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EXTRAORDINARY

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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 26th April 2008

No.4949-1i/1(B)-76/2005/LE.— In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award dated the 1st March 2008 in Industrial Disputes Case No.11/2005 of the Presiding Officer, Labour Court, Jeypore to whom the industrial dispute between the Management of M/s Harobina Vidya Bhawan, Hill Patna, Berhampur, Dist: Ganjam and their Workman Smt. Saraswati Nayak, 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.11/2005

The 1st March 2008

Present : Shri G.K. Mishra, O.S.J.S. (Junior Branch)
Presiding Officer,
Labour Court, Jeypore
Dist : Koraput

Between: The Chairman,
M/s. Harobina Vidya Bhawan,
Hill Patna, Berhampur,
Dist: Ganjam. .. First-Party—Management

Vrs.

Smt. Saraswati Nayak,
Harihar Sahi,
Uttareswar Nagar,
Gosaninuagaon,
Berhampur,
Dist: Ganjam. .. Second-Party—Workman

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

Appearances :	For the Management	.. Shri K.N. Samantray, Advocate, Jeypore
	For the Workman	.. Shri T.K. Reddy, Advocate, Berhampur
	Date of Argument	.. 25-02-2008
	Date of Award	.. 01-03-2008

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. 9055/LE., dated the 27th October 2005 for adjudication of the following disputes :—

SCHEDULE

"Whether the action of the Management of Harobino Vidya Bhawan, Berhampur in terminating the employment of Smt. Saraswati Nayak, Ex-Aya with effect from the 5th December 2003 is legal and/or justified ? If not, to what relief she is entitled ?

AWARD

2. The case appears to have been originated out of a reference submitted by the Government for determination of an issue regarding the validity and justifiability of the act of the termination entertained by the Management in respect of the Workman coupled with other anciliary to be granted in consequence thereof.

3. The brief matrix of the facts presented by the Workman may be described inculently that, the Management having arbitrarily terminated the Workman from her service without affording any scope of hearing and in compliance with the mandatory provision enumerated under Section 25-F of the Industrial Disputes Act, 1947, challenge has been meted out as regards the sustainability of the order passed in respect of the termination of service along with the prayer for reinstatement and back wages.

4. The Management, on the contrary, traversed the entire assertions put forth by the Workman and sumptuously contended, *inter alia* that, the Workman in absence of any engagement, being only enrolled formally in the pay roll in order to deposit some amount in the provident fund for the prupose of providing security to her life. She can never be considered as a "Workman". The formal entrustment of some work to have watch and ward of the premises being not construed as a relationship between the employer and

employee, no right can be established for claiming any benefits as a “employer”. It is further added that, the Workman having voluntarily withdrawn from the service with the intention of being remained as a “house wife”, such abandonment of service can not be constructed as “retrenchment” as defined U/s 2 (oo) of the Industrial Disputes Act, 1947, for which the Workman is not entitled to any benefits of reinstatement and back wages.

5. The Management from the very threshold has repudiated the status of the Workman as a employer of his establishment, on the score of non-engagement except showing her name in the pay Roll of the establishment for securing benefits from other source. The Workman was initially worked in the fouse of the Chairman for some time and being influenced with love and affection and service rendered by her, the Chairman compassionately as well as sympathetically enrolled her name in the school register for securing future security of life. The crux of the matter is whether the Workman can be considered as an employee so as to bring within the purview of the definition of the Workman as defined U/s 2 (s) of the Industrial Disputes Act, 1947. There is no matter , whether the Workman was entrusted with the work of looking after the house of the Chairman of the establishment, but it is to be scrutinized as to whether the relationship between the employer and employee is established. The expression “employed in any Industry” in Section 2 (s) of the Industrial Disputes Act, 1947 would take in employees who are employed in connection with operations incidental to the main Industry. An employee who is engaged in any work or operation which is incidental connected with the main Industry of the employer would be a “Workman” provided the other requirements of Section 2 (s) as satisfied. In this connection, it is heardly necessary to emphasized that, in the modern world industrial operations have become complex and complicated and for the efficient and successful functioning of any Industry, several incidental operations are received in aid and it is the totally of these operations that intimately continues the Industry as a whole. Wherever, it is shown that the Industry has employed an employee to assist one or the other operation incidental to the main industrial operation, it will be unreasonable to deny such an employee the status of a Workman on the ground this work is not directly concerned with the main work or operation of the Industry. In order to deal with the question of incidental relationship with the main industrial operation an exception has to be prescribed so as to exclude the operation or activities whose relation with the main industrial activity may be remote, indirect and far-fetched. This rule has been advocated by our Hon’ble Supreme Court in J.K. Cotton Spinning and Weaving Mills Co. Ltd. *vrs.* Labour Appellate Tribuanl of India A.I.R. 1964 S.C. 737. The above enumerations dot it explicit that, a person shall be a “Workman” if the person is employed by any industry, no matter where he is employed. But, his service rendered must be directly

