering, Burla, Dist. Sambalpur was referred for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE COURT OF THE PRESIDING OFFICER
LABOUR COURT, SAMBALPUR

INDUSTRIAL DISPUTE CASE NO. 59 OF 2002

Dated the 26th July 2006

Present :

Shri P. K. Mohapatra
Presiding Officer, Labour Court,
Sambalpur.

Between :

The Management of
Indian Aluminium Company Limited
represented by the General Manager
At/P.O. Hirakud, Dist. Sambalpur. . . First Party—Management

And

Their Workman Mr. Rajesh Kumar Kar
C/o Shri Gopinath Kar
Qr. No. B. F/9, (New O.S.E.B. Guest House)
P.O. University College of Engineering
Burla, Dist. Sambalpur. . . Second Party—Workman

Appearances :

For the First Party—Management	. .	Shri B. K. Pattanaik, Advocate
For the Second Party—Workman	. .	Shri R. N. Debta, Advocate

AWARD

1. This case arises out of the reference made by the Government of Orissa, Labour & Employment Department under Section 10 & 12 of the Industrial Disputes Act, 1947 for djudication of the disputes vide Memo No. 7930(5)-L.E., dated the 28th June 2002 scheduled below :

> "Whether the termination of services of Mr. Rajesh Kumar Kar, Temporary Operator by the management of Indian Aluminium Company Limited, Hirakud, with effect from the 1st December 1999 is legal and/or justified ? If not to what relief is Shri Kar is entitled to ?".

2. The case of the workman is that he joined as a Junior Instrumentation Mechanic under the management on the 20th October 1997 and performed his duty with all sincerely and honesty, but some of the officers of the management with an ulterior motive assessed his service under the management as not satisfactory and accordingly extended his probation period from time to time and on the 1st December 1999 he was refused to enter inside the factory premise which can be equated with refusal of employment and from that day, he was terminated from service without observance of minimum famility as visualised under the Industrial disputes Act, 1947 (hereinafter referred as 'Act').

It is also the case of the workman that thereafter he requested the management for reinstatement in service and even issued a registered notice on the 10th March 2001, but the management did not pay any head to it. Then he approached the Labour Office for conciliation and in due process they took up the same, but it ended in failure due to non-cooperation of the management and then the matter was moved to Government. The Government of Orissa after being satisfied that a dispute exists in between the parties referred the same to this Court for adjudication.

3. The case of the management is that the termination of workman is due to non-renewal of contract of service as because his service was not satisfactory. It is the further case of the management that from time to time his probation period was extended and as at last chance it was extended till the 31st November 1999 and as his performance was not found to be satisfactory, he was terminated from service by way of non-renewal of the contract. The management side have pleaded that their action squarely covers within the sweep of the exception available under Section 2(oo)(bb) of the Act and in view of the statutory mandate, they are not required to comply the requirements of the Act, which are necessary in case of termination with stigma. To sum up the management side have pleased for answering the reference in their favour.

4. After receiving copy of the written statement filed from the side of the management, the workman has filed a rejoinder wherein he has specifically pleaded that the refusal of employment which occasioned on the 1st December 1999 can be equatted with dismissal by colourable exercise of power in a most illegal manner and contrary to the terms of appointment letter issued by the management.

5. By taking the note of the pleadings of the parties, the following issues are settled in this case.

ISSUES

(i) Whether the termination of services of Mr. Rajesh Kumar Kar, Temporary Junior Operator by the Management of Indian Aluminium company Limited, Hirakud with effect from the 1st December 1999 is legal and justified ?

(ii) If not, what relief Shri Kar is entitled to ?

6. In order to substantiate his claim the workman is only examied from his side and he has also relied on Exts. A to AA. The management side have examined 4 witnesses to hutress their case and they have also exhibited some documents which are marked as Exts. 1 to 10/ K. It is the admitted case of the parties that the workman joined in service on the 20th October 1997 and from the 1st December 1999 e was terminated from service and while terminating him from employment, no show cause notice was issued and no enquiry as contemplated under the Industrial Disputes Act was conducted. It is also the admitted position that from the date of employment i.e. from the 20th October 1997, the workman was working under the management up till the 30th November 1999. Keeping the above position in view, I will net deal with the issues settled in this case.

