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LABOUR AND EMPLOYMENT DEPARTMENT

NOTIFICATION

The 25th April 2008

No.4887-1i/1(J)-3/2004/LE. — In pursuance of section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award dated the 28th March 2008 in Industrial Dispute Case No. 12/2004 of the Presiding Officer, Labour Court, Jeypore to whom the industrial dispute between the Management of M/s. M. Patnaik & Co. Therubali, Dist: Rayagada and its workman Shri Kanhu Gouda, was referred for adjudication is hereby published as in the scheduled below: —

SCHEDULE

IN THE COURT OF THE PRESIDING OFFICER, LABOUR COURT, JEYPORE, KORAPUT.

INDUSTRIAL DISPUTE CASE NO.12/2004.

The 28th March 2008.

Present : Shri G. K. Mishra, O.S.J.S. (Junior Branch)

Presiding Officer,
Labour Court, Jeypore
Dist : Koraput

Between:

(i) Shri Mahesh Patnaik
M/s. M. Patnaik & Co.,
Rajendra Nagar,
Dist: Cuttack.

... First -Party –Management No.I

(ii) Senior Manager,
M/s. Indian Metals & Ferro Alloys Ltd.,
At/P.O.-Theruvali
Dist:- Rayagada.

... 2nd -Party –Management No.II

Vrs

Shri Kanhu Gouda

Shri Judhistir Gouda

At/P.O.- Visamcuttack

Dist: Rayagada.

... Second-Party—Workman.

Under Sections :— 10 & 12 of the Industrial Dispute Act, 1947.

Appearances :

For the Management No.I	.. Shri B. K. Das, A/R of the Management No.I
For the Management No.II	.. Shri S. S. Das, Manager personal
For the Workman	.. Self.
Date of Argument	.. 24-03-2008
Date of Award	.. 28-03-2008.

1. The Government of Orissa in Labour and Employment Department in exercise of the power conferred upon them under sub-section (50) 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. 8993/LE., dated the 8th October 2004 for adjudication of the following disputes.

SCHEDULE

“Whether the disengagement of services of Shri Kanhu Gouda Supply Labour by M/s. M. Patnaik & Co., At/P.O-Theruvalli, Dist:- Rayagada with effect from the 29th January 2003 is legal and/or justified ? If not, what relief is Shri Gouda entitled to ?”

AWARD

2. This is a case seems to have been originated out of the reference submitted by the Government for determination of an issue with regard to the validity and propriety of the order of disengagement from the service by the Management in respect of the workman coupled with any other relief to be granted in consequence thereof.

3. The pith and substance of the facts presented by the workman may be described here under that, the Management having not allowed the workman to be engaged after he returns from the place of transfer finding no availability of the job there and reluctants shown by the transferee authority to accept him as a employee, the workman challenged such disengagement as illegal and invalid which amounts to retrenchment as per the statue, with a claim of reinstament or reengagement with full back wages.

4. The Management, on the contrary, abnegtting the entire assertions, contended interalia that, the workman after his transfer to Paradeep having not reported his duty either in the place of transfer or before the Management his absence thereto can be considered as abandonment

The workman is not entitled to any benefits as claimed for. In this connection the Management claims for dismissal of the case considering the claim to be misconceived.

5. There is no dispute as regards the status accrued by the workman as an employee working under the control of the Management. His continuity in the service for a long period has not been assailed under any circumstances nor challenged by the Management. Serious allengations seen to have been unfurled by the Management against the workman to have been involved in sundry activities like man handling different officers of the establishment lurching illegal strikes, indulged in disturbing the peaceful atmosshare of the premises thereby serious apprehention of the production of the factory being hampered in consequence thereof. Many a cases having registred against the workman at the Police Station and the activities of the workman well also deeply disapproved by the Employees Union, as a result, the workman was driven out from his post as Vice-President. Despite the admission made by the workman about his fault he could not able to create any normalcy in the situation due to further involvement in nefarious activities. The situation being intractable the employees Union suggested the Management and the company to transfer the workman to any other place to present determint of the establishment and other workers working in the same. The Management confeonting with the turbulent situation, finding no other alternative, transfered the workman to another establishment at Paradeep which is under the control of the company. The workman honouring the order of the Management proceeded to Paradeep with a view to report his joining but, unfortunatly the transfree authority having denied to accept his joining, the workman was constrained to return back to the establishment. Besides the workman ventilated his grivance about the inconvenience experienced by him during the stay at Paradeep, on account of scant money at his hand. Further complaint was mooted by him alleging against the Management showing indifferent attitute to allow him to report joining in the establishment. Since his transfer to Paradeep was not cancelled or revoked. The workman at his junctrure was in a state of doldrum without being accepted by anybody to continue his job.