connected to the establishment either working inside the industry or under any of the Officers which will ultimately benefit the establishment All the Officers of the establishment should be sufficiently provided with all amenities and service for securing greater benefit and profit to the Industry by virtue of the objective satisfaction in the work. No matter where the person employed either in the Industry or any other place. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in Shri Vikar Kanpur *vrs.* Cooper Allen and Company, 1952 LIC, 928. It is to be seen whether he ahs been enrolled in the pay roll or attendance register. Once he is enrolled in the pay roll it can be simply construed the person to be a "Workman", which will justify the relationship between the employer and the employee. Particular place of employment is not necessary for a Workman as entrustment of work is ordained by the employer. Reliance has been placed in a decision in Deevan Sugar Mills *vrs.* Mazdoor Sangha, 1952 (1) LLJ 805 (S.C). An employee on the pay roll of the employer receiving salary from him is a Workman although, he was a Gardner working at the Managing Director's Bunglow as has been propounded in a decision rendered in Upper India Chini Mills Mazdoor Union *vrs.* Upper India Sugar Mills, 6-FJR,27, 1955. The contention of the Management that, the Workman was specially engaged in the residence of the Chairman of the establishment has received no entity as a Workman, under the above analysis, is considered to be purely misconceived and unfounded. By taking her work in the residence of the Chairman and getting salary from the Industry can not be said that, her incidental work is too remote, indirect and far fetched. Her incident at work has got direct connection with the Industrial Development and also the productivity by rendering implicit service to the Chairman. Therefore, it is cumulatively deduced that, the Workman is considered as a "Workman" in true sense of the term so as to bring within the perview of the definition under Section 2 (s) of the Industrial Disputes Act, 1947.

6. The Management further contended that, the Workman was not terminated from the service, but she voluntarily withdrew from the service, without intimating the authority as shown in the provident fund slip, wherein she has mentioned the cause of the final withdrawal of the amount with an intention to be remained as a "house wife" with mentioning of the date of withdrawal i.e. dated the 5th December 2003. The withdrawal slip appears to have been furnished by the Management. It does not append with any signature of the authority by whom it was forwarded. It appears to have received no authentication on account of the lack of affixion of seal of the provident fund authority. The Workman has challenged the slip to have been fraudulently obtained by the Management showing the abandonment of her service on the pretext of getting a loan from the provident fund authority for her daughter's marriage. Once the transaction is challenged on account

of fraud, the onus shall shift to the Management to rebut the presumption. There being no support of proof from the side of the Management, it can be said that, it being a self same document, no significance shall be attached on it.

