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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 23rd August 2007

No.9898-1i/1-(B)-230/1992/L.E. —In pursuance of section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the award dated the 30th June 2007 in I.D. Case No. 211/1993 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial disputes between the Management of M/s. Indian Oxygen Ltd., Cuttack and its workman Shri Laxminarayan Padhi was referred for adjudication is hereby published as in the schedule below:—

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR
INDUSTRIAL DISPUTE CASE No. 211 of 1993

Dated the 30th June 2007

Present:

Shri S.K. Mohapatra, O.S.J.S. (Jr.Branch),
Presiding Officer,
Labour Court,
Bhubaneswar.

Between:

1. The Management of Indian Oxygen Ltd., Cuttack.
2. M/s. ESAB India Ltd., 5th Floor,
Bank of Baroda Building, Bombay
Bombay Samachar Marg,
Bombay-400 023. ... First-Party —Management

And

Its Workman
Shri Laxmi Narayan Padhi ... Second-Party —Workman

Appearances :

Shri S. C. Samantaray, Advocate ... For First-Party—Management

Shri S. B. Mishra, Advocate ... For Second-Party—Workman

AWARD

The Government of Orissa, Labour & Employment Department referred the present dispute between the Management of Indian Oxygen Ltd., Cuttack and Shri Laxmi Narayan Padhi under Notification No. 14679/LE., dated the 21st October 1991 vide Memo. No. 16422(6)/LE., dated the 9th December 1993 for adjudication by this Court.

2. The terms of reference by the State Government is as follows :

“ Whether the termination of service of Shri Laxmi Narayan Padhi, workman by the Management of Indian Oxygen Ltd., Canal Road, Cuttack by way of refusal of employment from 4th October 1991 is legal and/or justified ? If not, to what relief the workman is entitled ?”

3. The brief facts leading to the present reference to this Court are as follows :

The second-party workman (hereinafter referred to as the workman) had been engaged in the Sales Depot of M/s. Indian Oxygen Ltd., at Canal Road, Cuttack (hereinafter referred to as the Management) with effect from 26th August 1988 on a daily wage of Rs. 16/-. Subsequently the daily wage was raised to Rs. 25/- after revision of the minimum wage by the Government of Orissa in the year 1990. The workman had been entrusted with the duties of maintaining records in respect of cylinders, giving delivery of full gas cylinders to the customers, receiving empty cylinders, maintaining stock of the welding materials and giving delivery of the came to the customers. Besides such work, the workman had also been entrusted that the work of collecting payments of bills from customers, collecting Sales Tax Forms and going to different places as per the direction of the Depot Keeper of the Management. With effect from 21st May, 1991 ESAB India Ltd. joined with the Management of the Indian Oxygen Ltd. in respect of the business of welding division of the Management Company. Thereafter the work of the Depot was carried on both by Indian Oxygen Ltd. and ESAB India Ltd. at Cuttack. On 3rd October 1991 the Depot of the Management was shifted to another place at Zobra Road, Cuttack. On 4th October 1991 the Management refused employment to the workman. In this way the service of the workman was terminated with effect from 4th October, 1991 by way of refusal of employment. Although the workman was in continuous service for a period of three years under the Management, the Management did not give any notice or notice pay or any compensation to the workman when he was retrenched from his service.

4. During pendency of the case, M/s. ESAB India Ltd. was impleaded as a party in this case under Section 18(3) (b) of the Industrial Disputes Act, 1947 (hereinafter referred to as the I.D. Act). vide order dated the 25th October, 1996. The said M/s. ESAB India Ltd.

submitted one written statement on 4th October 1997. Thereafter the said ESAB India Ltd. did not take any step in this case and was set *Ex parte* vide order dated 13th February, 2001.

5. The Management namely M/s. Indian Oxygen Ltd. in its written statement has challenged the maintainability of the present reference on the grounds that there was no employer and employee relationship between the Management and the workman and therefore there was no industrial dispute as such. It is further contended in the written statement that the second-party was an independent contractor doing the loading and unloading cylinders from trucks. The Management Company sold its welding equipments business to M/s. ESAB India Ltd. with effect from 1st April, 1991 and in the process the Sale Depot of Cuttack was transferred to M/s. ESAB India Ltd. who owned the same. After 1st April, 1991 onwards the Management Company did not have any right title or interest in the said Depot in question. The Management Company had never carried on the Management of the Depot jointly with ESAB India Ltd. at any time. It has been specifically pleaded that since there was no employer employee relationship between the Management Company and the workman, the question of termination of his service by Management does not arise at all. since 4th January 1991 the Management Company was not functioning at all and was not having its sale depot in question at Cuttack. The workman was never under the employment of the Management at any time and therefore, the question of any continuous service of the workman in service does not arise at all. There was never any question of granting of notice pay or compensation to the workman as there being no employer and employee relationship between the Management Company and the workman. On these averments the Management has sought for refusal of any relief to the workman.

6. On the basis of the above pleadings of the parties, the following issues have been framed for determination.

ISSUES

- (i) Whether the termination of service of Shri Laxmi Narayan Padhi, workman by the Management of Indian Oxygen Ltd., Canal Road, Cuttack by way of refusal of employment from 4th October 1991 is legal and/or justified ?
- (ii) If not, to what relief the workman is entitled ?

