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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 7th December 2007

No. 13241–Ii/1(J)-17/2005-L. E.–In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 4th August 2007 in Industrial Dispute Case No. 7/2005 of the Presiding Officer, Labour Court, Jeypore to whom the industrial dispute exists between the Management of Shri B. V. Srinivas Rao, a Contractor of M/s. J. K. Paper Ltd., Jaykaypur, District Rayagada and its workman, Shri A. Ganeswar Rao was referred for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE COURT OF THE PRESIDING OFFICER
LABOUR COURT, JEYPORE, KORAPUT
INDUSTRIAL DISPUTE CASE NO. 7/2005
Dated the 4th August 2007

Present :

Shri G. K. Mishra, O.S.J.S. (Jr. Branch)
Presiding Officer, Labour Court
Jeypore, District Koraput.

Between :

Shri B. V. Srinivas Rao, Contractor M/s. J. K. Paper Ltd., Jaykaypur Dist. Rayagada	. .	First Party—Management No. I
M/s. J.K. Paper Mill, Jaykaypur At./P.O./District Rayagada.	. .	First Party—Management No. II
Versus		
Its workman Shri A. Ganeswara Rao Vill. Jingliballi, P.O. Penta Dist. Rayagada.	. .	Second Party—Workman

Under Sections : 10 and 12 of the Industrial Disputes Act, 1947.

Appearances :

For the Management Nos. I & II	. .	Shri K. N. Samantaray, Advocate, Jeypore.
For the Workman	. .	Shri Dasarathi Patnaik and Associates Advocate, Jeypore.
Date of Argument	. .	3-8-2007
Date of Award	. .	4-8-2007

1. The Government of Orissa in the Labour & Employment Department in exercise of the powers conferred upon them under sub-section (5) of Section 12 read with clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) have referred the following disputes vide their order No. 9165, dated the 29th October 2005 for adjudication of the following dispute :—

SCHEDULE

"Whether the termination of services of Shri A. Ganeswar Rao, Contract Labour with effect from the 1st November 2004 by Shri B. V. Srinivas Rao, Contractor of M/s. J. K. Paper Ltd., Jaykaypur, District Rayagada is legal and/or justified ? If not, to what relief the workman Shri A. Ganeswar Rao is entitled ?"

AWARD

2. This is a case originated under reference submitted by the Government in order to determine the legality and justifiability of the termination effected by the Contractor in respect of the workman. The management in abnogetting the entire assertation contended *inter alia* that, there was no such retrenchment as claimed by the workman, but there was an abandonment of service by the workman in remaining unauthorised absent for a long period. It is further added that, the workman having not produced any Medical Certificate from the E.S.I. Hospital running inside the Mill premises, doubt can be cost on the propriety of the absence from the service and the termination effected in his respect being legal, he is not entitled to any relief.

3. There is no dispute regarding the continuity of service undertaken by the Workman under the control of the management, since 1984 till the date of termination effected on the 11th December 2004. There service of the workman was terminated on basis of the long absence from duty of the workman. The management relying upon clause 12 (5) of the conditions of service under Orissa Contract Labour (Regulation and Abolation) Rule 1975, terminated the service of the workman who was found unauthorised absent for more than five days without any leave application or making representation without any sufficient cause. It is unfolded by the management that, the unauthorised absence is treated equivalent to the abandonment of service, and the workman having voluntarily withdrawn from the service, no termination is required to be effected and no notice is also required to be served on the workman.

4. It is true that, the termination of service of the workman is brought about for any reason whatsoever, it will be a case of retrenchment. In order to constitute retrenchment, termination of the service is a condition precedent. This will not covered abandonment of job or service.

Reliance has been placed in a decision rendered by the Apex Cout in D 'SOUZA' S Case AIR 1982 S.C. 854. In order to constitute abandonment of service, there must be failure to perform duties pertaining to the office, with actual and imputed intention on the part of the workman to abandon and relinquish the office. The intention may be infered from the Act's and conduct of the workman, length of absent and other releavant circumstances. Reliance has been placed in a decision rendered by the Hon'ble Apex Court in G. T. laid *Vrs.* Chemicals and Fibres India Ltd. AIR 1979 S.C. 582. If the workman himself willingly abandon his service, it can not be said that, he has been retrenched. In every case, absent with permission or not, requirements of observing the principles of natural justice is a requirement of the from of fair treatment. The natural justice has to be implied into Certified Standing Order. Which confer upon the employer a right to take adverse action against the employee, *inter alia* on the ground of absence. Reliance has been placed in a decision rendered by the Hon'ble Supreme Court in D. K. Yadav *Vrs.* J.M.A. Industries Ltd. 1993 L.L.R. 584. The legal position has been properly explained by the Hon'ble Supreme Court in Syndicate Bank *Vrs*. General Secretary, Syndicate Bank Staff Association 2000 L.L.R. 68 in the point of the fact that, (i) the workman should know the nature of the complaint (ii) the workman must have the oppoertunity to state it's case, (iii) the action of the management should be fair, reasonable and just. The compliance of natural justice would not mean that, a full fledged departmental enquiry is required. A limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duties after the period of leave has expired or failure on his part on being asked, so do, amounts to sufficient compliance, with the requirements of the principles of natural justice. Reliance has been placed in a decision rendered by the Hon'ble Supreme Court in Vivekananda Sethi *Vrs*. The Chairman, J & K Bank Ltd. 2005 L.L.R. 641. The above principle has been reiterated in a subsequent decision rendered by our Hon'ble Supreme Court in V. C. Banaras Hindu University *Vrs*. Srikanta Manu Patra S. C. 2006 Page 386.

