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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 7th September 2007

No. 10436—1i/1-(J)-20/07/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.186/91 of the Presiding Officer, Labour Court, Bhubaneswar to whom the Industrial dispute between the Management of Tribal Development Co-operative Corporation Ltd. Bhubaneswar and its workman Shri Ostaram Bhoi was referred for adjudication is hereby published as in the schedule below.

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 186 of 1991

Dated the 30th June 2007

Present :

Shri S. K. Mohapatra, (OSJS), (Jr. Br.)
Presiding Officer,
Labour Court,
Bhubaneswar.

Between :

The Management of Tribal Development Co-operative Corporation Ltd.,
Bhubaneswar. .. First-party—Management

And

Their workman,
Shri Ostaram Bhoi .. Second-party—Workman

Appearances :

Shri B.K.Patajoshi, Advocate, .. For First-party—Management

Shri D.K.Panda, Advocate, .. For Second-party—Workman

AWARD

The Government of Orissa in exercise of its powers under sub-section (5) of Section 12 read with clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to as the I.D. Act) made a reference of the present industrial dispute to the Presiding Officer, Labour Court, Jeypore for adjudication. On consideration of the representation of the workman, the Government of Orissa in exercise of its power under sub-section (1) of Section 33-B of the I.D. Act with drew the industrial dispute from the Labour Court, Jeypore and transferred the same to the Presiding Officer, Labour Court, Bhubaneswar for adjudication.

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

"Whether the action of the management of Tribal Development Co-operative Corporation Ltd., Bhubaneswar by removing their workman Shri Ostaram Bhoi with effect from 11th February 1990 is legal and/or justified ? If not, to what relief is the workman entitled ?"

3. Shorn of all unnecessary details, the case of the workman in brief is as follows :

The workman had joined as a shop Supervisor under the management of Tribal Development Co-operative Corporation Ltd., Bhubaneswar (hereinafter referred to as the management) in the year 1976. The management vide proceeding No.6343/TDCC. dated the 21st May 1988 started a departmental proceeding against the workman on the charges of misappropriation of Corporation fund and deliberately causing loss to the Corporation. The management did not supply any audit report and/or statement of accounts along with the charges to enable the workman to submit his defence. All the charges were for alleged misappropriation towards value of stock of goods. During the enquiry the workman denied all the charges and submitted a detailed statement showing procurement and transaction made during his incumbency. During the enquiry the workman had not been given proper opportunity to defend himself as the documents/records called for by him had not been supplied to him. Even the documents which were relied upon by the Enquiring Officer had not been shown to the workman. The Enquiring Officer without considering the statement of defence of the workman and without giving him proper opportunity to defend himself and without found the workman guilty of all charges. The management without communicating copy of the enquiry report, imposed the punishment of dismissal. In doing so the Managing Director of the management solely relied upon the enquiry report and did not applying his independent mind. Since the report of the Enquiring Officer was not supplied to the workman prior to imposing punishment on him, he was deprived of his right to explain the report of the Enquiring Officer and thereby rules of natural justice was violated. According to the workman the impugned order of dismissal from service was bad in law and illegal and therefore, he was prayed for his reinstatement in service with all mandatory benefits including back wages.

4. The management in its written statement has contended that the workman had been appointed as Shop Supervisor purely on temporary basis with effect from 1976 and was posted as such at Sunabeda Branch under defunct Rayagada Division which subsequently became Sunabeda Division. During his tenure the workman caused shortage/misappropriation of Rs. 60,848.15 at Sunabeda Branch as revealed from the audit report and accounts finalization statement and as such, a departmental proceeding was initiated against the workman by the Managing Director-*cum*-Disciplinary Authority of the management. The workman was directed to show cause after the charge sheet was supplied to him. The Enquiring Officer appointed by the Disciplinary Authority after going through the charges and written statement of defence of the workman gave his findings with recommendation to

terminate the services of the workman as the continuance of the workman in his service was detrimental to the interest of the Corporation (management). The Managing Director being the authority terminated the services of the workman under Rule 9 (a) (1) of T.D.C.C. Employees Disciplinary Proceeding Appeal Rule, 1983. In terminating the services of the workman the management had followed due procedure of law. The management is claiming that due procedure had been followed by the management to terminate the services of the workman and has contended that the termination of services of the workman was legal and justified.

