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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 25th February 2009

No. 1934—li/1(B)-1/2006-L.E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 11th February 2009 in I. D. Case No. 67 of 2006 of the Presiding Officer, Labour Court, Bhubaneswar to whom the Industrial Dispute between the Management of Puri Investigation Division, Puri, C/o Chief Engineer, Project Planning and Formulation, Secha Sadan, Bhubaneswar and their workman Shri Sadasiv Nayak was referred for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE LABOUR COURT, ORISSA, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No.67 OF 2006

Dated the 11th February 2009

Present :

Shri M. R. Tripathy,
Presiding Officer, Labour Court,
Bhubaneswar.

Between :

The Management of Puri Investigation Division, . . . First Party—Management
Puri subsequently merged with Chief Engineer,
Project Planning and Formulation,
Secha Sadan, Bhubaneswar.

And

Its Workman . . . Second Party—Workman himself
Shri Sadasiv Nayak.

Appearances :

Shri B. N. Mohanty, S.D.O.	..	For the First Party—Management
Shri Sadasiv Nayak	..	The Second Party—Workman himself

AWARD

The Government of Orissa in exercise of powers conferred by sub-section (5) of Section 12, read with Clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 have referred the dispute between the parties to this Court for adjudication vide Labour & Employment Department Order No. 3441—li/1(B)-1/2006-L.E., dated the 2nd May 2006.

2. The Schedule of reference is as follows :

“Whether the action of the management of Puri Investigation Division, Puri, in retrenching the services of Shri Sadasiva Nayak, Gauge Reader with effect from the 19th January 2005 is legal and/or justified ? If not , what relief Shri Nayak is entitled to ? ”

3. The case of the workman may be briefly stated as follows :

The workman, namely Shri Sadasiv Nayak was engaged as N. M. R. Gauge Reader in Section No. III, Sakhigopal under Pipli Drainage Master Plan Subdivision, Pipli and Drainage Master Plan Division, Puri on the 15th June 1987. While he was continuing as such, his services were illegally terminated by the management on the 1st November 1989. Before termination no disciplinary proceeding was initiated against him. Also notice or notice pay, retrenchment compensation, etc. were given to him at the time of termination. Some persons who were junior to him were allowed by the management to continue in service after his retrenchment. Hence he raised an Industrial Dispute which was referred to this Court vide Government Order No. 4604, dated the 26th April 1997 for adjudication. The said reference was registered as I. D. Case No. 2/1997 and an Award was passed in favour of the workman on the 15th November 2003. Subsequently the Award was published in the Gazette on the 14th April 2004. The operating portion of the said Award is as follows :

“That, the action of Puri Drainage Master Plan Division, Puri Division, Puri now renamed as Puri Investigation Division, Puri in terminating the services of Shri Sadasiv Nayak, N. M. R. Gauge Reader by way of refusal of employment with effect from the 1st November 1989 is neither legal nor justified. The workman Shri Nayak is entitled to be reinstated in service, but on the facts and circumstances of the case as he had not worked with effect from the date of termination he is entitled to get a lump sum amount to the tune of Rs. 5,000 only in lieu of back wages. The management is directed to implement the Award within a period of two months from the date of publication in the official Gazette.”

In view of the aforesaid Award he submitted an application before the management on the 20th March 2004 to reinstate him in services. After publication of the Award in the Gazette, he submitted another application with similar prayer on the 27th April 2004. As the Award was not

