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## LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 25th March 2009

No. 3135—Ii/1(B)-74/2002(Pt.)-L. E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 27th February 2009 in Industrial Dispute Case No. 6 of 2002 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the Management of Khurda Central Co-operative Bank Limited, Khurda and its Workman Smt. Sujata Tripathy was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 6 OF 2002

Dated the 27th February 2009

*Present :*

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

*Between :*

The Management of Khurda Central Co-operative Bank Limited, Khurda . . First Party—Management

*And*

Its Workman Smt. Sujata Tripathy . . Second Party—Workman

*Appearances :*

Shri B. C. Bastia, Advocate . . For First party—Management

Shri S. Dash, Advocate . . Second Party—Workman

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 vide Order No. 1400—Ii-1(B)-74/2002-L.E., dated the 2nd February 2002 of the Labour & Employment Department, Orissa, Bhubaneswar for adjudication.

2. The schedule of reference is as follows :

> "Whether the action of the Secretary, Khurda Central Co-operative Bank Limited, Khurda by refusing employment to Smt. Sujata Tripathy with effect from the 15th September 1996 is legal and/or justified ? If not, to what relief Smt. Tripathy is entitled ?"

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

The workman namely Smt. Sujata Tripthy was appointed as a Typist on *ad hoc* basis with a consolidated salary of Rs. 910 per month, on daily wage basis for a period of 89 days under the management i.e. Khurda Central Co-operative Bank Ltd., Khurda. Thereafter her services were extended from time to time and in that regard last order was passed on the 27th January 1996. From the 17th June 1996 to 30th June 1996, she remained on leave on the ground of illness of her husband. Subsequently she herself became ill and extended her leave from the 1st July 1996 to 12th July 1996. After recovery from illness she joined in her post on the 13th July 1996 and continued to perform her duty till the 15th September 1996. Though she had worked from the 13th July 1996 to 15th September 1996 her salary and other allowances for the aforesaid period was not paid to her. On the 15th September 1996 she was not allowed to sign in the attendance register and thereby she was refused employment. She had continuously performed her duty for 240 days during the preceding 12 months from the date of refusal of employment. As such, the management was required to comply the provisions of Section 25-F of the Industrial Disputes Act, 1947. But actually Section 25-F of the Industrial Disputes Act, 1947, was not complied and therefore, according to her, the retrenchment is void *ab initio*. She approached the labour machinary for necessary relief. Accordingly a conciliation proceeding was initiated but the same ended in failure. Thereafter the matter was referred to this Court for adjudication.

4. The management in the written statement has submitted that the present reference is barred by law of limitation. The management has admitted the fact that the workman was appointed as Typist on *ad hoc* basis for a period of 89 days with a consolidated salary of Rs. 910 per month which was extended from time to time, but according to the management the appointment was purely temporary in nature. There was a clause in the appointment order that the same can be terminated at any time without assigning any reason therefore. The appointment was not made according to the recruitment rules approved by the Registrar of Co-operative Societies. Of course the appointment was extended from time to time but each time the appointment was given for 89 days on *ad hoc* basis on the same terms and conditions. She was not in service on the break days i.e. the 12th December 1994, 12th March 1995, 10th June 1995, 8th September 1995, 7th December 1995, etc. It is further

stated by the management that she had not filed any leave application for the period from the 17th June 1996 to 30th June 1996 and again from the 1st July 1996 to 12th July 1996 and she had not performed any duty from the 13th July 1996 to 15th September 1996. Her whereabouts was not known to the management from the 17th June 1996 till the 22nd September 1999 i.e. the date on which the representation was made by her was received. As she remained absent on her sweet will the question of not allowing her to sign in the attendance register on the 15th September 1996 does not arise. Due to her long absence and expiry of last spell of appointment for 89 days her service was automatically terminated and so the allegation made by her that she was refused employment on the 15th September 1996 is not correct. Further according to the management the workman is not entitled to get any relief in this case.

5. The following issues were settled :—

ISSUES

(*i*) Whether the action of the Secretary, Khurda Central Co-operative Bank Limited, Khurda by refusing employment to Smt. Sujata Tripathy with effect from the 15th September 1996 is legal and/or justified ?