5. On the aforesaid pleadings of the parties, the following issues were framed for determination.

ISSUES

- (i) "Whether the removal of workman with effect from 11th February 1990 from service was by way of punishment awarded was under a valid and proper domestic enquiry?"
- (ii) Is the workman entitled to any relief ? "

6. During trial the learned Presiding Officer, Labour Court, Bhubaneswar examined the workman as W.W. 1 and the Branch Manager of the management of Sunabeda Branch who was also the Marshalling Officer during the enquiry was examined as M.W.1. The learned Presiding Officer after hearing argument from both the sides passed Award in this case on 8th November 1994 holding that the principle of natural justice and fair play had been properly observed while conducting the departmental enquiry and passing of the final order of termination of service was suitable and required no interference and did not accept the plea of the workman and further hold that the workman has not entitled to any relief. As against the Award the workman preferred writ Petition before the Hon'ble High Court of Orissa vide O.J.C. No. 2224 of 1995. The Hon'ble High Court of Orissa set aside the Award and remanded the case for disposal in accordance with law after providing opportunity of hearing of argument to both the parties.

7. In the instant case the workman faced departmental proceeding in service after charges were framed alleging misappropriation of value of goods/value of stocks under ten numbers of distant charge under Ext.A. After filing of the show cause by the workman under Ext.H the matter was enquired into by the Special Officer of the management who found the workman guilty of all the charges levelled against him. In this context the workman who has examined himself as W.W.1 has deposed in his evidence that he was working under the management as Shop Supervisor with effect from 4th April 1976 and a disciplinary proceeding was started against him in the year 1988 alleging charges as noted in Ext.A. Further evidence of W.W.1 is that he filed explanation denying the charges under his show cause Ext.H which also continuous statement regarding procurement made by him in the relevant years by application of advance received by him from the authorities of the management and other details were also shown in the statement. All the charges vide Ext.A basically referred to misappropriation towards valuable goods/stocks without giving any details as to in what manner the alleged misappropriation/shortage of goods/stocks were committed by the workman. The words misappropriation shortage in value of goods and stocks may have different connection depending on the actual acts/commissions committed by the persons against whom the charges have been levelled. On one hand it may mean shortage of stocks on physical verification which were not accounted for and on the other hand, it may mean more goods/stocks were sold but all the sale proceeds were not reflected in the cash book and thereby misappropriation was committed. It may also mean that in the stock register relevant entries were made showing receipt of loss stocks/goods than actual stocks/goods received by

the workman. So on the very face of it Ext.A is a document capable of many meanings and it is more so because none of the ten numbers of charges disclosed as to the manner in which the workman allegedly committed shortage/misappropriation for value of stocks/goods. This being so, it is now to be examined from the evidence on record as to what the workman W.W.1 has deposed in the matter.

8. So far as Charges No.1 and 2 of Ext.A are concerned the evidence of W.W.1 is that he was not in charge of any Fair Price Shop at Sunabeda either in the year 1976-77 or in the year 1977-78 and therefore the finding of the Enquiring Officer that he was responsible for shortage in the Fair Price Shop of Sunabeda in those two years is not correct. So far as charges Nos. 3 to 6 and 8 those relate to alleged misappropriation/shortage of value of goods during the period from 1981-1982 to 1984-85 while the workman was in charge of Sunabeda procurement centre. Charge No.7 under Ext.A relates to alleged misappropriation of sale proceeds amounting to Rs.1,956/- while the workman was Shop Supervisor of sunabeda Fair Price Shop. Charges No.9 and 10 relate to alleged shortage/misappropriation of goods during the period from 1985-86 and 1986-87 while the workman was in charge of central godown at Nayagarh. In his evidence the workman W.W.1 has contended that the authorities of the management did not taken into account the shortage which was admissible on account of driage. The workman has proved Exts.B,C,D,E,F and G circulars all of which relate to permissible percentage of shortage that is allowed because of driage of agricultural produces on storage. In this evidence W.W.1 has stated that as the authorities of the management did not take into account the permissible percentage of shortage as described in Exts.B to C the charge Nos. 3 to 6 and 8 were made against him. In his evidence W.W.1 has further stated that had the shortage been allowed the charges could not have been made against him. According to W.W.1 in the enquiry report the permissible shortage was not considered as per circulars under Ext.F and G and therefore the Enquiry Officer did not take into account the normal shortage due to driage of products after procurement and the same occasioned in erroneous finding. Since the basic stand of the workman is that the normal shortage which are permissible under Exts. B to C were not allowed to him, therefore such permissible shortage were shown as shortage of stocks/goods and therefore, the charge which should not have been made against him in the first place were held to be substantiated rather wrongly. This being the main plank of the evidence of W.W.1 it is needless to go into the figures and prices stated by W.W.1 in his evidence given by him in the statements attached to his reply to the charges vide Ext.H. In the cross examination of W.W.1 not a single question has been asked to discard his statement that during the enquiry the normal shortage which is permissible under Exts. B to C were not allowed to him.