implemented in time he filed another application before the Labour Commissioner, Orissa, Bhubaneswar on the 16th October 2004. The management in order to avoid criminal proceeding issued a letter on the 11th January 2005 to him to join in duty in the office of the Subdivisional Officer, Puri Hydrometry Subdivision, Puri and in obedience to the said letter he joined in duty on the 19th January 2005. On the same day, i.e. on the 19th January 2005 the management through the Subdivisional Officer, Hydrometry Subdivision, Puri issued an order of retrenchment. According to him he was not given one month prior notice indicating the reason of retrenchment. Also in lieu of such notice wages for the period of notice was not paid to him. It is further stated by him that he joined in service on the 15th June 1987 and in view of the Award passed by this Court it is to be deemed that he was continuing in service till the 19th January 2005 but retrenchment compensation at the rate of 15 day's average pay for every completed years of service was not calculated and paid to him. Added to that the management had also not issued notice to the State Government in the manner prescribed in law. So the retrenchment made by the management is illegal and *ab initio* void. Though the letter of retrenchment of the 19th January 2005 discloses about the notice pay and retrenchment compensation yet the same was not adequate and calculated according to law and not paid to him, as such, the same was not valid. It is further complained by him that one Shri Alekha Pani who was junior to him in service is still continuing and during pendency of the I. D. Case No. 2/1997 some persons namely, Sarbashree Jagannath Sahu, Sudarsan Patra, Pramod Kumar Sahu, Bharat Chandra Parida, Damodar Samal, Bhagirathi Samantaray, Bhikari Charan Parida, Birabar Sahu, Mukunda Prasad Jena, Bata Krushna Jena, etc. were appointed by the management who are still continuing in service. Further according to him the retrenchment order of the 19th January 2005 was passed in a vindictive manner because the Award was passed by this Court in his favour. He filed an application before the District Labour Officer, Puri complaining against the illegal action of the management. Accordingly a conciliation proceeding was started which ended in failure. Hence the retrenchment order passed by the management on the 19th January 2005 may be declared as illegal, unjustified and the management may be directed to reinstate him in service with full back wages.

4. The management in the written statement has stated *inter alia* that the workman had worked as N. M. R. on daily wage basis for a total period of 80 days, i.e. from the 11th July 1987 to the 30th September 1987. After he was retrenched the matter was referred to this Court and in I. D. Case No. 2/1997 an Award was passed on the 15th November 2003. Thereafter the Award was examined at various level of the Government regarding its implementation and finally the workman in response to the call of the management joined in duty on the 19th January 2005. In view of the Award passed by this Court a lump sum amount of Rs. 5,000 in lieu of back wages was paid to him. Simultaneously in view of the instruction and direction of the Government in the Department of Water Resources vide letter No. 35409, dated the 2nd November 2004 he was retrenched from service on the same day, i.e. on the 19th January 2005 after due compliance of Section 25-F of the Industrial Disputes Act, 1947. The retrenchment compensation was calculated and sanctioned at the rate of 15 days average wage for every completed years of service which was duly checked by the Legal Cell of Engineer-in-Chief of Water Resources Department, Orissa, Bhubaneswar. Though the workman received a lump sum amount of 5,000 in lieu of back wages he did not received

notice pay and retrenchment compensation amounting to Rs. 3,376. The said amount remained unpaid till the closure of the financial year 2004-2005 and so the said amount was finally deposited. According to the management, the workman is not entitled to get any relief in the present case and the present case is liable to be dismissed.

5. The following issues were settled in this case.

ISSUES

(i) "Whether the action of the management of Puri Investigation Division, Puri in retrenching the services of Shri Sadasiv Nayak, Gauge Reader with effect from the 19th January 2005 is legal and/or justified ?

(ii) If not, what relief Shri Nayak is entitled to ?"

6. In support of his case the workman only examined himself as W. W. 1. The management also examined a witness who is working as Assistant Engineer, Investigation Division No. II, Pattamundai.

FINDINGS

7. *Issue Nos. (i) and (ii):*—For the sake of convenience, both the issues are taken up together.

It is stated by the workman that he joined as N. M. R. Gauge Reader in Section No. III, Sakhigopal under Pipli Drainage Master Plan Subdivision, Pipli and Drainage Master Plan Division, Puri on the 15th June 1987 and worked as such till he was retrenched on the 1st November 1989. This fact is not admitted by the management and according to Para. 5 of the written statement the workman worked for 80 days, i.e. from the 11th July 1987 to the 30th September 1987. This dispute was considered by my predecessor and in the Award passed in I. D. Case No. 2/1997 he had come to a definite conclusion that the workman had continuously worked from the 15th June 1987 till the 1st November 1989. Ext. C is the calculation sheet which reveals that the calculation of salary and retrenchment compensation was also made in respect of the period from the 15th June 1987 to the 30th October 1989 and Ext. C has been filed by the management. So I find no merit in the contention raised by the management that the workman had only worked for 80 days, i.e. from the 11th July 1987 to the 30th September 1987.

