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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 6th February 2008

No. 1476—li/1(J)-10/2008-L. E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 28th September 2007 in I. D. Case No. 94 of 1995 of the Presiding Officer, Labour Court, Jeypore to whom the industrial disputes between the Management of M/s Oberoi Palm Beach, Gopalpur-on-Sea, Dist. Ganjam and its workman Shri N. Vignesh represented through the President, Hotel Oberoi Palm Beach Employees Union was referred for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE LABOUR COURT, JEYPORE, KORAPUT

INDUSTRIAL DISPUTE CASE NO.94 OF 1995

Dated the 28th September 2007

Present :

Shri G. K. Mishra, o.s.J.s. (Jr. Branch),
Presiding Officer, Labour Court,
Jeypore, Dist. Koraput.

Between :

The Manager, . . First Party—Management
M/s Oberoi Palm Beach,
Gopalpur-on-Sea,
P.O. Gopalpur,
Dist. Ganjam.

Versus

Shri N. Vignesh, . . Second Party—Workman
C/o President,
Hotel Oberoi Palm Beach Employees Union
Hospital Road, Gopalpur-on-Sea,
Dist. Ganjam.

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

Appearances :

Shri R. Venu Gopal Rao, Advocate	..	For the Management
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Shri Kalu Panda	..	For the Workman
Date of Argument	..	11-9-2007
Date of Award	..	28-9-2007

AWARD

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. 11843(5), dated the 4th September 1995 for adjudication of the following disputes :—

SCHEDULE

“Whether the action of the management of M/s The Oberoi Palm Beach, Gopalpur-on-Sea, Dist. Ganjam is justified in dismissing Shri N. Vignesh, Gardner from his services with effect from the 10th February 1994 vide Order, dated the 9th February 1994 ? If not, to what relief Shri N. Vignesh is entitled ?”

2. This is a case originated out of the reference submitted by the Government for determination of the validity and justifiability of the act of dismissal entertained by the management in respect of the workman coupled with the determination of any relief to be granted in consequence to such determination.

3. The facts in epitome may be succinctly described in favour of the workman that, the workman though engaged as a regular employee, A Gardner, under the management was consequently dismissed by the management without complying the norms of natural justice in the form of resorting to any domestic enquiry, taking on vexatious aspersion of misconduct. The workman challenging the illegality of dismissal sought for reinstatement and full back wages.

4. The management, on the other hand, traversing the entire assertions put forth by the workman unfurled contention *inter alia* that, the workman being actively involved in malicious prosecution against the management and having viciously tarnished the code of discipline by involving in illegal strike espousing the cause of others as well as defaulted in performing proper duties as ordained affecting the efficiency and improvement of the productivity, there was no alternative than to entailing imposition of punishment of dismissal after adequate opportunity being offered to the workman. The order of dismissal being justified as well as plausible, the claim of the workman for reinstatement with full back wages should be jettisoned on the ground of closure of the establishment.