7. In the instant case the main stand of the Management is that there was never any employer and employee relationship between the Management and the workman and therefore, before answering the issue No. (i), it is of paramount importance to examine from the evidence on record as to whether there existed relationship of employer and employee between the Management and the workman. In this context the workman has examined himself as W.W.1. In his evidence the workman has deposed that he was working under the Management on daily wage basis from 26th June, 1988 till 3rd October 1991. According to W.W.1. he was performing various of works including delivery of full cylinders and receiving of empty cylinders, maintaining the stock position and collecting Sales Tax and bills from the customers as per the direction of the Depot in charge. In this context the workman has proved

document Ext.2 series to show that on different occasions he had been directed to perform different types of works. Under Exts.2 to 2/9 on different dates the Depot Keeper or Acting Depot Keeper as the case may be issued direction to the workman for collection of cheques and payments or collection of Sales Tax declaration from customers. All these letters having letter head of the Management and relate to the years 1990 and 1991. The witness for the Management M.W.1 on his part has deposed that prior to 1991 the workman had been engaged as an independent contractor under the Management at Cuttack Depot for loading and unloading gas cylinders. For doing this service the workman was being paid service charges. M.W.1 has denied any employee and employer relationship between the workman and the Management. In all letters under Ext.2 series except in Ext. 2/2 the workman has been described as representative of the Management. No document has been proved by the Management to show that the workman was an independent contractor doing any work on a contract basis for the Management. Ext.7 series proved by the workman however show that the workman was getting service charges from the Management for the days of work done by him. Whatever may be the term of the payments to the workman, it is clear that the workman was being paid hiring charges. In the absence of any specific evidence, mere statement of M.W.1 that the workman was a contractor for doing loading and unloading cylinders can not be believed. On the other hand, the Area Sales Manager of the Indian Oxygen Ltd., Calcutta had written to the Depot Keeper of the Management on 10th September, 1990 vide Ext.5 that they had got a letter from the workman who was working under Cuttack depot and that the head office had decided to take necessary steps for his permanent posting. Thus all these documents go on to show that the workman was working under the Management to do manual works for hire and therefore, the second-party was a workman within the meaning of Section 2(S) of the I.D. Act. since the workman had been employed to do some manual work on daily hire or service charge basis by the Management, it can definitely be said that there was an employee and employer relationship between the workman and the Management. At least it is important to note that all the documents under Ext.2 series and under Ext.7 series are under the letter head of the Management Company and not under the letter head of any private party. The argument raised during argument stage that one Sriram Associates was the distribution agent and he was using the letter head of the Management Company, does not appeal to common sense. In any event there is no compelling evidence to show that said Sriram Associates had been authorised to use the letter pad of the Management Company. Therefore preponderance of probability lies heavily in favour of the contention of the workman that he was an employee of the Management concerned.

8. Now most important question arises as to whether the workman was in continuous service within the meaning of Section 25-B of the I.D. Act. In the decision of Range Forest Officer Vs. S.T. Hadimani reported in 2002 LBJ(I) supreme Court 1053, the Hon'ble Apex Court have held that the burden of proving of continuous service within the meaning of Section 25-B of the I.D. Act rests solely on the workman. Now it is to be seen from the materials on record as to whether the workman had discharged the heavy onus that lies on

him to prove continuous service. In this context the only evidence of the workman W.W.1 is that he was working under the Management on daily wage basis from 26th June, 1988 to 3rd October 1991. Save and except this bald statement there is no documentary proof to sustain the claim of the workman regarding his continuous service under the Management for the requisite period to satisfy the provision under Section 25-B of the I.D. Act. The petty cash vouchers Ext. 7 series do not prove that the workman had worked for 240 days in 12 calendar months preceding to his termination from service on 4th October 1991. The workman has failed to tender any credible evidence regarding continuous service within the meaning of Section 25-B of the I.D. Act and therefore, there was never any reason on the part of the Management to comply with the provisions under Section 25-F of the I.D. Act before terminating the service of the workman. Thus the irresistible conclusion would be that the termination of service of the workman by the Management by way of refusal of work with effect from 4th October 1991 is not illegal in any manner and therefore justified. The issue No. (i) is answered accordingly.

9. In view of my answer to issue No. (i), the workman is not entitled to any benefit whatsoever under any provision of the I.D. Act and hence the issue No. (ii) is answered accordingly.

10. In view of the discussion made above, the reference is answered as follows:

(i) The termination of services of Shri Laxmi Narayan Padhi, workman by the Management of Indian Oxygen Ltd., Canal Road, Cuttack by way of refusal of employment from 4th October 1991 is legal and therefore justified. (ii) The workman is not entitled to any relief whatsoever.

Dictated and corrected by me.

S.K. Mohapatra
30-6-2007
Presiding Officer,
Labour Court,
Bhubaneswar.

S.K. Mohapatra
30-6-2007
Presiding Officer,
Labour Court,
Bhubaneswar.

By order of the Governor

N. C. RAY
Under-Secretary to Government