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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 25th April 2008

No. 4904-1i/1-(J)-7/2007/LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the award dated the 29th February, 2008 in I.D. Case No. 14 of 2007 of the Presiding Officer, Labour Court Jeypore to whom the Industrial Dispute between the Management of M/s. Ashoka Talkies, Rayagada and its workman Shri M. Bhaskar Rao, Ex-Assistant Operator, 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. 14 OF 2007

Dated the 29th February, 2008.

Present:

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

Between:

Shri K. Amarnath Kumudan, Employer,
M/s. Ashoka Talkies,
New Colony, Rayagada,
At/P.O./Dist.- Rayagada.

... First-Party — Management

Vrs.

Shri M. Bhaskar Rao,

S/o. Shri M. China,

Qrs. No. B/4.

Back side of R.M.S., Rayagada,

At/P.O./Dist.- Rayagada

... Second-Party— Workman

Under Section : 10 & 12 of the Industrial Disputes Act, 1947.

Appearances :

For the Management	...	...	... Shri B. Padhy, Advocate, Jeypore..
For the Workman	...	...	... Shri D. Kumar Swamy, Advocate, Rayagada.
Date of Argument	...	...	... 23-02-2008.
Date of Award	...	...	... 29-02-2008.

1. The Government of Orissa in the Labour & Employment Department in exercise of the power conferred upon them under sub-section (5) of the 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. 9270/LE., dated the 2nd August 2007 for adjudication of the following disputes :—

SCHEDULE

“ Whether the action of the Management of M/s. Ashoka Talkies, Rayagada, Orissa in dismissing Shri M. Bhaskar Rao, Assistant Operator from service with effect from 30th January 2005 is legal and/or justified ? If not, to what relief Shri M. Bhaskar Rao is entitled ?”

2. This case seems to have been originated out of the reference submitted by the Government for determination of an issue regarding the validity and propriety of the act of termination entertained by the Management in respect of the workman coupled with other ancillary reliefs to be granted in consequence thereof.

3. The laconic story presented by the workman may be lucidly described here under that, the Management though well conceived of the factum of his absence of genuine and plausible ground of ill health; having arbitrarily dismissed him from service without resorting to any fair enquiry and without affording adequate scope of being heard, the workman challenged the act of the Management to be unjustified and purely illegal with a prayer of reinstatement and back wages.

4. The Management, on the other hand, vehemently repudiated the entire assertions put forth by the workman and unfurled submissions, *inter alia* that, the act of unauthorized absence being considered as a serious misconduct, a disciplinary proceeding was conducted with the appointment of an enquiry officer, fairly and reasonably giving sufficient scope to the workman to defend his case, but unfortunately despite repeated issuance of notices, the workman having deliberately withdrawn from participating in the proceeding, enquiry was disposed of *ex parte* and basing upon such report, imposition of penalty of dismissal is properly ordered to have been passed against the workman. Natural justice having been completely adhered to and no prejudice being caused to the workman, the order of dismissal is claimed to be proper and justified; thereby no benefits is to be accrued by the workman.

5. Admittedly, for the cause of misconduct alleged to have been committed by the workman as regards the unauthorized absence, the Management at the very inception considering the explanation submitted by the workman to be un-satisfactory; an enquiry through disciplinary proceeding was ordered to be conducted with the appointment of an enquiry officer, in order to rejuvenate the allegations leveled against him. The workman appears to have assailed the process of enquiry to have been conducted in un-fair and un-reasonable manner depriving his right to defend the case by adducing evidence and producing materials documents. As it appears and properly manifests from the documents on record that, the absence of the workman paved the way for the Management to conclude the enquiry *ex parte*. Basing upon the reason which is apparent from the circumstances. Where the validity of the action is challenged, it is the duty encumbered on the part of the Court to take an in depth analysis regarding the proper applicability of the principles of natural justice and the extent of prejudice suffered by the workman. Though there exists standing orders formulating norms of enquiry before taking any adverse action, but the principles of natural justice which is the core of the rule of law must be adhered to in order to give an opportunity to the workman to know about the accusation