5. The allegation of misconduct principally enjoined the management to take a strongest decision of imposing extreme punishment of dismissal without resorting to any domestic enquiry inconsonance with the certified standing order formulated basing upon the agreement between the management and the employees with the independence of the principle of *laissez faire* governing the relationship between the employer and employee, an employer cannot be dismissed or discharged an employee, how indisciplined, undesirable or unwanted he may be. The current Labour Legislation, Judicial pronouncement which have for their objectives, the amelioration of the lot and the betterment of the service condition of the working class, have to a great extent, restricted the rights of the employer and secured to the corresponding extent the job security of a workman. The principles and procedure relating to the disciplinary action are properly embodied in the standing order of the service rule of an establishment basing upon the enunciation of the principles of natural justice. The applicability of the principles of natural justice is not a rule of thumb or straight jacket formula as an abstract proposition of law. It depends upon the facts of the case, nature of the enquiry and the effect of the order on the right of the person and attendant circumstances. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Ratanlal Sharma Vrs. Managing Committee* (1993) 4-S.C.C. (10) and *Maharashtra State Board of Secondary and Higher Education Vrs. K.S. Gandhi* (1991, 2-S.C.C. 716). The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justic. The rules can operate only in areas not covered by any law validly made. They do not supplant the law of the land, but supplement it. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court *R. S. Naik Vrs. Union of India* A.I.R. 1994 S.C. 1558. Rules of natural justice are not embodied rules, nor can they be elevated to the position of Fundamental Rights. The width and amplitude and the manner of exercise of the power conferred on the authority to act in accordance with the principles of natural justice, depends upon the circumstances of each case. Reliance has been place in a decision rendered in by our Hon'ble Apex Court in *Union of India Vrs. J.N. Sinha* (1970, 2-S.C. 458). The principles of natural justice primarily depends upon taking action which is fair just and reasonable. The compliance of natural justice would not mean a fullfledged departmental enquiry. A limited enquiry as to whether the employee concerned has sufficient explanation as to be conduct shown to be impinged. For that, the action of the management should be fair, reasonable and just. Reliance has been placed in a decision rendered in our Hon'ble Supreme Court in *Syndicate Bank Vrs. General Secretary, Syndicate Bank Staff Association* 2000 L.L.R. 68. The natural justice is always implied into the certify standing order which confers upon the employer a right to take adverse action against the employee. Where standing order is to be applied the principles of natural justice is always to be adhered to for taking any action against the employee.

6. In the instant case, standing orders have been formulated by the management on basis of the agreement effected between the employees, wherein, it has been laid down that, for the purpose of commission of any misconduct, the disciplinary authority must resort to a domestic enquiry for establishing the charge. It becomes crystal clear that, disciplinary

proceeding must be initiated for proving any commission of misconduct. Mere issuance of show cause is not sufficient for establishing the charge of misconduct. The employee must be given a chance to know the accusation made against him and for explaining the cause and to defend his case by adducing sufficient evidence. In the instant case no enquiry seems to have been conducted by the authority concerned through an independent body in order to substantiate the charges. Although allegations have been made, no charges have been framed regarding the misconduct, alleged to have been committed. The authority appears to have conducted preliminary enquiry in a halfhazard manner and purpose of preliminary enquiry is in order to establish a *prima facie* charge against the delinquent. It is only for the purpose of ascertaining the truth of the allegation and not otherwise for punishing any delinquent. The reasonableness of the charges framed on basis of the preliminary enquiry can only be determined by resorting to a process of domestic enquiry, which is in relation to the appointment of enquiry officer, presenting officer, production of documents, examination of witnesses, recording of evidence in presence of delinquent and supply of enquiry report to the delinquent. If the enquiry is not conducted, which is essential condition to the legality of the disciplinary order, then the action taken by the authority would be an illegality. The Industrial Adjudication always insists on proper enquiry, which must be fair and reasonable for enquiry into any misconduct.

7. The management basically took the view that, the workman always involved in illegal strike and also giving co-operation to other person involved in the strike which purely impinged the disciplinary order of the establishment and on the vexatious of allegations presented against the management. Those allegations are the part of misconduct embodied in the standing order. That does not mean that, the allegation of misconducts are sufficiently proved, automatically without adjudging the genuineness of the allegations. The right of the employee cannot be limited to the extent of confining himself to the duty. He can have the right to strike in order to press their demands without snapping the relationship of employer and employees. It is equally well settled that, the work of the establishment should not be paralised and brought to a standstill by an illegal strike. A worker cannot always be dismissed for joining a strike which is not illegal, but simply unjustified. In such cases, in absence of any evidence to show that the workman concerned were guilty of violence during the strike, the action of dismissal cannot be sustained and the dismissal order can be effected, if the strike is not *bona fide* and it is for extraneous consideration not only with a view to betterment of the condition of the labourer. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Oriental Textile Mill Vrs. Labour Court* (1971, II LLJ S.C. 505). The question whether the strike was justified or not is a question of fact and further whether the strike is illegal or not is a question of law is to be determined by way of extensive domestic enquiry. The workman emphatically replied to the allegation made by the management taking the fact that, at the time of allegation made he was on leave due to off day for which unnecessary allegation have been made to harass him. On the date when the workman was alleged to be participating in the '*dharana*' in front of the Labour Office was declared was a holiday. It had no connection