9. From the side of the management only one witness has been examined as M.W.1 who was the Marshalling Officer during the enquiry. The management has neither examined the Enquiring Officer nor has proved the enquiry report. Accordingly to M.W.1 there was proof of misappropriation but M.W.1 has not deposed as to what was the said proof to show that the workman had really committed any misappropriation. In this cross-examination M.W.1 has stated that he could not say anything about the misappropriation besides the record thereby probably meaning that he could not say about the misappropriation without the concerned records. In the cross-examination M.W.1 has further stated that no witness had been examined from the side of the management during enquiry and that as Marshalling Officer he had only produced the records before the Enquiring Officer. The very evidence of M.W.1 does not indicate clearly as to what those records were being on which the Enquiring Officer conducted his enquiry and submitted his report when no witness was examined on behalf of the management. Further evidence of M.W.1 during cross-examination is that the copies of the enquiry report and other records were

not given to the workman. In his evidence M.W.I has further stated that the annual audit is held once in each year and shortage and loss are reflected in the audit report but in the instant case no such audit report has been proved by the management. It is true that in a proceeding before the Labour Court the only duty of the management is to show that a fair and proper enquiry into the charges were made by the management and that the workman had been given reasonable opportunity to defend himself. It is obviously not necessary for the management to produce all the records which were used as evidence against the workman during the enquiry but the management is always bound to prove that a fair and proper enquiry had been held and reasonable opportunity had been given to the workman.

10. In the instant case in the absence of the evidence of the Enquiring Officer himself and in the absence of the enquiry report it is very difficult, rather impossible to exactly know as to on what basis the Enquiring, Officer recorded a finding that all the charges have been proved. More over the applicability or otherwise of the main evidence of the workman that driage which results in the permissible shortage as reflected in Exts.B to G were not allowed to him and therefore, charge bearing Nos.3 to 6 and 8 to 10 were framed against him and the evidence that he was never in charge of the Fair Price shop at Sunabada and therefore, he was not responsible for shortage/misappropriation in the said Fair price shop as alleged in charge Nos.1 and 2 and further that he was not responsible for misappropriation of any sale proceeds at Sunabada vide charge No. 7 as he was not in charge of said Fair Price Shop in question can not be appreciated in its proper perspective in the absence of the evidence of the Enquiring Officer and in the absence of the enquiry report. Therefore, in the facts and circumstances of the present case the acceptability of evidence of the workman regarding permissible shortage and his noninvolvement in charge No.1, 2 and 7 can not be brushed aside lightly. At this stage it should be made clear that it is not the intention of this court to give any remark on the findings of the Enquiring Officer or about its correctness or otherwise because it is never the duty of a labour court to reopen an enquiry into the charges and Judge the charges made against the workman by deciding truth or otherwise of the factual aspects of the charge but it is definitely the duty of the Labour Court to examine the evidence on record to satisfy it self if a fair and proper enquiry had been held and if reasonable opportunities had been given to the workman to defined himself.

11. Now the important question arises as to whether the departmental enquiry against the workman had been conducted in a fair and proper manner giving reasonable opportunity to the workman to defend himself. In the instant case as many as ten numbers of charge had been framed against the workman under Ext.A. All the charges except charge No.7 relate to misappropriation/shortage of stock but none of the said charge give any other details as to what were the items of shortage/misappropriation and the quantity of shortage of such goods. Charge No.7 relates to misappropriation of sale proceeds. Not a single document was supplied to the workman by the management alongwith the charge. A plain reading of the charge shows that the workman had been called upon to submit his written statement of defence within 15 days of receipt of the charge sheet and to show cause as to why he should not be removed/discharged/dismitted from service and it has been added that the workman was permitted to verify the relevant records on prior appointment with the Branch Manager of Sunabada and Nayagarh. During argument it was submitted by the learned advocate for the management that when the charge sheet was served on the workman he was posted at Nayagarh. Sunabada is a far off place from Nayagarh. The charge under Ext.A do not give any hint regarding the basis of the charge that was made against the workman. It also does not disclose as to what were the materials basing on which the management concluded that the workman had committed shortage/misappropriation of goods of certain value and misappropriated Rs.1,956/- towards sale proceeds.