5. The workman on the contrary has emphatically stated, that due to serious ailments continuing from the1st November 2004 to the 8th December 2004, he could not attend the job and the absent was communicated orally to the Contractor through P. Rama Rao intimating his sickness. Besides a letter with Regd. Post with A/D was sent to the Contractor informing about his illness. After recovery from the illness he had intended to join in his duty basing upon the Fitness Certificate obtained from the Medical Officer and approached the Contractor on the 10th December 2004 to allow him to join in his duty, but the Contractor turned down his request and consequently a letter was sent to the Contractor through Regd. Post with A/D vide Ext. 2 which was received back by Postal Department on the 11th December 2004. The workman in support of his plea has adduced documentary as well as oral evidence. The Medical Certificate produced by the workman has been duly proved by the Doctor, the W.W. No. 2, who admitted to have treated the workman with advice to take rest from the 1st November 2004 to the 8th December 2004. The workman was also declared fit on the 9th December 2004 by the Doctor vide Ext. 1. It is disputed by the management that, though there was availability of E.S.I. Hospital for treatment, the workman did not opt to be treated by such hospital thereby generated suspicion on the propriety of his treatment as well as his illness and also genuiness of his Medical Certificate obtained from a private Doctor marked Ext. 1. The contention of the management on generating suspision on the Medical Certificate is quite misconceived. There is no such indication in the E.S.I. Act dealing with the leave,

which only relates to medical benefits payable under the Act. The Act does not provide for any Medical Certificate to be obtained from the Doctor working under the E.S.I. Hospital. Further more, there is no law which prohibits a portion for taking medical help from a private Doctor, if he is a member of E.S.I. This being a beneficial Act which can not be constructed in a manner to militate against the workman. Only claim can be put forth under E.S.I. Act for the period of his sickness. Only the E.S.I. Authority can determined the entitlement of the benefits accrued by the member on medical ground. The evidence of the doctor being considered to be genuine can be relied upon by the workman in order to support his case. The absence of the workman on health ground can not be considered to be un-reasonable so as to disallow the workman to continue in the job. The management though was sufficiently aware of the absence un proper leave application and representation as proved, the management would be estopped from saying that, he was totally ignorant about his absence. The provision under E.S.I. Act quoted by the management stipulating the period of absence of any workman can not be strictly construed. Any workman can not be remained absent whether giving application or not except without having nurtured with sufficient reason. More stipulation of period is not sufficient to invoke the provision but management should be attentive to the reasonable circumstances of the absence of any workman. An enquiry must be conducted by the management at the very threshold regarding the genuiness of the absence of the workman. If there was any negative report than, it would be necessary on the part of the management to take recourse to the alternative made for calling for a show cause from the workman. The workman is admittedly employed on daily wages basis. He has not been adjusted on any existing vacancy of any post. The period of continuity of such worker comes to an end of every working day and the post is purely temporary in nature and service is required for taking in to consideration of the nature of job required. Whether the workman is a daily rated or casual labourer or seasonal worker may be immaterial for the purpose of exercising the principle of natural justice available in respect of regular employees as has been propounded by the Hon'ble Supreme Court in a recent decision. Whatever the nature of job so adorned to them they should be equally provided with an opportunity of being heard. So as to covered under Articles 14 and 16 of the Indian Constitution. Apart from that, every worker has got right to leave under Article 21 of the constitution and right to livelihood is a part and parcel of Section 21 of the constitution. The Directive Principle of State Policy has also come to rescue the workers for their protection and security of job. The Fundamental Rights of the workers can not be whittled down by the management without looking into the interest of such workman. Where the livelihood of the workman depends upon the job and removal from such job would lead to starvation along with the dependant families, the consequence would be precarious. Taking the background of the workman the Rule of Law as provided certain norms to protect the every individual including the workman by the implication of natural justice. It is the bounded duty of the management to follow the natural justice in respect of the workman whose service or survival depends upon his work. By more absence nothing can be prompted the management to straight way terminate him from his service. Had the management made any enquiry the resonableness of the absence would have been properly dictated. The cause shown by the workman is found to be genuine which prevented him from being absent from the duty during the aforesaid period. The workman consequent upon the fitness requested the management to allow him to join. The refusal of the management not to allow him to join is amount of unjust Act and actuated with *mala fide*