7. Before going to deal with the merit of the issues settled in this case it would be better to first of all decide as to what be the standard of proof in a case of present type and in the circumstances as pleaded by the parties on whom the burden of proof lies. As per sub-section (3) of Section 11 of the Act, the authorities mentioned therein shall have the same powers as are vested in a Civil court under the Code of Civil Procedure, when trying a suit, in respect of the matters enumerated therein. Though an Industrial Adjudicator has power to follow his own procedure, it is the usual practice in all adjudication proceedings to follow the procedure as required for a Civil Suit pending before a civil Court. So, the standard of proof should be the same as is required in a Civil Trial. Now coming to the burden of proof, the general principle of the law of evidence is that he who asserts must prove it. so it is for the person putting forward the claim to establish the facts and circumstances supporting his claim. In the present case it is the claim of the workman that he was retrenched from service without observance of procedural law, but the management side have pleaded that it is a case of non-renewal of contract of service. so it is for the workman to establish that the termination of service was by way of retrenchment with stigma and not within the sweep of the exception provided in Section 2(oo)(bb) of the Act. so even though the evidence Act does not apply in a case of this type, but the principles of 1 law required for burden of proof are to be followed by Industrial Courts including this court. To sum up, in a case of the present type where the workman has claimed that his termination from service amounts to retrenchment, the burden is on him to put forward his claim and to establish the same by way of positive evidence. In otherwords, as the workman claims that he has been reterenched, he must prove that he was retrenched from service and his case does not come under the exception available under Section 2(oo)(bb) of the Act.

FINDINGS

8. *Issue Nos. (i)* and *(ii)* :- The above two issues are taken up together as those are interlinked. It is the specifi plea of the management that the termination of workman's service was effected, as a result of the non-renewal of contract of the employment on its expiry and under the stipulation contended in the contract, as a result, the termination is not a retrenchment a per Section 2 (oo)(bb) of the Act. They have also pleaded that as the performance of the workman was not found satisfactory, he was not given further extension and such termination does not require notice as contemplated under the Act. The workman has come up with a plea that though his service was satisfactory, the officers of the management with ulterior motive from time to time have made unfounded allegation that his service was not satisfactory and he was victimised without any good cause and lastly on the 1st December 1999, he was not allowed to enter the factory premises which can be equatted as refusal of employment to him. so the workman has claimed that he was refused employment by way of victimisation and while doing so, the management side have not followed the mandatory requirements of law. The management side have mainly claimed that the workman was a 'probationer' and he was temporarily appointed in the expansion and commissioning of Caster Project work and in view of his such position, the management has th3 right to terminate his service after making over all assessment of his performance. In this copnnection, the learned counsel for the management has relied on two decisions of the Apex court and one judicial pronouncemkent of Hon'ble court of Rajasthan. The sum and substance of the above referred judicial pronouncements is that an employer can terminate the services of a 'probationer' after making over all assessment. The learned counsel appearing for the workman has given emphasis to the statutory requirements prior to the termination of a workman and according to him, non-compliance of the same is sufficient to reinstate the workman with full back wages. So on perusal of the pleadings of the parties it is to be primarily decided as to whether the workman was a 'probationer' as claimed by the management or he can be treated as a 'permanent employee' deemed to have been absorbed in the Cadre, but he was terminated from service without observance o fthe mandatory requirements.

9. In order to arrive in a just decision on the above aspect, it is opposite to take note of the appointment order issued to the workman and the contents of the same. At the time of argument, the learned counsel of the parties differ as to whether Ext. D is the appointment order or Ext. E which was issued on the date of joining of the workman in his post is to be treated as the appointment order. According to the learned counsel for the workman Ext. D is the appointment order, but according to the learned counsel of the management Ext. E is the real appointment order and Ext. D is a mere intimation to the workman regarding his selection. I took judicial note of the above referred two letters issued by the management. As it appears Ext. D was issued on the 13th October 1997 wherein it was informed to the workman that he was selected provisionally for the post of 'Junior Operator' and he was also requested to join in his post positively on the 20th October 1997. In the body of Ext. D there is no mention of the scale of pay allowed to the workman and other stipulations which normally should contain in the appointment letter. In Ext. E the above referred details are available and an offer was given to the workman to accept the same in writting. As it appears, the workman has accepted it on the same day and then follow up actions were taken up. So it is hard to say that Ext. D is