8. Admittedly an Award was passed in favour of the workman in I. D. Case No. 2/1997. In the said Award this Court had given direction as follows :

"That the action of the management of Puri Drainage Master Plan Division, Puri now renamed as Puri Investigation Division, Puri in terminating the services of Shri Sadasiv Nayak, N. M. R. Gauge Reader by way of refusal of employment with effect from the 1st November 1989 is neither legal nor justified. The workman Shri Nayak is entitled to be reinstated in service, but on the facts and circumstances of the case as he had not worked with effect from the date of his termination, he is entitled to get a lump sum amount to the tune of Rs. 5,000 (Rupees five thousand only) in lieu of back wages. The management is directed to implement the Award within a period of two months from the date of its publication in the official Gazette."

Ext. 1 is the xerox copy of Gazette Notification on the 20th February 2004. According to the direction given in the aforesaid Award, the workman was entitled to be reinstated in service and to get a lump sum amount of Rs. 5,000 in lieu of back wages within a period of two months from the date of publication of the Award in the Gazette that means on or before the 20th April 2004. But neither he was reinstated in service nor the compensation amount in lieu of back wages of Rs. 5,000 was paid to him on or before the 20th April 2004. So it can be safely said that the management has failed to implement the Award within the stipulated period.

9. Of course the management being the employer is empowered to retrench the service of its employees but the service of an employee can only be retrenched according to law. According to settled position of law the management is bound to comply Section 25-F of the Industrial Disputes Act, 1947 at the time of retrenchment. So let us now examine as to whether the management had duly complied Section 25-F of the Industrial Disputes Act, 1947 while retrenching the workman on the 19th January 2005.

10. According to M. W. 1 after receipt of the Award necessary correspondence was made to the Government and as per the direction given by the Government vide letter No. 35409, dated the 2nd November 2004 of the Department of the Water Resources the workman was reinstated in service and retrenched simultaneously, after payment of the amount awarded in I. D. Case No. 2/97 and retrenchment benefit under Section 25-F of the Industrial Disputes Act, 1947, calculated and tendered to the workman. The workman though received the compensation amount of Rs. 5,000 awarded in I. D. Case No. 2/97, he did not receive the retrenchment benefit amounting to Rs. 3,376. Hence notice was issued to him. In spite of receipt of notice he did not appear to receive the amount and therefore at the end of the financial year the said amount was deposited in the Treasury.

Ext. A is the copy of letter No. 35409, dated the 2nd November 2004 of the Department of Water Resources, Orissa, Bhubaneswar. As it appears from the said letter the same was given with reference to letter No. 762, dated the 6th May 2004 of the Executive Engineer, Puri Investigation Division, Puri. I may here note that the stipulated period to reinstate the workman in service and to pay the compensation of Rs. 5,000 had already passed by then. Be that what it may in response to the aforesaid letter of the Executive Engineer it was decided by the Department of Water Resources that the Award passed by this Court on the 15th November 2003 would be implemented but simultaneously the workman will be retrenched after payment of retrenchment benefits as provided in Section 25-F of the Industrial Disputes Act, 1947 at one stroke. No reason has been mentioned as to why a decision was taken to retrench him immediately after reinstating him in service. It is stated by M. W. 1 that in pursuance to the direction given in the aforesaid letter calculation was made regarding retrenchment compensation and the concerned authority was moved for sanction of the amount. M. W. 1 has proved the relevant letter and the calculation sheet marked as Exts. B and C, respectively According to the workman the calculation has not been made according to law. So let us now examine the calculation sheet to find out its correctness. According to Ext. C the wage for one day of the workman was Rs. 62.50 or say Rs. 63, his one month pay as required to be paid under

Section 25-F(a) of the Industrial Disputes Act, 1947 has been calculated to be Rs. 1,688 by multiplying Rs 62.50 X 27. In bracket it has been stated that the calculation was made excluding four (4) off days. In my view this is not correct. According to Section 25-F(a) of the Industrial Disputes Act, 1947 the workman is entitled to one month's notice in writing indicating the reasons for retrenchment or payment of wages in lieu of such notice for the period of notice. Period of notice means one month including all holidays and off days. Period of notice does not mean only the working days. Similarly I find defect in the calculation made regarding retrenchment compensation. The retrenchment compensation has been calculated for the period from the 15th June 1987 to the 30th November 1989 that means 2 years 4 months 15 days. According to Section 25-F(b) of the Industrial Disputes Act, 1947 the retrenchment compensation shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. In I. D. Case No. 2/97 the retrenchment of the workman with effect from the 1st November 1989 was held to be illegal and unjustified. Of course in the Award it has been mentioned that as he had not worked with effect from the date of his termination he is entitled to get a lump sum to the tune of Rs. 5,000 in lieu of back wages. But that does not mean that the Court had not accepted his continuity in service. In the decision reported in 69(1990) C.L.T. 357 in the case of Shyam Sundar Rout Vrs. Orissa State Road Transport Corporation and others the Division Bench of our own Hon'ble High Court held as follows :