6. Disputing feature seems to have been cropped up to determine (1) as to whether the transfer of the employee or workman from one place to another place is just and proper (2) whether non reporting to duty either before the establishments amounts to abandonment of services. The Contractor who are authorised to supply contract labourers to the Company Management on the terms of contract engaged the workman to be worked under the factory as per the guidance and control of the company. Everything is regulated under the terms and contract executed between the contractor and/company. Nothing has been ascribed either by the Management or the Contractor about the proper availability of the provision regarding the transfer of any employees from one establishment to another establishment. Merely on the request of the employee's Union, the transfer was effected is not sufficient unless and until their appears resonableness of the order pictrrising the inevitable circumstances leding to such transfer. Unless and otherwise a particular provision is in-corporated in the contract no such employee working under the contract is liable for transfer to any other establishment in respect of which no contract was executed by the contractor. The order of transfer even if made should

malafides or by extraordinary circumstances without any factual background on foundation. Reliance has been placed on a decision rendered by our Supreme Court in state of Madhya Pradesh *Vrs. S. S. Kourav* A.I.R. M.S. SC 1056. The malafides must be proved under the circumstances available on record. Before assessing of the probability of the transfer I am inclined to determine whether transfer is plausible in respect of the employee-workman. It may be true that one undertaking may run several Industries or Business which are distinct and separate. It would be clear that in all of the distinct and separate business it would be run on the basis that there are distinct and separate employees who are to be separately employed in respect of the same business and then their terms and conditions of service may vary according to the character of the business. In such a case, it would not be useful to have one Muster Roll for all the employees and the organisation of employment would indicate clearly the distinct and separate character of different business. If that be so, then the transfer by the undertaking of one of its business may attract the application of Section-25 FF of the I.D. Act. Reliance has been placed in a decision rendered by our Supreme Court in *R.S. Madhoram and Sons Private Ltd., Vrs. The workman* A.I.R. 1964 SC 645. The Supreme Court has held that, the Company must be one Muster Roll for the employees of the business run by the transferee and the terms and condition of such employees in all his divisions must be the same and the employees could be transferred from one department run by the transferor company to another department. A business conducted by an Industrial undertaking would ordinarily be an integrated branches or departments that they would generally be interrelated with each other so as to constitute one whole business. In such a case transfer of an employee can not be invalidated incurring liability U/s. 25 FF of the I.D. Act. The management being instigated by the company transferred the workman to Paradeep where a business for exporting and importing materials produced from different establishment has been undertaken. There is no materials nexus between the company and the transferee business. The employees working there are not regulated or controlled by this company. It is purely regulated by the Head Office which is the unity of all establishment. The two business are not considered to be an integrated business so as to effect, transfer. The conduct of the workman paves the way for the Management and the company to transfer the workman to another establishment which is not legal. The transfer being effected in violation of the section 25 FF of the Act is also illegal. The Management had no connection with the transferee undertaking nor has executed any contract with him. It was obligated on his part only to supply labourers to the company at Rayagada. The Company also has no power to effect transfer for the labourer to any other establishment on the request of other employees. The Management or the Company should not resort to any practice of such transfer capriciously and unreasonably and the order should not be used as an alternative to disciplinary proceeding or the order of suspension. If the facts warrant issuance of suspension or initiation of disciplinary proceeding the authority ought not to use the strong weapon in its hand by ordering a transfer in lieu thereof. Reliance has been placed in a decision rendered in by Calcutta High Court in *S. V. Singh Vrs. Union of India* 1988(2) SLR 545. It becomes crystal clear that, the order of transfer has been issued merely to avoid taking disciplinary action against the workman which would have entailed holding a departmental enquiry in accordance with the rules and regulations. This