the appointment order. If the submission of the learned counsel of the workman that Ext. D is the real appointment order is accepted, then in absence of any mention with regard to the scale of pay and other particulars of appointment, as to how he preferred to join is to be taken into account. Normally the appointment order should speak of the scale of pay, the terms and conditions of the appointment and the other benefits extended to the employee. In Ext. D there is no such mention and the opening sentence is very clear that the same is an intimation to the employee regarding his selection for the post of Junior Operator and he has also been advised to bring with him two recent passport size photographs and certificates in original for verification while joining in the post on the 20th October 1997. As such Ext. E is the appointment order issued to the workman and after being satisfied with the terms and conditions enumerated in it, he he joined in duty on the 20th October 1997.

10. It is submitted by the learned counsel for the workman that from the evidence on record it is forthcoming that while presenting the declaration at the foot of Ext. E, the workman has not availed equal bargaining power and such a document cannot be judicially noted. he has also pointed out his finger to the evidence adduced by the aorkman that his signature in Ext. E was obtained while he was leaving the factory on the 20th October 1997 in the evening hour. According to him, the above evidence is not challenged in any manner. But in my opinion the above submission of the learned counsel for the workman cannot be accepted as it was not pleaded by him in his pleading. Rather in Para 4 of his statement of claim, the workman has pleaded that on the 20th October 1997 after his joining one Shri Nabaghana Pani who was by then working as personnel Superintendent under the management for the reasons not known to him issued another appointment order containing certain uncalled for terms and conditions and then he was compelled to sign on it as a taken of acceptance and the workman accepted the terms specified in it as he has no other alternative by then. In his examination-in-chief, he has given his evidence with regard to the above aspect in a twisted form. Rather in his examination-in-chief, the workman has state that while he was joining in the post, he and other new employees were taken inside the plant premises and then instructions were imparted about the nature of job to be performed. If his version that Ext. E was handed over to him at the evening hour of the 20th October 1997 is believed, there is no reason as to how the workman has joined in his post without knowing the terms of employment, the scale of pay which he would and other stipulations normally required at the time of joining. So his evidence that his signature was obtained on Ext. E at the evening hour of the 20th October 1997 cannot be legally accepted as this material fact is not pleaded by him in his statement of claim and Ext. I. (Advocate notice). Though as per law evidence is not to be pleaded, but material particulars and facts ought to be pleaded so that the adversary could know what case he has to meet and thus to prevent a surprise at the trial. As per law, Court should bot permit evidence to be led on matters which are beyond the pleadings of the parties and even if such evidence is placed on record, the Court is not entitled to look into it for any purpose whatsoever. Though in industrial disputes pleadings need not strictly conform to the provisions of C.P.C., but the rules of natural Justice require that the pleadings must atleast be such as to give sufficient notice to the other party of the case as to what he has to meet. The submission of the learned counsel of the workman that the assertion of the workman with regard to the above aspect is not challenged in any manner and it is to be accepted in to cannot be legally accepted as such material particulars are not pleaded and at this stage, the same cannot be looked into.

Further more, from the documents filed from the side of the management it is forthcoming that similar type of official treatment was also meted out with two other employees who joined on that day. In view of the above situation there is no reason to accept the version of the workman that at the relevant time he could not avail the equal bargaining power and that he acted as per the direction of Shri Nabaghana Pani. As such, I am of view that Ext. E is the appointment order issued by the management and Ext. D is the intimation letter issued in favour of the workman.

In this regard the stand of the workman in the body of the Advocate notice (Ext. L) is also contradictory. In Para 3 of the Ext. I, it is stated that on joining in his post Shri Nabaghana Pani issued another order of appointment containing certain terms and conditions and the workman was compelled to sign the same as a token of acceptance. The stnad of the workman that he was compelled to sign is given a goodbye in his evidence in Court. In Ext. L it is also not stated by the workman that Shri Nabaghana Pani handed over Ext. E while he was leaving the Plant premises after finishing his work on the 20th Octobe 1997. so it can be safely said that the workman is not in a position to account himself pertaining to the above important aspect and in a case of the present type, it is difficult to swallow his contradictory stand at different stages.