“The settled position of law is, Section 25-F of the fact being a beneficial legislation it has to be strictly complied with and is a mandatory precondition. The negative form adopted by the provision coupled with the use of the word 'until' which introduces the condition, indicating that the conditions must be first satisfied before retrenchment can be validly effected. Non-compliance of Section 25-F of the Act renders the order of retrenchment void *ab initio*. Taking into account all the provisions of law in A. I. R. 1976 S.C. 1111, the State Bank of India Vrs. Shri N. Sundara Money, Their Lordships have laid down the dictum that the payment of retrenchment benefits as required under Section 25-F (2) of the Act is mandatory and precondition to the order of retrenchment. In absence of such compliance it has to be held that the workman continued in service though the order of appointment was for a specific period.”

11. Once it is declared that the retrenchment was void *ab initio* it will be deemed that the workman is continuing in service. For the purpose of calculation of back wages my predecessor in I. D. Case No. 2/97 considered an amount of Rs 5,000 to be adequate in lieu of back wages. Even if for the sake of argument let us say that there was no continuity of service and the workman had worked only for a period of 2 years 4 months 15 days, i.e. from the 15th June 1987 to the 30th November 1989 and the calculation is required to be made for the said period only. If such a view of the matter is taken still I find the calculation to be not correct. Since he had worked for more than two years he is entitled to get compensation for a total period of 30 days, i.e. at the rate of 15 days' average pay for each completed year. But as it appears from Ext. C the calculation has been made by multiplying one day wage of Rs. 62.50 X 27. Thus it is proved that the calculation was not made in a correct manner. Therefore, there was justification for the workman not to receive the same.

It is stated by the management that in spite of notice the workman did not receive the amount of compensation and one month's pay and therefore the amount was deposited in the Treasury at the end of the financial year. In order to prove the said fact the management has filed copy of two letters marked as Exts. D and E. In Ext. D the workman was directed to receive the notice pay of Rs. 1,688 and compensation of Rs. 1,625 from the cash counter of Subdivision Office. In Ext A a similar direction was given to the workman to receive the same before the 31st March 2005 or else the amount would be deposited in the Government revenue. No action was taken by the management to send the amount either through Money Order or through Bank Draft in the address of the workman after he declined to receive the amount. In A. I. R. 1968 Punjab and Haryana 90, Pepsu Transport Co. Private Ltd., Vrs. State of Punjab and others it was held as follows :

“He has to pay the compensation at the time of retrenchment. If the said workman does not come to receive it on or before the due date, when called upon to do so, the employer should send the same to him on that date, if possible, otherwise on the next day and it is only then that it can be said that he complied with the condition laid down in the section.”

12. The workman not only in his statement of claim but also in his evidence has stated that one person who is junior to him namely, Shri Alekh Pani is still continuing in service. In the earlier I. D. Case bearing No. 2/97 he had also raised this point against which the management had contended that such a claim made by the workman is false and baseless because Shri Pani was engaged with effect from the 10th July 1987 whereas the workman was engaged from the 11th July 1987. In the Award as I have said earlier this Court had disbelieved the version of the management that the workman was engaged from the 11th July 1987. It was clearly held that the workman was engaged from the 15th June 1987 to the 1st November 1989 that means earlier to the engagement of Shri Pani. The Award passed by this Court in I. D. Case No. 2/1997 was not challenged before any forum and so according to Section 17-A of the Industrial Disputes Act, 1947 the same had become enforceable on expiry of 30 days from the date of publication in the official Gazette, i.e. from the 20th April 2004. Once it is held that the workman was engaged from the 15th June 1987 and according to the version of the management if Shri Pani was engaged from the 10th July 1987 then automatically the inference would be that the workman is senior to Shri Pani. The workman in Para. 14 of his deposition has stated that during pendency of I. D. Case No. 2/1997 the management appointed Sarbashree Jagannath Sahu, Sudarsan Patra, Pramod Kumar Sahu, Bharat Chandra Parida, Damodar Samal, Bhagirathi Samantaray, Bhikari Charan Parida, Birabar Sahu, Makund Prasad Jena, and few others who are still continuing in service. In the statement of claim at Para. 7(b) he has also pleaded the above fact. But there is no specific denial to such averments in the written statement filed by the management nor any question was asked by the management on the above point to the workman during the time of cross-examination. So the above said facts stated by the workman have remained uncontroverted and unchallenged. I have already earlier