7. The intention of abandonment of service is to be scrutinized form the facts and circumstances of the case. It is true that, the termination of service of the Workman is brought about for any reason whatsoever it will be a case retrenchment. In order to constitute retrenchment "termination of service is a condition precident". This will not cover abandonment of job or service. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in L. Rorbert Dsouza *vrs.* Executive Engineer, A.I.R. 1982 S.C. 864. In order to constitute an abandonment of service, there must be failure to perform duties pertaining to the office with actual and imputed intention of the part of the Workman to abandon or relinquish the office. The intention may be inferred from the act and conduct of the Workman and relevant circumstances. Reliance has been placed in a decision rendered by our Hon'ble Apex Court in G.T. Lad *Vrs.* Chemicals and Fibre India Limited, AIR 1979 S.C. 582. If the Workman himself willingly abandoned his service it can not be said that he has been retrenched. The Workman has emphatically submitted that, he has never abandoned her service, but she was not allowed to continue the job taking the allegation of commission of theft committed by her. The Management's contention that, there was no question of disallowing her to remain in job on the cause of her voluntary abandonment of service, is not sustainable, in as much as the Management while placing his written submission before the District Labour Officer tacilly indicated the circumstances under which the Workman was terminated or disengaged. It is quite manifests from the letter that, the Workman being involved in commission of theft, causing heavy loss to the establishment, her service was not more required for the interest of the establishment. The intention of the Management is quite conspicuous and apparent as regards his active involvement in the termination of the service of the Workman. The conclusion is inevitable that, the Workman has never abandoned her service; rather she was terminated from her service by way of disallowing her by the Management to remain in the job. The Management for cause of commission of theft appears to have lodged an F.I.R. at the police with like correspondence with the District Labour Officer. This fact propelled the Management to take drastic action of termination of the Workman which is arbitrary and unreasonable. It is stated by the Management that, due to commission of theft, some detriment has been suffered by the Management. However, illegal act might have been committed by the Workman, the act of termination is not proper, which is to be utilized at the last resort. The termination can not compensate the loss sustained by the Management. The provisions of the constitution are conceived in public interest and are intended to serve public purpose. The Workman has right to livelihood by Article 21 of the constitution which lays down that, no person shall be deprived of life or liberty except in accordance with the procedure establish by the law. But the high purpose which the constitution seeks to achieve by conferment of the fundamental right is not only to benefit individuals but to secure the larger interest of the community. No individual can barteraway

the freedoms conferred upon him by the constitution. Article 21 of the constitution clubs life with liberty, dignity of person which means of livelihood without which the glorious content of dignity of person would be reduced to animal existence, as propounded by our Hon'ble Supreme Court in Fransis Curalie Mullin *vrs.* Union Territory of Delhi, AIR 1981 S.C. 746 and also Olga Talies *vrs.* Bombay Municipal Corporation AIR 1986, S.C 180. The right to life includes right to livelihood, because no person can live without in means of living that is means of livelihood. Reliance has been placed in a decision by our Hon'ble Supreme Court in L.I.C. *vrs.* Consumer Education and Research Centre, AIR 1995 S.C.W 2834. This does not mean that, everybody in the country must be given a job but what they do mean is that, once a person has been given a job, it can not be taken away arbitrarily. The procedure adopted by any State, Agency or Corporated body must be fair, just and reasonable. The procedure may not be fair and just or reasonable unless the person aggrieved in given an opportunity of being heard about such matter and to defend his case. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in Menaka Gandhi *vrs.* Union of India, AIR 1978 S.C. 597 and in Hussainara case, 1979. The principle of reasonableness is essential to the element of equality and non-arbitrariness as enshrined under Article 14 of the Indian Constitution. The principle of nationality is imbubed with the principle of reasonableness. Reliance has been placed in a decision rendered by our Hon'ble Supreme Court in Ramana *vrs.* International Airport Authority, AIR 1979, S.C. 1928. The Hon'ble Supreme Court in Sreelekha Vidyarthi *vrs.* State AIR, 1991, S.C 537 has propounded that, every state action in order to survive must not be susceptible to device of arbitrariness which is crux of Article 14 of the constitution. The Hon'ble Supreme Court in Bandhu Mukti Morcha *vrs.* Union of India, AIR 1984, S.C 802 expressed that, the obligation of the State to provide essential requirements to the Workman thereby to ensure their right to life with basic human dignity. It is deduced that, the temporary employees has a right to the post must be held to be subject to Article 14 of the constitution. To terminate the employee after a long period of service, that, the service is no more require, and he has no right to post as he is a temporary employee is purely arbitrary. The Hon'ble Supreme Court has observed in D.K. Yadav *vrs*. J.M.A Industries AIR, 1993, S.C.W 1995. The order of termination of service of an employee Workman visits with civil consequence of Jeopardising, not only his livelihood but also the carrier and livelihood of the dependants. The disciplinary authority before taking any punitive action against the Workman, care and circumspection must be taken for consideration and the act of the disciplinary authority most not be arbitrary, hasty and unreasonable. An industrial worker is always entitled to question the propriety and justifiability of a punitive and departmental action. In case of departmental action for misconduct, the employer must establish the action taken against the Workman for just and reasonable cause. The spirit of the Indian constitution under Article 311 has been infused in the Industrial adjudication as an essential component of disciplinary procedure. It is obligatory on the part of the employer to give opportunity to the Workman of being heard, if he intends to take any action for act of misconduct. Reliance has been placed in a decision rendered by

