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## LABOUR & EMPLOYMENT DEPARTMENT

### NOTIFICATION

The 7th February 2009

No. 1133-li/1(S)-5/2006-L. E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 30th December 2008 in Industrial Dispute Case No. 9/2006 of the Presiding Officer, Labour Court, Sambalpur to whom the industrial disputes between the management of Regulated Market Committee, Balangir and its workman Shri Sitakanta Mishra, ex-Yardman was referred for adjudication is hereby published as in the Schedule below :

#### SCHEDULE

IN THE COURT OF THE PRESIDING OFFICER, LABOUR COURT, SAMBALPUR  
INDUSTRIAL DISPUTE CASE No. 9 OF 2006  
Dated the 30th December 2008

*Present :*

Smt. Suchismita Misra, L.L.M.,  
Presiding Officer, Labour Court, Sambalpur.

*Between :*

The Management of .. First Party—Management  
Regulated Market Committee, Balangir.

And

Its Workman .. Second Party—Workman  
Shri Sitakanta Mishra, ex-Yardman,  
S/o Gadadhar Mishra, At/P.O. Jogisarda,  
P.S. Loisingha, Dist. Balangir.

*Appearances :*

For the First Party—Management .. Shri Dwarika Prasad Panda,  
Secretary.

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For the Second Party—Workman .. Self

## AWARD

1. The Government of Orissa in the Labour & Employment Department have, in exercise of power conferred upon them u/s 12, read with clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (for short, "the Act"), referred the following disputes for adjudication by this Court.

"Whether the termination of Shri Sitakanta Mishra, Yardman, with effect from the 1st June 1999 by the Management of Regulated Market Committee, Balangir is legal and/or justified ? If not, what relief is Shri Mishra entitled to ?"

2. Shorn of unnecessary details, the facts leading to the present dispute between the first party namely the management of Regulated Market Committee on the one hand and the workman, Sitakanta Mishra on the other are stated below.

The claim of the second party workman as would appear from the statement of claim filed by him in the present proceeding runs as below :

The second party workman was employed/appointed as a Yardman by the First Party Management of the Regulated Market Committee, Balangir from the year 1995 and continued as such under the said management till the 31st May 1999. He was disengaged from his job with effect from the 1st June 1999. During the aforesaid period of his employment he had been posted to different check gate of Regulated Market Committee, Balangir at Titilagarh, Burda, Salebhat and according to him to the best of his ability and satisfaction of his employer, he discharged his duties till the date of his disengagement. According to second party workman after he was disengaged, he approached the first party management time and again to reinstate him in his service or to his post but to no effect. The management of Regulated Market Committee (for short "R.M.C."), Balangir lodged an F.I.R. at the Police Station making certain allegations against the second party workman and two others which case was forwarded to the Court of J.M.F.C., Loisingha (G. R. Case No. 59 of 1999). Ultimately learned J.M.F.C., Loisingha acquitted the second party workman of the charges of which he was tried as the offences alleged against him were not proved. The second party workman continued to represent to the first party management to restore him to his old position and reinstate him but the first party did not pay any heed to his representations. Under such circumstances the second party workman has claimed that the order of the termination of his employment dated the 1st June 1999 be held illegal and unjustified and he be reinstated in service from which he was terminated with regular service benefits.

3. The first party management in their written statement contested the pleas advanced by the second party workman on the following grounds :

- (a) Regulated Market Committee, Balangir is not an 'Industry' and the second party not being a regular employee of the Regulated Market Committee, Balangir is not a workman coming within the purview of the Industrial Disputes Act, 1947.
- (b) In the above circumstance, the reference made by the State Government in the Labour & Employment Department is incompetent and not maintainable.

- (c) The second party workman was a Daily Rated Employee engaged/employed with many others at the time of need and was disengaged like other daily rated workers on the 1st June 1999 and as such he is not entitled to question the management's action and claim reinstatement with back wages.
- (d) The second party workman was found to have committed serious acts of misconduct (such as fraud like irregularities, mishandling of receipt books and misappropriation of Committee fund while working at Salebhat Check gate vide office order No. 574, dated the 22nd October 1998 and after an enquiry conducted by the Deputy Registrar, Co-operative Society, Balangir who found him guilty, he was terminated. Besides in a criminal case charge-sheet had been filed against him by Loisingha Police and though he was acquitted under benefit of doubt, the charge-sheet would reveal that he had misconducted in course of his employment which rendered him liable to be terminated.

The second party workman filed a rejoinder to the written statement of the first party management denying the pleas advanced by the first party management.

4. On the above pleadings only two issues were framed in this proceeding and those are :

- (1) Whether the termination of service of Shri Sitakanta Mishra, Yardman with effect from the 1st June 1999 by the management of Regulated Market Committee, Balangir is legal and /or justified ?
- (2) To what relief Shri Mishra is entitled ?