(*ii*) If not, to what relief Smt. Tripathy is entitled ?

6. In support of her case, the workman examined herself as W. W. 1. The management has also examined two witnesses. M. W. 1 is the Manager and W. W. 2 is the Assistant Secretary of the management Bank.

7. *Issue Nos. (i)* and *(ii)* :—In this case earlier an Award was passed on 13th June 2005 which was challenged by both the parties in the Hon'ble Court vide W.P. (C) No. 13538 of 2005 and W.P. (C) No. 13490 of 2005. The management challenged the Award on the ground that the workman was engaged for a specific period and so she was not entitled to get the protection provided under Section 25-F of the Industrial Disputes Act, 1947 as it is covered under Section 2 (oo) (bb) of the Industrial Disputes Act, 1947. The workman challenged the Award so far as the back wages of Rs. 4,000 is concerned and prayed for full back wages. While both the writ petitions were pending before the Hon'ble Court, both the parties agreed for remand of the case to this Court for consideration of the above aspects within a stipulated period. Accordingly the Award passed on the 13th June 2005 by this Court was quashed and the matter was remanded back to this Court for re-consideration.

8. So the points that are required to be determined at present are :

(*1*) Whether the workman i.e. Smt. Sujata Tripathy was engaged for a specific period as such not entitled to the protection as provided under Section 25-F of the Industrial Disputes Act, 1947, as it is covered under Section 2(oo)(bb) of the Industrial Disputes Act, 1947 ?

(*2*) Whether Smt. Tripathy is entitled for reinstatement and to get full back wages ?

9. Admittedly the workman was appointed on *ad hoc* basis with a consolidated salary of Rs. 910 per month (on daily wage basis) for a period of 89 days and she joined in her duty on the 4th September 1994. It is also an admitted fact that her services were extended from time

to time for the same period and the last order in that regard was passed on the 27th January 1996. According to the workman she remained absent from the 17th June 1996 to the 30th June 1996 on the ground of illness of her husband and again from the 1st July 1996 to the 12th July 1996 on the ground of her own illness. It is further stated by her that she went to join in her duty with a medical certificate on the 13th July 1996. She has filed a copy of joining report marked as Ext. 7. It is stated by her that her joining report was accepted and she was allowed to work in the same seat and in the same capacity till the 15th September 1996 but her wages for the aforesaid period was not paid to her and so she requested the management time and again for payment of her wages. On the 15th September 1996 when she reported for duty the Branch Manager did not allow her to sign in the attendance register and told her not to work from that date.This fact is denied by the management. According to the management the workman was working till the 16th June 1996 and from the 17th June 1996 she remained absent from duty without any intimation. In order to prove the above fact the management examined the Branch Manager under whom the workman was working. The Branch Manager i.e. M.. W. 1 has stated that the workman remianed absent from the17th June 1996 without giving any intimation to him. About three months thereafter she again came to the office and approached him to join in her duty. Since there was no office order regarding her appointment after three months he refused employment to her. The workman has filed a copy of Memo. No. 2983, dated the 5th July 2000 signed by the Secretary of the management Bank marked as Ext. 12. In the said letter the Secretary had directed the Branch Manager to release the wages of the workman for the period from June, 1996 to September, 1996. The cross-examination of M. W. 2 reveals that the wages for the period from June to September, 1996 was not paid to the workman till the date of his examination i.e. the 6th May 2004. Now the question is if she had not worked for the months of June to September, 1996, why the Secretary gave a direction in the above manner to the Branch Manager ? It is explained by M. W. 2 that the Secretary had issued the letter in order to avoid dispute, but can such an explanation offered by M.W. 2 be accepted ? The workman was working in an institution which is a Bank and the Secretary of the Bank is a repsonsible officer. The Secretary is not expected to give a direction to the Branch Manager to disburse the salary of an employee who had actually not worked. In view of Ext. 2 it can be safely concluded that the workman had worked during the month of June to September, 1996. M. W. 1 during the time of his cross-examination has admitted that the workman had worked continuously under the management for two years but with breaks. The break days have been noted in the written statement which is one day between two periods of 89 days. So it can be safely concluded that during the preceding 12 months from the date of retrenchment she had worked for more than 240 days. Thus Section 25-F of the Industrial Disputes Act, 1947 is applicable to her case. But it is contended by the management that in view of Section 2 (oo)(bb) of the Industrial Disputes Act, 1947, Section 25-F of the Industrial Disputes Act, 1947 is not applicable in the case of the workman of the present case. According to the management the workman was employed on contract basis for a period of 89 days and the termination of service was made as a result of the non-renewal of the contract after its expiry and therefore the termination cannot be termed as retrenchment. The learned advocate for the management in support of his argument has relied on some decisions. The learned advocate for the workman argued that Section 2 (oo)(bb) of the Industrial Disputes Act, 1947 is not applicable in the present case and in support of his argument he has also relied on few decisions.