said that without assigning any reason the management retrenched the workman on the 19th January 2005. Therefore, there is merit in the submission made by the workman that Sections 25-G and H of the Industrial Disputes Act, 1947 have been violated.

13. In the written argument the workman has raised some other points. According to him the management has committed 'unfair labour practice' in passing the order of retrenchment. The term 'unfair labour practice' has been defined in the Fifth Schedule of the Industrial Disputes Act, 1947 as follows :

“On of the part of Employers and Trade Unions of Employers—

XX XX XX XX

5. To discharge or dismiss workmen—

(a) by way of victimisation ;

(b) not in good faith, but in the colourable exercise of the employer's right ;

XX XX XX XX

9. To show favouritism or partiality to one set of workers regardless of merit.

XX XX XX XX

13. Failure to implement award, settlement or agreement.”

In view of Section 25-T of the Industrial Disputes Act, 1947 the employer is prohibited from committing any unfair labour practice.

14. The workman in his written argument has further submitted that according to Rule 82(1) of the Orissa Industrial Disputes Rules, 1959 if any employer desires to retrench any workman employed in his Industrial Establishment who has been in continuous service for not less than one year under him, he shall give notice of such retrenchment as in Form S to the State Government, the Labour Commissioner, Local Conciliation Officer, Local Employment Exchange and Director of Employment, Orissa and such notice shall be served on that Government, the Labour Commissioner, Local Conciliation Officer, Local Employment Exchange and Director of Employment, Orissa by registered post in the following manner :—

(a) Where notice is given to the workman notice of retrenchment shall be sent within three days from the date on which notice is given to the workman.

(b) Where no notice is given to the workman and he is paid one month's wages in lieu thereof notice of retrenchment shall be sent within three days from the date on which such wages are paid.

(b) Where retrenchment is carried out under an agreement which specifies a date for the termination of service notice of retrenchment shall be sent to as to reach the State Government, Labour Commissioner, Local Conciliation Officer, Local Employment Exchange and Director of Employment, Orissa at least one month before such date :

Provided that if the date of termination of service agreed upon is within thirty days of the agreement the notice of retrenchment shall be sent to the State Government, the Labour Commissioner, Local Conciliation Officer, Local Employment Exchange and Director of Employment, Orissa within three days of the agreement.

Similar Provision has been made in Section 25-F(c) of the Industrial Disputes Act, 1947 and the same was not complied while retrenching him from service. It cannot be said that the submission made by the workman as stated above is without any merit.

15. Considering all the aforesaid facts I come to the conclusion that the retrenchment of the workman on the 19th January 2005 is unjustified and illegal. He is entitled to be reinstated in service with back wages from the 20th April 2004, i.e. the date before which the Award passed in I. D. Case No. 2/97 was required to be implemented. Accordingly both the issues are answered.

16. Hence ordered :

The action of the management of Puri Investigation Division, Puri which was merged with Chief Engineer, Project Planning and Formulation, Orissa, Bhubaneswar in retrenching the services of Shri Sadasiv Nayak with effect from the 19th January 2005 is unjustified and illegal. The workman Shri Nayak is entitled to be reinstated in service with full back wages from the 20th April 2004 till the date of actual payment. The management shall implement this Award within two months from the date of its publication in the official Gazette failing which the workman Shri Nayak will be entitled to get interest at the rate of 6% per annum on the back wages from the date on which it becomes due till the date of actual payment.

The reference is thus answered accordingly.

Dictated and corrected by me.

M. R. TRIPATHY
11-02-2009
Presiding Officer
Labour Court
Bhubaneswar.

M. R. TRIPATHY
11-02-2009
Presiding Officer
Labour Court
Bhubaneswar.

By order of the Governor

K. C. BASKE

Under-Secretary to Government