11. I took jidicial note of the contents of Ext. E. The opening para of Ext. E is very clear that the appointment offer was temporary and it is for a fixed periof of six months or the completion of the work whichever is earlier from 20th October 1997 with a total wage of Rs. 396 per month. The second para of Ext. E is still important as it stipulates the terms and conditions of the employment. On perusal of the second para it is forthcoming that the appointment is for a temporary period and subject to the satisfation of the management. In the same para an equal opportunity is also given to the workman to resign his post during the temporary period without any notice. So from the body of Ext. E it is well forthcoming that equal scope was given to the parties in relation to the termination by the management and resignation by the workman. So in the offer of appointmentit is specifically averred that “During the temporary period, if we are not satisfied with your work or conduct for any other reason whatsoever, we shall have the right at any time to terminate your temporary appointment forthwith of payment to you of any wages accrued to the date of termination of your service, or any wages in lieu of such notice. similarly, you have the right to resign your position during the temporary period without notice”. The workman has accepted it. according to him at the relevant time, he ahs no other choice but to accept the same. The declaration furnished by him is very clear to conclude that he has accepted the terms and conditions enumerated in the offer of appointment. It is not the case of the workman that after receiving the terms and conditions enumerated in Ext. E at any point of time, he has challenged it or approached any forum not to act upon such terms and conditions. His previous employment with M/s Nandi & Associates was also not a permanent one and he was with them from the 7th April 1996 to the 17th Otober 1997. Admittedly the present management is a bigger concern and with a high hope the workman had joined in the post. so while executing the declaration, he was alive to the terms and conditions available in the body of Ext. E. By then, the workman had clearly understood that his appointment is short-lived. He, furthermore understood that his services can be terminated at any point of time as it was for six months or the completion of

the work which ever is earlier from the 20th October 1997. In his evidence the workman has also stated that at the time of his joining the Cster Project was under construction. so while executing Ext. E he was conscious of his position in the factory and after accepting it, he continued there. But according to the management his performance was not satisfactory as a result, it was extended from time to time with the observation that he should improve his performance. It is the specific case of the workman that thereafter on the 20th May 1998 Shri Nabaghana Pani issued another letter to his client extending his appointment for another three months with effect from the 20th April 1998. Though in the body of Ext. L it is stated by the workman that the probation period was extended for another period of three months with retrospective effect from the 20th April 1998, but on perusal of the Ext. F it is forthcoming that the temporary employment was extended for three months from the 20th april 1998 on the same terms and conditions as laid down in Ext. E. Then on perusal of Ext. 6 and G it is forthcoming that the temporary employment of the workman is further extended and then he was transferred to rectifier Section wherein his temporary employment was extended from time to time. As it appears as a last chance vide Ext. K he was askd to improve his performance failing which his temporary appointment would be terminated without as signing any reason thereof. Thereafter, no extension was given to the workman. So from the above back ground it can be safely said that he was appointed for a particular period on temporary basis and then his employment period was extended from time to time and as no improvement was noticed in his performance, so no further extension was given to him. So he being a temporary employee and that the management is not satisfied with his performance, his termination as propounded by him cannot be held to be stigmatic and punitive in nature. The law in this regard is highly settled. Very recently, our Apex Court in case of Abhijit Gupta Vrs. S. N. B. National Centre. Basic Science & others 2006 LLR 545 have held that the termination of a probationer after making over all assessment cannot be treated as punitive and not notice is required to be given before termination of such service. It is also pointed out by the learned counsel of the management that in view of the above position, the termination of the workman cannot be treated as retrenchment. According to him, it comes within the exception provided in Section 2(oo)(bb) of the Act, as a result the requirements of Section 25-F will have no application. In this connection the learned counsel for the workman has given emophasis to the date available in Ext. K. according to him, Ext. K was prepared on the 16th October 1999 and if by virtue of Ext. K a period of two months is extended then it will remain in force till the 15th December 1999 and no good ground is shown as to why employment was refused to the workman on the 1st December 1999. But after perusing that document it can be safely said that it will have its force from the 1st October 1999 and not from the 16th October 1999 as claimed by the workman. The claim of the workman that he was a regular and confirmed employee of the management as because after the expiry of the probation period, he would have been deemed to be a confirmed employee cannot be accepted as because the rquirements of treating him as such are not compiled by him and it was also not accepted by the management in black and white. so the termination of the workman on the above referred date cannot be treated as retrenchment in view of the exception available in Section 2(oo)(bb) of the Act. Law is well settled that the temporary employee has noright to seek permanent status on the basis of long service. So the claim of the workman with regard to the above aspect cannot be easily swallowed.