The only term used in Ext.A is that the workman could verify the relevant records on prior appointment with the Branch Manager of Sunabeda. In the instant case the enquiry report has not been proved by the management during the evidence. The Enquiring Officer has not been examined as a witness in this case M.W.1 who was the Marshalling Officer in the domestic enquiry in question as has simply stated that there was proof of misappropriation but he has not disclosed as to what was the proof and what was the nature of evidence against the workman in the domestic enquiry. In the cross-examination M.W.1 has stated that he could not say about the misappropriation besides the records meaning that he could not say anything about the misappropriation without verifying the records but he has not explained what were the records which proved the alleged misappropriation. On the other hand in his cross-examination M.W.1 has further stated that the management had forced him to give statement in the Court in the I.D.Case No.186/91 (in this case). In his cross-examination although M.W.1 has stated that the annual audit is held once in each year and that the shortage and losses are reflected in the audit report but no such audit report is before this Court to have any idea about the nature of misappropriation/shortage of goods in question as noted in charge Nos.1 to 6 and 8 to 10. In his cross-examination although M.W. 1 has stated that the annual audit is held once in each year and that the shortage and losses are reflected in the audit report but no such audit report is before this Court to have any idea about the nature of misappropriation/shortage of goods in question as noted in charges Nos. 1 to 6 and 8 to 10. In his cross-examination M.W.1 has further stated that no witness had been examined in the enquiry (from the side of the management) and that he had produced the records before the Enquiring Officer but copies of such records had not been given to the workman. Although the witness M.W.1 has denied the suggestion that proper opportunity was not given to the workman to defend his case, there is absolutely no material before this Court or there is nothing in the evidence of M.W.1 to show that the management had given proper opportunity i.e. reasonable opportunity to the workman to defend himself. M.W.1 has not explained as to what type of opportunity had been given to the workman to defend himself. On one hand the relevant records on which the charge Ext.A is based were not supplied to the workman and the management has not come up with any explanation as to what prevented the management not to give the copies of the alleged relevant documents on the basis of which charge had been framed against the workman. The charge Ext.A although contains ten numbers of charges all the charges are very short and cryptic without disclosing anything about the basis of such charge. The management has its own rules regarding disciplinary proceeding and Appeal. The relevant rule is the Tribal Development Co-operative Corporation Employees Disciplinary Proceedings Appeal Rules, 1988 (hereinafter referred to as the Rule). Rule 9 (2) reads as follows:

“The disciplinary authority shall frame definite charges on the basis of the allegation on which the enquiry is to be held. Such charges together with a statement of the allegation on which they are based, shall be communicated in writing to the employee and he shall be required to submit within such time as may be specified by the disciplinary authority not ordinarily exceeding one month, a written statement of his defence and also to state whether he desires to be heard in person.”

Further Rule 9 (3) reads as follows :

“The employee shall for the purpose of preparing his defence, be supplied with all the records on which the allegations are based. He shall also be permitted to inspect and take extracts from such other official records as he may specify, provided that such permission may be refused if for reasons to be recorded in writing in the opinion of the disciplinary authority. Such records, are not relevant for the purpose of it is against public interest to allow his access there to.”

In the instant case Ext.A does not contain any statement of allegation on which the charges had been based and no each statement had been communicated in writing, even if the evidence of M.W.1 is taken into consideration that in such year audit is conducted in the management organization and each audit reports reflected shortage/misappropriation but now where in four corners of Ext.A there is any mention of any audit report. In his evidence the workman M.W.1 has categorically stated that he had asked for documents but nothing had been supplied to him and that no witness had been examined during the enquiry from the side of the management. W.W.I has further stated that no document had been shown to him. Such evidence of the workman finds support from the management witness W.W.I who has stated that the records were not given to the workman. Further more although the alleged misappropriation took place as back as in the year 1975-76 and continued till the year 1985-86, charge sheet was filed against the workman in the year 1989 only. In such situation it is very difficult to believed the evidence of M.W.I that audit was held in each year and that shortage and lasses had been reflected in the audit report. In any event none of the charge referred to any audit and as stated by M.W.I himself records were not given to the workman and no witness was examined during the enquiry. Such lapses on the part of the management are sufficient in themselves to conclude that no reasonable opportunity had been given to the workman to defend himself. Morely writing in the charge sheet that the workman could inspect the records after prior appointment with the Branch Manager of Sunabeda is not enough. Rule 9(3) clearly mandates that the employee shall for the purpose of preparing his defence, be supplied with all the records on which the allegations are based and he shall be permitted to inspect and take extract from such other official records as he may specify and in the event of refusal of any permission to supply such records reasons are to be recorded in writing by the disciplinary authority. In the instant case the provision under Rule 9(3) of the Rules have been clearly violated by the management who did not supply any document to the workman on which the allegations had been based. Therefore, the workman has been deprived of reasonable opportunity to defend himself.