Transfer has been used vindictively and maliciously, without enquiry into the allegation made against the workman which has been counteracted by the workman. The least that the authority could have done was to consider the explanation of the workman and to give him an opportunity of hearing. If the workman was involved in antisocial activities stringent action would have been taken by initiating disciplinary proceeding or putting him under suspension. Where there is malafide transfer made victimisation can be inferred against the workman which can be treated as illegal (*Syndicate Bank Vrs. the workman 1966 I LLJ 440 SC.*) The burden of proving malafides is on the workman (*Canda Bank Corporation Vrs. Vittal 1963 II LLJ 354 SC.*) the workman has challenged the order of transfer to be emerged out of victimisation in order to weed out him from the establishment. Where there is prohibition on the contract of service condition for such transfer, it will be invalid (*New India Flour Mills Vrs. I.T. 1963 I LLJ 745 cal.*) the transfer to another employer can not be done without the workman consent. The workman has complained that, being poorly salaried employee he could not meet the expenses of the livelihood on the far away place leaving his children at the working place. In this connection where a poorly paid workman was transferred to another city and the transfer caused great economic difficulty to the workman the transfer can be considered as illegal. (*1977 LIC 994(pat)*). The job contane of the workman was not similar to gthe work entrusted to the workman in another place. Where job description is different it will affect the aficiency & dexcerity of the workman. In this context the transfer should not be effected (*B. P. Drugs Co. Vrs. Bastian 1977 II LLJ 113 Kerla*). The Management without applying his mind to go through the contract between him and the Company maliciously transfered the workman against the will of the workman which purely illegal and unreasonable. Where such transfer is not permitted and his transfer is beyond the perview as well as the Company the workman is entitled to be protected U/s. 25 FF of the I. D. Act seems the provision has not been complied by the Management the order of transfer is considered to be illegal and inoperative to law.

7. As regards the contention raised by the Management and the company showing the no duty of the workman to be an absente or abondonment of service by the workman. In order to constitute abondonment of service, there must be a failure to perform duties pertaining to the office, with actual and emputed intention on the part of the workman to aboandon or relinquish the office. The intention may be inferred from the act and conduct of the workman, the length of absenace and other relevant circumstances. Reliance has been placed on a decision rendered by the Hon'ble Apex Court in *G.T. land Vrs. Chemicals and Fibres Indian Ltd. A. I. T. 1979 SC. 582*. If the workman himself willingly abondon his service, it can be said that, he has been re trenched. In every case of absence with permission or not, requirements of observing the principles of natural justice is a requirement of the form of fair treatment. The natural justice has to be imported into the standing order which confers upon the employer a right to take adverse action against the employee, interalia on the ground of absence. Reliance has been placed in a decision rendered by Our Supreme Court *D. K. Yadav Vrs. J. M. A. Industries Ltd. 1993 LLR 584*. The legal position has been properly explained by the Hon'ble Supreme Court in *S yndicate Bank Vrs. General Secretary Syndicate Bank Staff Association 2000 LLR 66* in the point of the fact that workman should know the nature of the complaint (II) the workman must have the

In this case, (III) the action of the Management should be fair and reasonable and just. The compliance of the natural justice would not be that, a full fledged departmental enquiry is required. A limited enquiry as to whether the employee concerned has sufficient explanation for not reporting to duties after the period of absence 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 our Hon'ble Supreme Court in *Vivekananda Sethy Vrs. The Chairman, J & K Bank Ltd.*, 2005, LLR 641. The above principle has been reiterated in subsequent decision rendered by our Hon'ble Supreme Court in *V.C. Banaras Hindu University Vrs. Srikanta Manu Patra*, S.C. 2006. Different High Courts has come to a unanimous view that, holding of enquiry will be necessary and imperative in case absence of a workman from duty, 94 Lab L. R. 538, 1994-LLC, 2446 (Punjab and Haryana), 1996-LLR, 513 (Bombay). 1997-LIC 2686 (All) 1998-LLR, 150 (All), 1999-LIC, 1254 (Kan't). An employee would not be permitted to draw presumption by remaining absent from duty, the employee has abandoned the employment by losing lien on the job or otherwise. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Uptron India Ltd. Vrs. Shammi Bhan*, 1998, LIC, 1545-S.C.

8. The Management appears to have did not considered the case of the workman, when he reported in his joining after returning from Paradeep on the ground that, his joining was not approved by the transfere employer. No report was also send by the transfere employer about the non-joining of the workman. There is no letter of authority send by the Management in writing to transfer the workman so as to attract the attention of the transfere employee. The Management has testified that, no written document was handed over to the workman on such transfer. Unless, a transfer was communicated to the transfere employer the transfer can not be said to have been properly effected. Moreover, the Management or the company did not allow the workman to continue his work as he was. The Management did not obtain any report from the transfere employer about the conduct of the workman. The Management and the company admitted that, the workman returned back without giving report of joining at Paradeep. But no action seems to have been taken by them as to be disobedience of the order. The non-joining at Paradeep had been intimated to the Management. But they did not pay any heed to such complaint or not allowed him to join. The Management could have ascertain the cause of non-joining by issuing a notice to the workman or he could have initiated a disciplinary proceeding treating his act to be mis-conduct. The workman should given an opportunity for explaining the circumstances under which he failed to join in the duty. The workman has served for long period under the Management. He might have committed mis-conduct or involved in otherwise anti-social activities, but such act could have been thwarted by initiating proceeding. The mere dis-allowing the workman from doing duty without resorting to any enquiry which is an imperative one as per the rulling of Hon'ble Supreme Court amounts to retrenchment and he had no intention to remain absent from duty and nothing can be imputed against him to have unauthorised absent. Since he has represented the Management many a times and approached the authority to take him to the job by persuasions, it can not be said that, he has any motive to