intention to deprive him from the enjoyment of the post or job, that he had secured in the earliest opportunity. The none adoption of enquiry in order to ascertain of the genuiness of the absence is a serious violation of the principle of natural justice. The more notice to show cause or notice pay is not sufficient to save guard the interest of the workman, if an enquiry is not resorted to by the management. The notice as claimed to have been sent by the management is not is a proper step. The management should have given indication about the absent to have been emerged out of any genuine cause. The management has not satisfied himself about the sufficient cause for the absent of the workman, enlight of the power embodied in the Contract Labour (Abolition and Regulation) Rule, 1975. Unless, the cause is found to be sufficient termination can not be effected. The termination effected by the management without applying the true provisions of the Law and having not followed the principles of natural justice, it can be said that, the management has committed gross illegality in terminating the workman. Hence, the order of termination issued by the management is considered to be illegal and unjustified.

7. The result of illegal termination will indubitably pave the way for granting relief of reinstatement and full back wages. But it is not a straight jacket formula for applying the above norm. Due to passage of time under the Globalisation of economy, the norm has been changed. Now it has been necessary by our Hon'ble Apex Court to develop a pragmatic approach problems dogging industrial relations. This has been emphasised by our own Hon'ble Supreme Court in Allhabad Jal Sansthan *Vrs*. Daya Sankar Ray and another (2005, 5 S.C. C. 124). The Hon'ble Supreme Court in a case of Banishidhar *Vrs*. State of Rajasthan 2007 (112 F. L. R. 687), that back wages would not be granted automatically although the order of termination passed against the concerned workman is found to be invalid. The Hon'ble Apex Court has also referred the case in General Manager, Haryana Road Ways *Vrs*. Rudhan Singh 2005 (5 C.C. 591) and Municipal Council, Sujanpur *Vrs*. Surinder Kumar 2006 (110 F. L.R. 198 S. C.). It depends upon the facts and circumstances of the case taking the length of service rendered by the workman, the qualification passed by him, the age and other similar circumstances. A regular service of permanent character can not be compared to short or intermittent daily wage employment though it may be for 240 days in a Calender Year, General Manager, Haryana Road Ways *Vrs.* Rudhan Singh (2005 S.C.C. 591). When question of determination of the entitlement of back wages comes up for consideration, *prima facie,* it is for the employer to show that, he remained without any employment as has been emphasised by the Hon'ble Supreme Court in Kendriya Vidyalaya Sangathan *Vrs.* S. C. Sharma (2005 L.I.C. 843 S.C.). The normal burden of proof generally lies on the workman analogous to Section 106 of the Indian Evidence Act. The Hon'ble Supreme Court in M.U.I.R. Mills Unit of N.T.C. (U. P.) Ltd. *Vrs*. Shyama Prakash Shrivastav and another (2007-1 S.C.C. 491) has propounded a new theory that, the Court must before granting back wages record a finding about the "gainful employment" and directed all the Courts to follow the "gainful employment concept" in letter and spirit. The onus proving the factum should be on the workman and the employer shall only have to rebut, if there is positive evidence and opts to challenge it. The concept of gainfull employment must have to be reflected in the claim statement at the very threshold of the proceeding and he can not subsequently raise the concept of employment during the course of evidence and at the stage of argument. In the instant case the workman has never resorted to any attempt to incorporate his plea of un-employment during the period of retrenchment nor reflected such during the course of evidence. Presumption will automatically accrue against him that, he was during the period of retrenchment was gainfully employed, for which he is not entitled to any back wages.

8. The workman was engaged on daily wage basis as a contract labour under the Contractor. The daily wage workman or casual labourer being not employed in a regular post without being recruited as per rules and service condition, they shall not be entitled for any post nor they can be reinstated. They not being held by any post, reinstatement is not warrented except in case of permanent and regular employees. This is not applicable in case of temporary employees. They can only be engaged on daily wage basis. It is adverted by the management that, the workman being deeply involved in the union activities, resulting in frequent absence from the duty, he has lost his faith as well as norm of efficiency of the workman. For which he does not want to reemploy him in any job work incurring the same problem in future. In this connection the management can not be said to have committed unfair labour practice so as to deprive him from the job. Taking the above aspect in view in to consideration, the inevitable conclusion that, the reinstatement of the workman is not opposite to be adopted. The interest of the justice would be best served if the workman is given a compensation in lump sum instead of reinstatement and back wages.

9. The reference is answered accordingly on contest. Management No. 2 having no connection with the retrenchment effected by the management No. 1 is immuned from the responsibility as well as liability.

ORDER

The Award is passed in favour of the workman as per the analysis effected above. Management No. 1 is directed to pay a compensation of Rs. 35,000 to the workman. Management No. 1 be of option to re-employ the workman as a daily wage worker in any field in his establishment with the approval of the principal employer (management No. 2) if the workman will be so approached to the management.

Dictated and corrected by me.

G. K. MISHRA
4-8-2007
Presiding Officer
Labour Court, Jeypore

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4-8-2007
Presiding Officer
Labour Court, Jeypore

By order of the Governor
P. MALLICK
Under-Secretary to Government

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