with the disciplinary order of the establishment. The management has not justified whether the *dharana* launched by the Union was justified or not and whether the same was entertained by the employees for the purpose of improvement of the service condition. That required some materials particular to be produced by the employees for justifying the legality of the strike and putting of batches in support of such strike. Unless an enquiry is made the justifiability of strike and their involvement thereto cannot be ascertained for construing an act of misconduct.

8. Another allegation has been made about the vexelity prosecution filed against the management. The allegation presented by the workman for unlawful restraint made before the Court by the workman was ended in acquittal of the management for which a show cause was issued to the workman by the management for such malicious prosecution. The acquittal in the Criminal Case does not itself automatically connote that the charge have been nullified. This Criminal Case has no relevancy to any misconduct to be proved departmentally which requires fresh evidence to be collected for assessment of misconduct. The workman having denied the charges of misconduct for filing the case on the point that, the management has truly misbehaved with filthy language inside the chamber for which a Criminal Case was filed, it is the bounden duty of the authority to dislodge his veracity by adducing materials against him. Unless, contradiction of allegations are resolved by way of enquiry, misconduct cannot be attributed with against the workman. Disciplinary proceeding has got special significance than the Criminal proceeding. The management appears to have not taken any due regard to follow the natural justice by giving a chance or opportunity to the workman for justifying his act. The assessment of the plea purely on the discretion of the authority. If on proper enquiry it is established that, there is semblance of evidence then nothing can debar the authority to impose any punishment. The workman having not been provided any opportunity for rebutting the allegations by adducing evidence, it cannot be said that, the act of the authority is fair, just and reasonable. Due to the non-compliance of natural justice and fair play in light of the standing order it can be said that, the act of the management is purely illegal and unjustified.

9. It is very much consequous that, no enquiry has been conducted by the management. There is no universal rule that, before taking any adverse action enquiry must be conducted. It is option lies with the management to first impose punishment by way of dismissal, discharge or otherwise, but he will have to justify the order before the Tribunal or the Labour Court by adducing sufficient evidence. Reliance has been placed in a decision rendered in our Hon'ble Supreme Court in Delhi Cloth & General Mills Co. Ltd. *Vrs.* L. B. Singh (1972-1 LLJ-180 S.C.). In such cases the Tribunal would have jurisdiction to go into the facts and the employers would have to satisfy it on the genuineness of the order of dismissal. A clear picture has been indicated by our Hon'ble Supreme Court in Karnataka State Road Transport Corporation *Vrs.* Srimati Laxmi Devamma AIR 2001 S.C. 2090, regarding the formalities to be maintained by the management for adducing evidence at the stage properly required for justifying the order of dismissal. If the right of the management to adduce evidence is exercised then it is bounden duty on his part to reflect the plea in the written statement in counter to the allegation

of the workman in respect of the illegality of the order, so that, the workman will have a chance accrued in his favour for preparation of giving rebuttal evidence. The right of the management in addition to the admission of the order passed which will be alternatively prayed for consideration of the legality of the order by taking evidence during the course of hearing. If the order of the dismissal is found to be unjustified and illegal. An embargo has been put for not directly adducing evidence without taking plea at the very inception of the commencement of the proceeding. It was restricted for the purpose of avoiding protracted litigation on the issue of adducing fresh evidence. If the Court is found the enquiry to be illegal as well as defective, the right can be invoked or exercised for adducing evidence in order to justify the order of dismissal and in that matter his right cannot be negated by the Labour Court and permission shall have to be accorded to the management for exercising his option of adducing evidence. The workman will be given a chance to furnish rebuttal evidence. Unless such right is exercised at the very threshold, the management cannot be permitted to leave any additional evidence for justifying his order.