Attention is very much writ large from the conduct and otherwise inference can not be drawn for abandonment of service. The dis-engagement have been proper caused just had there been any enquiry resorted to for ascertaining or assessing his mis-conduct. The Management has authority to remove of the workman at it's discretion, but such discretion must be fair and resonable and can not be originated out of capricious and malafide act of the Management. The Management having not resorted to any enquiry this decision of dis-engagement is considered to be un-fair, un-reasonable which does not stand to the norms of the principles of natural justice. Therefore, the order of transfer in one hand and dis-engagement of workman on the other are considered to be illegal and invalid.

9. The sequel of the illegal termination will automatically provide 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, emergence of liberalisation and industrial competition has been changed with the application or pragmatic approach. The Management has contended that, the employee being the unrullhorse can not be contorled even if taken in to job. He has drawn the attention of the Court, regarding the previous conduct of the workman and the involvement in various oriminal activities vexing the superior officers and staff. If he is inducted once again by virtue of re-employment the situation would be critical and intractable. The other employees would be ditrected from their ambition by mixing with the uncontrable workman. In the circumstances the hostility between the workman and the employer is writ large. The employer is in a full straight of apprehension of any un toward incident being emerged out of his induction. The Hon'ble Supreme Court in the present contest has emphasised that, there is a positive rule for reinstatement of the workman consequent of illegality of the order of the Management as per dicion Pubjab nation Bank Ltd. *Vrs. their workman* AIR 1960, S.C. 160. But whethor reinstatement is to be given or compensation is to be given is matter of discretion on the Tribunal or the Labour Court. The discretion should be exercised with great responsibility in the matter as it is no light matter to force an employee on an unwilling employer on the plea of industrial harmony. Reliance has been placed in a decision by Hon'ble Supreme Court in United Commercial Bank Ltd. *Vrs. U. C. Bank Employees Union*, AIR 1953, S.C. 437. It is the rule that, if there is betterness between the parties or if it is not equitable relief of reinstatement need not be granted, the Labour Court has to consider the circumstances of his case as held by our Hon'ble Supreme Court in Ruby General Incurance Company Ltd. *Vrs. Chopra* (PP) 1970 (I) LLJ 63, and Assam oil Company Ltd. *Vrs. It's workman*, AIR 1960 S.C. 1224. The Management and the company has pleaded loss of confidence on the workman and to deny reinatatement of that employee. The Hon'ble Supreme Court repeatudly held that, if the pleas of loss confidence is raised under positive circumstances even if dis-engagement is invalid, relief of reinstatement should not be granted rendering it insecure or un-desirable to retain such employee in service or it would be detrimental to the interest of dicipline and security of the establishment. Reliance has been placed in decision rendered by our Hon'ble Supreme Court in Chamber Co-operative Industrial Estate Ltd. *Vrs. M. K. Chhatre*, 1975 (II) LLJ, 375 and Binny

in, 1972 (I) LLJ, 478 and Hindustan Steel Ltd. Vrs. A. K. Roy, 1970 (I) LLJ 228. In a establishment like the company the reinstatement of such a workman will entirely upset the working of the establishment it self. Therefore, I feel it proper that, instead of granting the relief of reinstatement, compensation to be awarded will be meet the ends of justice. The workman is now serving under another establishment as admitted by the workman and reported by the Management. No hardship cannot be sustained by the workman, if a compensation is awarded. I feel is proper to award compensation of amount of Rs. 35,000/- in favour of the workman for the loss of service rendered by him.

The reference is answered accordingly.

ORDER

10. Award passed on contest in favour of the workman. The Management is directed to pay the compensation amount of Rs. 35,000/- to the workman within six months of receipt of the award otherwise the workman be at liberty to take shelter of the appropriate authority to relise the same. Management No.2 being the principal employer having no connection with the appointment or removal is immuned from the liability.

Dictated and Corrected by me.

G. K. Mishra
Dt. 28-03-2008
Presiding Officer,
Labour Court,
Jeypore, Koraput

G. K. Mishra
Dt. 28-03-2008
Presiding Officer,
Labour Court.
Jeypore, Koraput

By order of the Governor

G. N. JENA
Deputy Secretary to Government