5. In this proceeding the workman submitted his evidence on affidavit on the 21st September 2007 which was received as his examination in-chief and he was cross examined on behalf of the first party management. On behalf of the second party workman three documents were marked as Exts. W. 1, W. 2 and W. 3. Similarly on behalf of the management, the Secretary of R.M.C., Balangir namely Dwarika Prasad Panda submitted his examination in Chief by way of affidavit on the 27th November 2007 and he was cross examined on behalf of the workman. On behalf of the first party management also three documents were exhibited as Exts. M-1, M-2 and M-3.

6. Now coming to the question raised by the first party management that R.M.C., Balangir is not an 'Industry' coming within the purview of the Industrial Disputes Act, 1947 relying upon the Award of this Court made on the 20th January 1995 in I.D. case No. 8 of 1990, a copy of which has been marked Ext. M-1, I would say that the said Award had been made relying upon the decision of the Hon'ble Supreme Court of India in the case of Madras Gymkhana Club Employees Union Vrs. Management of the Gymkhana Club reported in AIR 1968-SC-554. Since after 1968, the question as to what would be covered by the expression 'industry' as defined in Section 2 (J) of the I.D. Act, 1947 have come up for consideration by the Hon'ble Apex Court several times. The leading decision on the said question is rendered in the case

of Bangalore Water Supply and Sewerage Board *Vrs.* A. Rajappa and others reported in (1978) 2 Supreme Court Cases 213. The majority view in the said decision prescribed the triple tests which provide *prima facie* as to which enterprise would be held an 'industry' coming within the purview of the I.D. Act, 1947. Those are : (i) Systematic Activity, (ii) Organised by Co-operation between Employer and Employee (the direct and substantial element is chimerical), (iii) For the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual) or religious but inclusive of material things or services geared to celestial bliss e.g. making on a large scale prasad or food.

In the present case before me applying the aforesaid tests prescribed by the Hon'ble Apex Court there could be no escape from the conclusion that Regulated Market Committee, Balangir is an industry as defined in Section 2(J) of the Act. In this very decision i.e. Bangalore Water Supply and Sewerage Board *Vrs.* A. Rajappa and others, the Hon'ble Apex Court have overruled the earlier decision rendered in the Gymkhana case, AIR 1968-SC 554 which this Court has relied upon earlier while delivering the Award in I.D. case No. 8 of 1990. In the premises I would reject the first party management's contention that R.M.C., Balangir is not an industry coming within the purview of Industrial Disputes Act, 1947.

7. Next coming to the question advanced by the first party management that the second party is not a workman I do not feel convinced with the reasoning given by the first party management in support of the contention. Section 2 (s) of the I.D. Act, 1947 which defines the term "workman" makes the position clear. Section 2 (s) is quoted below.

"Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person.

- (i) Who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) Who is employed in the police service or as an officer or other employee of a prison; or
- (iii) Who is employed mainly in a managerial or administrative capacity; or
- (iv) Who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

8. So far as the aforesaid question is Concerned M.W. 1 has clearly stated in his evidence during his cross examination that the second party workman was appointed in the

establishment of Regulated Market Committee, Balangir from the month of October 1995 to the 31st May 1999 as a Daily Wage Labourer and he was terminated from service on the 1st June 1999. There is no plea, whatsoever, advanced by the first party that the second party's employment was intermittent casual and was of such nature that he could be said not to have been in continuous employment in the establishment of the first party management i.e. R.M.C., Balangir for long more than four years. In the absence of any such plea it is impossible to hold that second party was not a workman in the establishment of first party as defined in Section 2 (s) of the Act.

9. In view of the conclusions arrived at in the foregoing paragraphs I would hold that the reference of the dispute by the Government of Orissa in the Labour & Employment Department for adjudication of the above stated dispute between the parties by this Court is maintainable.

10. The next important point which arises for consideration in the present case is as to whether the termination of services of Sitakanta Mishra, Yardman by the first party with effect from the 1st June 1999 is legal justified or not. The case of the second party is that he was subjected to retrenchment and such retrenchment was illegal having been effected in contravention of Section 25(F) and (G) of the I.D. Act. The dispute referred by the State Government relates to legality and justifiability of the termination of the employment of the second party. All terminations can not be said to be retrenchment. When a termination is effected on ground of surpluses it becomes retrenchment. The essential and basic element of retrenchment is surpluses. In other words, when an employer in an industry finds that he has labour which is in excess of the number and hence is surplus, the services of such workman as are in excess can be terminated and such termination would be retrenchment.