12. Throughout the length and breadth of this case, the workman has challenged the official actions taken by Shri Nabaghana Pani. According to him, he has gone out of his way in dealing with him and even his immediate Superiors have assessed his performance in a biased manner. The learned counsel for the workman has also stated that the performance reports produced from the side of the management should not be given importance as those are prepared behind the back of the workman and opportunity of being heard was not given to him to have his say in relation to it. but there is no reason to accept such submission as our Apex Court in the case of [Air-Vice Marshall S. L. Chhabra, VSM (Retired) Vrs. Union of India 1993 (Vol. 2) LLJ P.658] have held that “The Court cannot encroach over the power of the employer to assess and appraise merit of an officer by substituting its own view and opinion, accordingly there is no scope to interfere with the decision of the selection board”. The evidence of the management witnesses clearly indicates that the performance of the workman ws not satisfactory and from time to time extension was given to him with the hope that he will improve, but no improvement was noticed in his performance. As it appears, sufficient extension was given to him. The same is congenial to conclude that the management side have given sufficient opportunity to the workman to improve, but the workman failed to reach the satisfaction mark of the management. The claim of the workman that the other employees got employment along with him were absorbed in the regular cadre and that he was treated in such a unpalatable manner with ulterior notive cannot be accepted as there are materials on record that the other employees have also faced similar type of situation and then they were taken up to the regular cadre after showing better performance. So it is a clear case of termination of the owrkman due to non-renewal of contract and such termination will not amount to retrenchment in view of Section 2(oo)(bb) of the Act and as per law a probationer cannot claime deemed confirmation on expiry of period of the probation in absence of specific act of confirmation by the employer.

13. The learned counsel for the workman has also submitted that from the evidence of management witness No. 12 though it is forthcoming that the strength of the employees of the unit is more than 100, but while retrenching the workman, the permission of the Government is not taken and the benefits ought to be given to the workman also not extended. But in view of my conclusion that the case of the workman comes within the length and breadth of the exception available under Section (oo)(bb) of the Act, there is no need of compliance of the above conditions precedent enumerated in Section 25-F of the Act. The learned counsel for the workman has also given emphasis to the assessment reports frnished by the Superiors of the workman and submitted that those are not legally tenable. But in my view, the jurisdiction of this Court pertaining to the performance of an employee revolves in a narrow campus and normally the opinion of the Superior Officers should prevail. He has also pointed out certain ommissions and discrepancies available in the assessment reports. But this Court with limited jurisdiction cannot scrutinise the same to the extent as claimed by the workman. As such, I am of firm view that the termination of the services of the workman with effect from the 1st December 1999 is legal and justified, and the workman is not entitled to get any relief. The learned counsel for the workman has relied on some judicial pronouncements as per the memo of citation. After scrutiny, I am of opinion that those are distinguishable cases. Hence the following awards.

AWARD

The reference is answered on contest in favour of the management and against the workman. The termination of service of Mr. Rajesh Kumar Kar, Temporary Operator by the management of Indian Aluminium Company Limited, Hirakud, with effect from the 1st December 1999 is legal and justified and the workman is not entitled to get any relief in this case.

Dictated and corrected by me.

P. K. MOHAPATRA
26-7-2006
Presiding Officer,
Labour Court, Sambalpur

P. K. MOHAPATRA
26-7-2006
Presiding Officer,
Labour Court, Sambalpur

By order of the Governor
N. C. RAY
Under-Secretary to Government

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