our Hon'ble Supreme Court in Rohotas Industries Limited, *vrs.* Alli Hassan, 1963 (I) LIJ, 253 (S.C.)

8. In the instant case, the Management appears to have disengaged the Workman on the cause of misconduct arising out of the commission of theft alleged to have been perpetrated by the Workman. But, no disciplinary action has been taken to prove the misconduct. Without resorting to any procedure meant for termination, the Management has hastly taken the action of the termination of the Workman, which is considered to be sheer arbitrary, violating the norms of Article 14 of the constitution. No opportunity has been provided to the Workman to have say on the allegation of theft by adducing evidence. Mere allegation put forth against the Workman does not satisfy the norms of action entertained by the Management. The Management knows that, the Workman has served for a period of 18 years without any previous bad antecedent. In the mean time she has crossed her age to secure any job else where. Her children might have grown up and prosecuting studies. The deprivation would entail pernicious consequence which will jeopardize the life and also her children. Before taking away the right of livelihood, emanated from the job given by the Management, it is duty encumbered on the Management to prove the allegation by resorting to an enquiry. The act of the Management having not in conformity with the principle of natural justice and with the principles of reasonableness and fair play, the termination in light of dis-engagement is considered to be purely illegal and invalid.

9. The Management specially contended that, there appears a different dates of termination as shown in the reference and the documents produced by him. There might be variation of mentioning of dates but termination of the Workman is claimed by the Management to be justified as has been admitted by him in the letter submitted to the District Labour Officer. The Government while formulating issue in the reference has not been taken abudent care and the issue has been framed in a pedantic and hasty manner. The action of the Government is deprecated on this matter without framing issue taking into consideration, the respective pleas of the parties. Whatever, may be the date of termination it has been admitted that, the Workman has been terminated on the cause of misconduct shown by her in committing theft. Therefore, it is conclusively deduced that, the Workman has not been given any opportunity to say on the matter nor protection has been offered to her U/s 25-F of the Industrial Disputes Act, 1947. The violation of the norms prescribed in the statute as well as the principles of natural justice, paves the way for the Court to declare the order of the termination to be void.

10. 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 for implementation of the norm. Our Hon'ble Supreme Court has propounded in N.U.L.R. Mills Unit of N.T.C. (U.P.) Limited *vrs.* Shyam Prakash Shrivastav and another, 2007 (I) S.C.S. 491 a theory of "gainful employment" before granting of any back wages, providing responsibility on the Workman to prove non-engagement gainfully. Unless "gainful engagement" is not disclosed back wages can not be awarded as propounded by

our Hon'ble Suprement Court in Rudhan Singh case 2005, S.C.C 591. The Workman having not justified her non-engagement during the period of termination no back wages shall be awarded, except reinstatement which will meet the end of justice and to save the life from insecurity condition.

The reference is answered accordingly.

ORDER

11. The award is passed on contest in favour of the Workman. The Management is directed to reinstate the Workman as she was within six months of the receipt of the order.

Dictated and Corrected by me

G.K. Mishra
dt. 01-03-2008
Presiding Officer,
Labour Court,
Jeypore, Koraput.

G.K. Mishra
dt. 01-03-2008
Presiding Officer,
Labour Court.
Jeypore, Koraput.

By order of the Governor
G.N. JENA
Deputy Secretary to Government

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