relied upon against him and to defend his own case by adducing necessary cogent evidence as well as having an impression that, the process is going on in an enquiry fairly, reasonably and in just manner. Reliance has been placed in *Syndicate Bank Vrs. General Secretary of Syndicate Bank Staff Association* 2000 LLR, 68. The normal rule, which is only an aspect of the rule of law is that, any person before being penalised for his delinquency must have an opportunity of having his misconduct established through an enquiry which should not be dispensed with unless extraordinary circumstances is germinated. Reliance has been placed in a decision rendered in by our Hon'ble Supreme Court in *Tulsiram Patel Vrs. Union of India*, AIR 1985, S. C. 1416. The intention of the disciplinary authority is very much writ large from the direction given for holding an enquiry for proving the charges made against the delinquent workman. Though enquiry was conducted no direction was imparted by the Management for appointment and deputation of a marshalling officer to render assistance to the enquiry officer by causing production of the documents. The letter communicated by the Management to the enquiry officer does not reveal any such appointment except handing over the documents; required for sustaining charges, to him along with the appointment letter. The management has not reflected such factum in his evidence nor the enquiry officer was called for to substantiate this aspect of deployment of a representative of the Management. The enquiring officer must be shown to be neutral, without pressing on his personal information as well as impression, who should be free from the bias. The test for bias should be whether a reasonable and fair minded person who knows relevant facts, has a reasonable suspicion that, fair trial is not possible. A fair trial by an un-biased and non partisan trier of facts is of the essence of the adjudication process. The enquiry officer after receipt of charges must issue a notice to the delinquent for his appearance, before the enquiry to defend his case. The enquiry officer though expressed to have complied the norms of natural justice by issuing notices two times by virtue of Regd. With A/D at the very inception and by certificate of posting in the letter for his appearance on 9th February 2005 and 16th February 2005, but no such documents seems to have been furnished to show the genuines of the proper compliance. If the notice is not given then oblique intention can be inferred and adverse view shall be taken on the propriety of the enquiry. If after giving notice, the concerned delinquent remains absent, the enquiry should be held in his absence *ex parte*, but sufficient compliance must be resorted to. If the delinquent deliberately withheld his presence inspite of the summons received, the enquiry officer can take all the evidence recorded by him in his absence for consideration and the

delinquent can not subsequently contend that, the enquiry is not a bonafided one. Reliance has been placed in a decision rendered in *Imperial Tobacco Co., of India Ltd., Vrs. It's workman* 1961, II LLJ S. C. 414. There exists different modes of issuance of summons for appearance of the delinquent. Summons must be issued either Regd. With A/D or personal service of affixing it in the notice board. If the said summons returned without service with an endorsement by the postal department regarding the non availability of the delinquent, proper course must be resorted to by the Management or the enquiring officer to publish the notice in the local daily news paper in the regional language with a notice containing the name of the workman to whom action is proposed to be taken and the charges framed against him, in the area in which the delinquent resides and the news paper must have wide circulation in that area. Reliance has been placed in a decision rendered in by our Hon'ble Supreme Court in *G.T. Lad Vrs. Chemicals and Fibres India Ltd.* AIR, 1979, S.C. 290. If the delinquent remains absent inspite of such wide publicity in local news paper, it is obligatory on the part of the enquiring officer to conduct enquiry *ex parte* for which no prejudice shall be caused to the delinquent. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *State of U.P. Vrs. P. P. Lal Srivastav*, 1997 (I) LLJ 631. It does not mean that, the finding against the delinquent can be given by the enquiring officer without further investigation. It is almost necessary that, the enquiring officer should examine the case with great circumspection before any decision is taken about the guilty of the person. In the instant case the enquiring officer though admitted the summons issued returned un-served due to the non-availability of the delinquent, he has not taken any endeavour to get the notice published in the local news paper. Equally, the disciplinary authority before punishing the delinquent has not published the notice regarding appearance of the delinquent in the news paper, where the show cause notice was found to be returned unserved, thereby deprived the delinquent to have any say on the matter of punishment imposed on him. This caused serious prejudice to his interest not having obtained any scope of defending his case in proper and fair manner. The enquiry officer did not take any attempt to conceive the plea of the delinquent placed before the disciplinary authority while replying the show cause depicting his geniuses of the absence being supported by the doctor's certificate and the representation made there to. The enquiring officer must be attuned with the principle as propounded by the Hon'ble Supreme Court in *Syndicate Bank Vrs. General Secretary, Syndicate Bank Staff Association*, 2000 LLJ, 68, before taking any decision whether there was reasonableness in the cause of absence (i) whether medical certificate given by the workman was genuine,

(ii) whether the workman has any inevitable cause of his absence, (iii) whether the delinquent had leave in his credit. 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 *Vibekanda Sethi Vrs. The Chairman J & K Bank Ltd.*, 2005 LIR 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 Manupatra S.C.* 2006 page-386. The enquiry officer could have called for the O. P. D. Register of the relevant Hospital or examined the concerned doctor who had granted the certificate in order to assertion the genuineness of the illness suffered by the delinquent, thereby, cause of absence could have been divulged. Equally, the disciplinary authority did not take into consideration the medical certificate his representation before awarding punishment on the delinquent. He could have scrutinized the validity of the plea of illness and to unearth the truth. The conduct shown by the enquiry officer as well as the disciplinary authority is purely un-fair and un-reasonable. Thereby, biased can be simply attributed against the enquiry officer and authority concerned. Natural justice ordains that the enquiry should be held impartially and objectively. Fair trial and reasonable opportunity are inherent components of natural justice. Reasonable opportunity requires that, enquiry must be conducted honestly and bonafidely. Justice should not only be done, but should manifestly or un-doubtedly be seem to be done (*R. Vrs. Susscx*) justice 1924. I KB 256. The enquiry officer or the Management have not furnished any material documents alongwith the charge sheet which are in their possessions to support accusation of the workman. Therefore, the workman has sufficiently being prejudiced. Reliance has been placed in a decision rendered in by our Hon'ble Supreme Court in *A. K. Bhatnagar Vrs. G. R. ilk Mfg. Weaving Ltd.*, 1971 (II) LLJ S. C. 143. The enquiry officer has shown his legal interest in favour of the Management without following the principles of natural justice. The smallest legal interest will disqualified the officer. Dis-qualification exists even in the absence of the real likelihood of bias, if a reasonable man would reasonably suspect bias. The enquiry officer appears to have grossly failed to follow the principles of natural justice, nor the interest of the delinquent was carefully and properly taken into consideration.