10. The learned advocate for the management has relied on the decision of the Apex Court in the case of State of Rajasthan and others *Vrs.* Rameshwar Lal Gahlot reported in 1996-I-LLJ Page 888 S. C. In the said case a person was appointed on January, 1988 for a period of 3 months or till regularly selected candidate assumes office. Appointment of such perosn came to be terminated on November, 1988 and a writ pertition was filed challenging the termination. A single Hon'ble Judge took the view that since he completed more than 240 days, the termination is in violation of Section 25-F of Industrial Disputes Act and directed the State to make fresh appointment of the employee. The Division Bench of Hon'ble High Court set aside the latter part of the order and directed the reinstatement with back wages. Hence the Civil Appeal by Special Leave was filed in the Apex Court. It was held that when the appointment is for a fixed period, unless there is finding that power under clause (bb) of Section 2(oo) was misused or vitiated by its *mala fide* exercise, it cannot be held that the termination is illegal. But in the present case the appointment was initially made for 89 days which was subsequently extended from time to time over a period of about 2 years.

The learned advocate for the management has relied on the decision of the Apex Court in the case of Range Forest Officer *Vrs*. S.T. Madimani reported in 2002-I-LLJ Page 1053 S.C. In the said case their Lordships have explained as to on whom the burden of proof lies to establish continuous employment for 240 days during the preceding 12 months from the date of termination. But that is not actually the main dispute before me in the present case.

Next he relied on the decision of Apex Court in the case of Batala Co-operative Sugar Mills Limited *Vrs.* Sowarar Singh reported in 2006-I-LLJ Page 12 SC. In that case the engagement of the workman was for a specific period and specific work. Therefore the termination of his service was not held as a retrenchment in view of Section 2 (oo)(bb) of the Industrial Disputes Act, 1947. Similarly in the case of Municipal Corporation, Ludhiana *Vrs.* Ram Pal reported in 2006-II-LLJ Page 235 S.C. It was held that the respondent-workman being appointed by the appellant on contract for a period of one year as a tubewell operator and his services were terminated for non-renewal of the contract. Such termination is not a retrenchment in view of Section 2(oo)(bb) of the Industrial Disputes Act, 1947, as such neither Section 25-F nor Section 25-G would apply.

The learned advocate for the management has also relied upon a decision of the Apex Court in the case of Secretary, State of Karnataka and others *Vrs.* Umadevi (3) and others reported in (2006)4 S.C.C. 1 which has been taken into consideration by another decision filed by him i.e. in the case of Haryana State Electronics Development Corporation Limited *Vrs*. Mamni reported in 2006-II-LLJ 744. Interestingly this decision has also been relied on by the learned advocate for the workman. The facts and circumstances of the present case is almost identical to the facts and circumstances of the aforesaid case i.e. Haryana State Electronics Development Corporation Limited *Vrs*. Mamni on which both parties have placed reliance. In that case the respondent was appointed for 89 days on each time between the 31st October 1990 to the 7th February 1992 in the post of Junior Technician on *ad hoc* basis. The post was purely temporary and her services were liable to be terminated without assigning any reason or notice. Her services were extended from time to time and in each of the offer of appointment similar terms and conditions were laid down.She remained absent for 19 days