In the present proceeding the specific case advanced by the first party management is that the second party having been found guilty of commission of serious acts of misconduct was terminated after an enquiry was conducted by the Deputy Registrar, Co-operative Society, Balangir. The management has not come forward with a case of retrenchment. In the circumstance, on account of the aforesaid admission by the management it has got to be held that the second party was dismissed for misconduct which visited him with stigmas. In the circumstance, it was incumbent upon the first party management to establish by evidence that the second party was subjected to a disciplinary enquiry and was afforded reasonable opportunity to defend himself against the charges of misconduct as per the requirements of the principles of natural justice.

11. In the case before me not a single scrap of paper has been filed on behalf of the management to indicate much less to prove that any enquiry was conducted into any charges of misconduct allegedly committed by the second party to his knowledge. No statement was made by M.W. 1 as to if even an explanation was called for from the second party in respect of the so called charges of misconduct. The Deputy Registrar, Co-operative Society, Balangir who allegedly enquired into the acts of misconduct said to have been committed by the second party was not examined in this proceeding. In the circumstance, in the absence of any evidence

in respect of the above questions it is not at all possible to hold that the so called charges of misconduct had been enquired into and proved to have been committed by the second party. Thus it is clear that the second party's services were terminated on grounds of commission of misconduct by him without holding any enquiry and in violation of the principles of Natural justice.

In view of the discussions made above I have no hesitation to hold that the termination of services of the second party workman by the first party management with effect from the 1st June 1999 is illegal and unjustified.

12. Now the question comes as to what relief is the workman entitled to ?. It is evident from the record that the workman filed a complaint petition before the Conciliation Officer-*cum*-District Labour Officer, Balangir on the 19th November 2005 alleging about his illegal retrenchment from the service by the management of Regulated Market Committee, Balangir with effect from the 1st June 1990 and had prayed for initiation of conciliation proceeding u/s 12 of the Industrial Disputes Act, 1947. As no settlement could be arrived at between them during the said conciliation proceeding the aforesaid reference was made by the State Government in the Labour & Employment Department basing on the report of the Conciliation Officer-*cum*-District Labour Officer, Balangir. In his statement of claim, the workman made a prayer for his reinstatement in service with regular service benefits. Since it has already been held that the termination of services of the second party workman by the first party Management is illegal and unjustified, he is certainly entitled for his reinstatement in the post which he had held during the period of his appointment/employment in the R.M.C., Balangir. So far as his claim for regular service benefits is concerned the settled position of law is that a claim of service benefit which include back wages should not be the normal and natural consequences of an order of reinstatement and a workman cannot claim for such a relief as a matter of right. Relief of back wages may be denied where that would place an exorbitant burden on the employer as period of interrum being fairly long. In this regard I would like to quote here the decision in the case between Devendra Sahu and Presiding Officer, Industrial Tribunal-*cum*-Labour Court, Vishakhapatna and another reported in 2008-II-IJ October (at page 466) wherein it has been held by the Hon'ble Court that "while awarding back wages care should be taken to find out whether the employee has pleaded and established with reference to material on record that in spite of his best efforts he could not be secure any alternative employment during the period of his absence. In the aforesaid decision it has been made clear that such a claim has to be sufficiently pleaded and proved with the fact that the workman was not gainfully employed in any alternative employment during the period of his absence and in the absence of any material brought on record by the petitioner to that effect, he is not entitled to ask for back wages.

In the present proceeding the workman has neither stated nor provided any evidence that he had made efforts to secure and alternative gainful employment during the period of his disengagement but could not find one and the same is a relevant factor for consideration

regarding payment of back wages to him by the first party management. Therefore, it has to be held that the workman is not entitled to back wages or any other service benefits like continuity of service though he would be entitled to counting of the period of services rendered by him under the first party management before his termination for the purpose of fixation of his wages as a Yardman on his reinstatement and regularisation of his service in the event such question is considered.

In the circumstances, I would dispose of this reference with a direction to the first party management to reinstate the second party workman into service as a Yardman in the Regulated Market Committee, Balangir without back wages but with continuity of service notionally only for the purpose of fixation of his wages as a Yardman on his reinstatement and regularisation of his service in the event such question is considered.

Hence the following Award.

#### AWARD

The reference is answered on contest in favour of the second party workman and against the first party management. The termination of services of Shri Sitakanta Mishra, Yardman with effect from the 1st June 1999 by the Management of Regulated Market Committee, Balangir is held illegal and unjustified and the first party management is directed to reinstate the second party workman Shri Sitakanta Mishra into service as a Yardman forthwith in the Regulated Market Committee, Balangir without back wages but with continuity of service notionally only for the purpose of fixation of his wages as a Yardman on his reinstatement and regularisation of his service in the event such question is considered.

Dictated and corrected by me.

SUCHISMITA MISRA  
30-12-2008  
Presiding Officer  
Labour Court, Sambalpur

SUCHISMITA MISRA  
30-12-2008  
Presiding Officer  
Labour Court, Sambalpur

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