10. In the instant case the management appears to have not pleaded anything to justify his order of dismissal by way of adducing additional evidence. Nor has drawn the attention of the Court to emphasize on the adjudication of preliminary issue on the matter of justifiability of the order. There was no scope for the Court to preliminarily hold about the illegality of the order so as to pave the way for the management to adduce additional evidence. Though the management applied for adducing additional evidence at a belated stage that the midst of 2006, but the right has not been exercised to lead evidence though permitted by the Court. Even though permitted to lead evidence it would not be sufficient if other party is properly informed by way of issuing notice to adduce evidence in contra. Moreover, no evidence has been led for justifying the order of the dismissal. Where the order has been held to be illegal and unjustified on basis of the defective and no enquiry and there being no evidence justifying the cause of legality of the order on the part of the management, it can be cumulatively deduced that, the illegality of the order of dismissal held by the Court remain unchallenged and considered to be quite sustainable in the eye of law.

11. The result and effect of the illegal termination will automatically provides a scope for granting relief of reinstatement and full back wages, but there is no universal application or straight jacket formula for implementation of the norm. The norm due to passage of time during globalisation of economy, free trade, emergence of liberalisation and industrial competition, has been changed with the application of pragmatic approach. In view of the matter, back wages would not be granted automatically which depends upon the facts and circumstances of the case. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Bansidhar Vrs. State of Rajasthan* 2007 (112 F.L.R. 687) and *General Manager, Haryana Road Ways Vrs. Rudhan Singh* 2005 S.C.C. 591. Consideration of length of service rendered by the workman, the qualification passed by him, the age and other similar circumstances may be taken into consideration for granting order of back wages as has been propounded in *Municipal Council, Sujampur Vrs. Surinder Kumar* 2006

(110 F.L.R. 198 S.C.). An innovative concept was involved by our Hon'ble Supreme Court for determination of the applicability of the back wages. The Hon'ble Supreme Court in N.U.L.R. Mills Unit of N.T.C. (U.P.) Ltd. Vrs. Shyam Prakash Shrivastav and another 2007 1 S.C.C. 491 has propounded a theory "gainful employment" to be utilise by all Courts in letter and spirit before granting any back wages. The onus specially lies on the workman to established the facts that, during the course of the dismissal he has not gainfully employed as has been propounded in Rudhan Singh Case (*Supra*) 2005 S.C.C. 591, and the claim must have to be reflected initially in the claim statement. Otherwise he would not be entitled for the back wages. The workman has never pointed out anything that, he was not gainfully employed during the period of dismissal, so the order of back wages cannot be given effect to.

12. The workman though employed was a Gardner in regular form under the management the service is no more required by the management on account of the closure of the establishment since long. There being no vacancy accrued consequent upon the closure of the establishment except few for it's maintainance. In such contingency it is not possible to grant reinstatement except awarding of compensation as deemed proper for the service rendered by the workman. In such situation the justice would be best subserved if a long sum amount of Rs. 75,000 is paid to the workman. The management having dismissed the workman basing upon no enquiry he is liable to pay the aforesaid compensation amount, fixed for the purpose.

The reference is answered accordingly.

ORDER

The Award is passed in favour of the workman on contest. The management is directed to pay the compensation amount of Rs. 75,000 to the workman within six months, otherwise he be at liberty to take shelter of the appropriate authority for realisation of the aforesaid amount..

Dictated and corrected by me.

G. K. MISHRA
28-9-2007
Presiding Officer
Labour Court
Jeypore

G. K. MISHRA
28-9-2007
Presiding Officer
Labour Court
Jeypore

By order of the Governor
K. TRIPATHY
Under-Secretary to Government