during the period form the 20th January 1992 to the 7th February 1992 and a period of 11 days during the period from the 17th March 1992 to the 27th March 1992. Her services were terminated on the 7th August 1992. She raised an industrial dispute which was referred to the Labour Court for adjudication. While the matter stood thus the Appellant Corporation issued advertisement for filling up some posts on regular basis including the post of Junior Technician but the respondent however did not apply pursuant to the said advertisement. The Labour Court directed reinstatement of the respondent with back wages on the premise that she had completed 240 days of work during a period of twelve months immediately preceding the date of termination of her services and in view of the fact that the conditions laid down under Section 25-F of the Industrial Disputes Act, 1947 had not been complied with by the appellant. The Appellant Corporation being aggrieved filed a writ pertition before the Punjab and Haryana High Court and the writ petition was dismissed. Under the aforesaid circumstances, their Lordships of the Apex Court have held as follows :

> "9. The respondent was appointed from time to time. Her services used to be terminated on the expiry of 89 days on regular basis. However it is noticed that she used to be appointed after a gap of one or two days upon completion of each term. Such an action on the part of the appellant cannot be said to be *bona fide*. The High Court rejected the contention raised on behalf of the appellant herein stating".
>
> > ".....It is not possible for us to accept the aforesaid plea raised at the hands of the management on account of the fact that the factual position, which has not been disputed, reveals that the respondent workman was repeatedly engaged on 89 days basis. It is, therefore, clear that the intention of the management was not to engage the respondent workman for a specified period, as alleged, but was to defeat the right available to him under Section 25-F of the Act. The aforesaid practice at the hands of the petitioner management to employ the workman repeatedly after a notional break, clearly falls within the ambit and scope of unfair labour practice....."
>
> 10. A finding of fact was arrived at that her service were terminated on regular basis but she was re-appointed after a gap of one or two days. In that view of the matter, the Labour Court or the High Court cannot be said to have committed any illegality.
>
> 11. In this case the services of the respondent had been terminated on a regular basis and she had been re-appointed after a gap of one or two days. Such a course of action was adopted by the appellant with a view to defeat the object of the Act. Section 2(oo)(bb) of the Industrial Disputes Act, 1947, therefore, is not attracted in the instant case."

The learned advocate for the workman relied on a decision of Punjab and Haryana High Court in the case of Balbir Singh *Vrs*. Kurukshetra Central Co-operative Bank Limited and others reported in 1990 LLR 513 wherein it was held as follows :

> "8. In fact clause (bb), which is an exception, is to be so interpreted as to limit it to cases where the work itself has been accomplished and the agreement of hiring for a specific period was genuine. If the work continuous the non-renewal of the contract on the face of it has to be dubbed as *mala fide*. It would be fraud in law if it is interpreted otherwise."

The learned advocate for the workman has relied on few other decisions i.e. in the case of S. M. Nilajkar and others *Vrs*. Telecom, District Manager, Karnataka reported in 2003 LLR 470, D. K. Yadav *V*. J. M. A. Industries Limited reported in 1993 S.C.C.-3-259, Rameshwar Dayal *Vrs*. The Presiding Officer, Labour Court No. VI, Delhi and another reported in 2007 LLR 675, Jayabharat Printers and Publishers Private Limited *Vrs.* Labour Court, Koshikode and another reported in 1993 LLR 640 (Kerala High Court), Chief Administrator, Haryana Urban Development Authority, Manimajra and another *Vrs*. Presiding Officer, Labour Court, Rohtak and another reported in 1994 LLR 454 (Punjab & Haryana High Court). Perused the same. According to the settled position of law as enumerated by their Lordships in the aforesaid cases Section 2(oo)(bb) is in the nature of an exception and has to be construed strictly in favour of the workman as far as possible in letter and spirit. If the termination is meant to exploit an employee or to increase the bargaining power of the employer, then it has to be excluded from the ambit of clause (bb) and the defination of "retrenchment" has to be given full meaning. If the employer resorts to contractual employment as a device to simply take it out of the principle clause (oo) irrespective of the fact that the work continues or the nature of duties which the workman was performing are still inexistence, such contractual engagement will have to be tested on the anvil of fairness, propriety and *bona fide*. Section 2 (oo)(bb) has to be strictly interpreted and it is necessary to find out whether the letter of appointment is a camouflage to circumvent the provisions of the Industrial Disputes Act which confers the benefit of permanancy on workers who worked continuously for a period of more than 240 days.