6. It is mandatory on the part of the enquiring officer before submitting any report must supply a copy of the enquiry report to the delinquent for the purpose of giving

opportunity for presenting an explanation before the disciplinary authority. Besides that, 42nd Amendment of the Constitution has also provided similar provision, for furnishing a copy to the delinquent to adduce show cause against the proposed punishment. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Union of India Vrs. Mohammad Ramzan Khan* AIR 1991, S. C. 471. In this connection it is to be entertained whether non furnishing of the report will prejudice to the cause of the workman even the enquiry report is accepted on proper scrutiny by the disciplinary authority. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Managing Director, E. C. I. L. Hyderabad Vrs. B. Karunakar* AIR 1994, S.C. 1074. Unless, there is a prejudice. The enquiry report cannot be set aside on the technical ground as has been propounded by our Hon'ble Supreme Court in *State Bank of India Vrs. N. Sundermani* AIR 1975, S. C. 41. If any prejudice is caused then it will be obligatory on the part of the court to remit back the case to the Management for fresh trial keeping the delinquent under suspension and in consequence of the result favouring the delinquent, he shall be paid with back wages and reinstatement. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Bansidhar Vrs. State of Rajsthan* 2007 (112) FLR, 687 and *General Manager, Haryana Road Ways Vrs. Budhan Singh*, 2005-S.C.C. 591. In the instant case the Management has not supplied a copy to the delinquent to establish his case before the disciplinary authority. There being no proper process resorted to on basis of the principles of natural justice by not giving adequate opportunity to the delinquent the enquiry conducted by the enquiring officer and punishment is considered to be purely illegal and void. The workman has been seriously prejudiced to his interest due to the non compliance of proper procedure. If the enquiry was proper in form and delinquent was not given opportunity direction would be given for fresh enquiry. In the instant case neither enquiry has been conducted in proper form nor report there to was provided to the workman, For that, matter no fresh enquiry is required to be directed which will cause further prejudice to the delinquent. Therefore, the non furnishing of the report to the delinquent either by the enquiring officer or by the Management. Casts serious doubt as regards the propriety of the enquiry conducted by the authority. The defective enquiry as shown to have been committed is tantamount to no enquiry at all. The Management has got every right to dispense with the enquiry before taking any punitive action. But, he will have to justify the order before the Court or Tribunal by adducing sufficient evidence. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in *Delhi cloth and General Mills Co. Ltd., Vrs. L. B. Singh*, 1972 (I) LLJ 100. In such cases the court

would have jurisdiction to go into the facts and the employer would have to satisfy on the genuineness of the order of dismissal as propounded by our Hon'ble Supreme Court in Karnataka State Road Transport Corporation *Vrs.* Smt. Laxmi Devamma, AIR 2001 S. C. 2090. But plea of adducing evidence must be taken at the very inception of filing written statement by the Management. This has been developed in order to save delay for unnecessary litigation. The Management neither has taken any steps to draw the attention of the Court for adducing evidence to justify the cause of dismissal at the inception of filing written statement nor prayed anything during course of trial to adduce evidence. In absence of any plea it can be cumulatively deduced that, the order of dismissal passed by Management being not in conform with the principles of natural justice, nor being justified on basis of materials. Particular during the course of trial; can be considered to be illegal and unjustified which is liable to be *set aside*.

7. The result and effect 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 globalization of economy, freetrade, emergence of liberalization 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 Rajsthan* 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. Surindar Kumar* 2006 (110 F.L.R. 199) (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 utilized by all Courts in letter and spirit before granting any back wages. The onus specially lies on the workman to establish the facts that, during the course of the dismissal he nor "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 can not be given effect to. Though there is no justification for granting back wages the workman on account of illegal termination of service is only entitled to reinstatement as he was.

The reference is answered accordingly.

ORDER

8. The award is passed on contest in favour of the workman. The Management is directed to reinstate the workman in his former post within six month of the receipt of this order.

Dictated and corrected by me.

G. K. Mishra
29-02-2008
Presiding Officer,
Labour Court,
Jeypore,
Koraput.

G. K. Mishra
29 -02-2008
Presiding Officer,
Labour Court,
Jeypore,
Koraput.

By order of the Governor

G. N. JENA
Deputy Secretary to Government