12. In the instant case the workman was dismissed from service on 11-2-1990 i.e. prior to 20-11-1990 and therefore, the ratio decided by the Hon'ble Apex Court in the case of Union of India and others V. Mohd. Raman Khan reported in AIR 1991 SUPREME COURT 471 regarding non-supply of copy enquiry report to the workman before inflicting of punishment is not applicable in view of the Full Bench decision of our Hon'ble High Court in the case Chaitanya Charan Jena v. The Tribal Development Co-operative Corporation of Orissa Limited reported in 1993(1) OLR 86. In the case Chaitanya Charan Jena v. The Tribal Development Co-operative Corporation of Orissa Limited (Supra) the Hon'ble High Court of Orissa held that the decision in Ramsan Khan's case having been prospective effect will not effect the orders passed prior to the date of rendering of the Judgement i.e. prior to November 20, 1990. Thus non-supply of the copy of the Enquiry Officer's report to the workman in itself may not be a ground to question the departmental enquiry or the punishment of dismissal that followed basing on the enquiry report. But most important thing in the instant case as already discussed in detail is non-supply of relevant materials to the workman to reasonably defend himself during the enquiry. Since this matter has already been discussed elaborately in the proceeding paragraphs it need not be repeated again and again in the present judgement. It would suffice to say that non-supply of relevant documents to the workman in violation of Rules 9 (2) and 9 (3) of the Rules has vitiated the departmental enquiry and no reasonable opportunity had been given to the workman to defend himself during the enquiry. The management has signally failed to show that a fair and proper enquiry had been conducted against the workman and reasonable opportunity had been given to him before inflicting the punishment of dismissal. Hence it is held that the removal of the workman from service with effect from 11th February 1990 by way of punishment awarded was not valid and the domestic enquiry in question was not fair and proper. The issue No. (i) is answered accordingly.

13. Since the domestic enquiry against the workman was not fair and proper, the workman is entitled to the relief of reinstatement in service. On the question of back wages the Hon'ble Apex Court in the case of J.K.SYNTHETICS LTD., Vrs. K.P.AGRWAL AND ANOTHER reported in (2007) 2 Supreme Court Cases 468 have held as follows:—

“But the manner in which “back wages” is viewed, has undergone a significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In U.P.State Brassware Corporation Ltd., V. Uday Narain Pandey, this Court following Allababad Jal Sanathan V. Daya Shankar Rai and Kendriya Vidyalaya Sanghathan V. S.C.Sharma held as follows” (Uday Narain Pandey case, SCC P.4800-g)

“A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the court releasing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalization, privatisation and outsourcing is evident.

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputedly, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Dispute Act. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot be the natural consequence.”

In G.Mallaryana Roddways, V. Rudhan Singh this Court observed : (SCC P.596, Para. 8)

“8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether *ad hoc*, short term, daily wages, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or

partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shown is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration in the nature of employment. A regular service of permanent character cannot be compared to short or in terminate daily-wage employment though it may be for 240 days in a calender year.”

In the instant case the workman entered into service on 4-4-1976 and he was dismissed from service on 11th February 1990 i.e. after rendering service for more than 13 years. There is nothing on record to show that after dismissal from service till today the workman has been gainfully employed. Hence the management is to pay a lump sum amount of Rs.20,000/- to the workman as compensation towards back wages. The issue No.(ii) is answered accordingly.

14. Hence the reference is answered as follows :

- (i) The removal of the workman from service with effect from 11th February 1990 by way of punishment awarded is invalid because the domestic enquiry was not fair and proper and reasonable opportunity had not been given to the workman to defend himself.
- (ii) The workman is entitled to be reinstated in service and to be paid a sum of Rs. 20,000/- (Rupees twenty thousand) only as a lump sum as compensation towards back wages.

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