11. In the present case there is material to say that the workman had completed 240 days of work in the preceding twelve months from the date of termination of service. Initially she was given appointment as a Typist for a period of 89 days which was subsequently extended from time to time after a gap of one day for a period of about two years. The work she was performing is still required in the Bank in which she was working. It is not that she was engaged for a particular purpose or till completion of a particular project. Though she was being appointed for 89 days, in view of the decision reported in 1993 LLR 640 in the case of Jayabjarat Printers and Publishers Private Limited as well as 1994 LLR 454 in the case of Chief Administrator, Haryana Urban Development Authority and 2006 LLR 667 in the case of Haryana State Electronics Development Corporation (*Supra*) it cannot be said that Section 2(oo)(bb) of the Industrial Disputes Act, 1947 is attracted in this case. Once it is said that Section 2(oo)(bb) of the Industrial Disputes Act, 1947 is not attracted then there will be no difficulty to say that her termination is illegal and unjustified.

12. Now the question is as to what relief the workman is entitled. As I have said earlier both the parties have relied on the decision of Hob'ble Supreme Court in the case of Haryana State Electronics Development Corporation *Vrs*. Mamni reported in 2006 LLR 667. The facts and circumstances of the present case is almost identical to the facts and circumstances of the said case. The only difference is that in the present case after the workman was retrenched no advertisement was published to fill up the post in which she was appointed whereas in the cited case after the workman was retrenched an advertisement was published to fill up the said post to which the workman did not apply. In the cited case the workman was appointed on *ad hoc* basis and her services were terminated as far back in the year 1992. In the

present case also the workman was appointed on *ad hoc* basis and her services were terminated in the year 1996. Admittedly in the present case the workman had remained absent for two periods like the workman in the cited case. In the present case the workman remianed silent almost for a period of 3 years after she was retrenched. In view of the above position, it is not open for me to take another view of the matter. In the cited case it was held by their Lordships that even if the workman is reinstated, her service cannot be regularised in view of the Constitutional Bench decision in the case of Secretary, State of Karnataka and others *Vrs.* Umadevi(3) and others reported in (2006)4 S.C.C. 1. After considering the facts and circumstances of the said case their Lordships have held that interest of justice would be sub-served if in place of reinstatement with back wages a lump sum amount is directed to be paid by way of compensation. Therefore in the present case instead of giving direction for reinstatement in service with back wages, I think it will be just and appropriate to direct the management to pay a lump sum amount as compensation to the workman. Accordingly I direct the management to pay a sum of Rs. 50,000 (Rupees fifty thousand) only besides her wages for the period she had actually worked for the months of June, 1996 to September 1996 if the same has not yet been paid to her. Both the issues are answered accordingly.

13. Hence ordered :

That the action of the management i.e. Secretary, Khurda Central Co-operative Bank Limited, Khurda by refusing employment to the workman i.e. Smt. Sujata Tripathy with effect from the 15th September 1996 is neither legal nor justified. The workman Smt. Tripathy is entitled to get a lump sum amount of Rs. 50,000 (Rupees fifty thousand) only in lieu of reinstatement in service with back wages. She is also entitled to get her wages for the period she had actually worked for the month of June, 1996 to September 1996 if the same has not yet been paid to her. The management shall pay the aforesaid amount to the workman within three months form the date of its publication in the Official Gazette or else the aforesaid amount shall carry interest at the rate of 6% (six per cent) per annum from the date on which it becomes due till the date of actual payment.

The reference is answered accordingly.

Dictated and corrected by me.

M. R. TRIPATHY
27-02-2009
Presiding Officer,
Labour Court,
Bhubaneswar.

M. R. TRIPATHY
27-02-2009
Presiding Officer,
Labour Court,
Bhubaneswar.

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

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