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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 10th June 2009

No. 5286—li/1(B)-22/2005(Pt.)-L. E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 18th May 2009 in I. D. Case No. 4 of 2005 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the Industrial Dispute between the management of M/s OSWAL Chemicals & Fertilisers Ltd., Paradeep/ M/s Indian Farmers Fertiliser Co-operative Ltd., At Musadia, Paradeep, Dist. Jagatsinghpur and their workman represented though the General Secretary, Paradeep Industrial Workers, Union, Qrs. No. M-11/74, Madhuban, Paradeep, Dist. Jagatsinghpur was referred to for adjudication is hereby published as in the Schedule below :—

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 4 OF 2005

Dated the 18th May 2009

Present :

Shri P. C. Mishra, o. s. J. s. (Sr. Branch)
Presiding Officer, Industrial Tribunal
Bhubaneswar .

Between :

- (1) The Management of .. First Party—Management No. 1
M/s OSWAL, Chemicals and
Fertilizers Ltd., Paradeep
- (2) M/s Indian Farmers Fertilizer .. First Party—Management No. 2
Co-operative Ltd.
At Musadia, Paradeep
Dist. Jagatsinghpur.

and

Their workman represented through. . Second Party—Workman
the General Secretary
Paradeep Industrial Workers' Union
Qrs. No. M-11/74, Madhuban, Paradeep
Dist. Jagatsinghpur.

Appearances :

Shri Sailesh Ku. Pattanaik, Sr. Marketing Officer For OSWAL	. . For the First Party—management
Shri Anil Ku. Sukla, Manager (P. & A.) for IFFCO.	. . For the First Party—management No. 2
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Shri Satyananda Behera, Authorised Representative.	. . For Second Party—workman

AWARD

The Government of Orissa in the Labour & Employment Department in exercise of powers conferred upon them by sub-section (5) of 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 dispute for adjudication vide their Order No.6285—li-1(B)- 22/2005-LE ., dated the 25-7- 2005.

“Whether the action of the management of M/s OSWAL Chemicals & Fertilizers Ltd., Musadia, Paradeep in refusing employment to Shri Biswanath Choudhury and 49 others from dt. 29-7-2004 (as per list), Shri Ajay Sahoo and 46 others with effect from dt. 3-8-2004 (as per list) and Shri Guru Charan Rout & 53 others with effect from dt. 7-8-2004 (as per list) is legal and/or justified ? If not, what relief they are entitled to ?”

2. The case of the second-party members represented through Paradeep Industrial Workers' Union (for short 'Workers Union') in brief is that they were all, numbering 151, working under the erstwhile management of M/s OSWAL Chemical and Fertilizers Ltd., Paradeep which was subsequently taken over by M/s Indian Farmers Fertilizer Co-operative Ltd. (IFFCO) by virtue of a Sale Agreement. It is stated that the workers were working under the management being designated as Rigger, Fitter, Welder, Operator, Helper' etc. and as they were not provided with the E. P. F. and E. S. I. benefit and other benefits as per the Factory Act, they formed a Union, namely, Paradeep Industrial Workers' Union to ventilate their grievance in a legitimate way. It is alleged that soon after formation of the Union, the management became vindictive towards its active members and in a phased manner refused employment to them violating the provisions of the Industrial Disputes Act. It is asserted in the claim statement that all the second-party members have completed more than 240 days of continuous work under the management and thus they were all entitled to the protection as envisaged under the Industrial Disputes Act. It is stated that out of the 151 workmen, 20 workmen had been forced to resign from service but subsequently they have been re-engaged and accordingly they are entitled to reinstatement in their previous service with retrospective effect with all back wages. According to the workmen, their refusal of employment being contrary to the provisions of the Industrial Disputes Act, they are all entitled to reinstatement in service with full back wages.

3. The management of M/s OSWAL Chemicals & Fertilizers Ltd. (for short 'OSWAL') filed its written statement stating therein *inter alia* that the Workers Union has no *locus standi* to raise the dispute and represent the workmen in the present proceeding as because at no point of time it had any activities in the establishment of the management nor had it represented the cause of the workers before the management. The specific stand of the management of OSWAL relating to the dispute is that out of the 151 workmen, 101 workmen by submitting their resignation have already left the service, 18 workmen are still continuing in the employment even after sale of the establishment to M/s IFFCO, 22 workmen having absconded, their whereabouts are the not known, 3 workmen, namely, Ashok Parida, Ramroop Yadav and Gurvind Singh were never employed under the management at any point of time, Sl. No. 87 and 137 represent the name of a single workman Khageswar Samal and the rest 6 workmen were working with a Contractor M/s D. K. Enterprises and they were not on the rolls of the management of OSWAL. Further to the aforesaid stand, it is stated by the management of OSWAL that out of the 101 workmen, who after their resignation have left the service, 59 workmen had collected their dues towards full and final settlement, 37 resigned workmen did not turn-up to collect their dues and the remaining 5 workmen even after submitting their resignation did not turn-up to settle their accounts. According to the management of OSWAL, on the face of the above, the allegation of the Union there the management refused employment to the workmen is nothing but an attempt to drag the management into unnecessary litigation. It is further stated in the written statement that except those workmen who continued to work with M/s OSWAL and are now continuing under IFFCO after sale of the Plant w. e. f. dt. 1-10-2005, none of the workmen ever approached the management for their re-employment as long as the management was owning the Plant at Paradeep up to dt. 30-9-2005 and as such, it is completely false to allege that they were ever refused employment. It is stated that since M/s OSWAL has already sold its unit to M/s IFFCO under certain terms and conditons of sale and M/s IFFCO took over the unit w. e. f. dt. 1-10-2005, the members of the Union are not entitled to any relief in the present proceeding. Disputing the averments of the claim statement, it is stated by the management that it had never violated the labour laws and as such the allegations made in that regard are all false. With the aforesaid assertions, the management has prayed to answer the reference in the negative as against the workmen.

4. The management of IFFCO, who has been impleaded as a party to the present proceeding entered appearance and contested the case. It has asserted in its written statement that the Union, which has no *locus standi* to represent the workmen, with an ulterior motive has foisted this false claim with a view to harass the management. The specific case of the management of IFFCO is that it has purchased the assets of M/s OSWAL on as is where is basis under certain terms and conditions stipulated in the Sale Agreement and as such, it is neither the employer nor the principal employer in respect of the workmen and for that reason it is not liable to accept any liability of the workmen and the liability, if any, shall be solely on M/s OSWAL. Referring to Clause 2.3.3 of the Sale Agreement it is stated in the written statement that M/s OSWAL having agreed to shoulder any liability arising out of these or any other pending or future litigation relating to the period prior to dt. 1-10-2005, the management of IFFCO is discharged from the liability of the present dispute which arose prior to dt. 1-10-2005. Further, referring to Clause 11 of the Sale Agreement, dated 13-3-2006, it is stated that the management of IFFCO has already absorbed the employees of M/s OSWAL, who were on the rolls as on dt. 30-9-2005. With regard to the dispute, it is stated in the written statement of M/s IFFCO that as per the information and records received from M/s OSWAL, out of the 151 workmen alleged to have been refused employment, 18

workmen are continuing even as on date , 22 of them have absconded and their whereabouts are not known, 3 of them were not on the rolls of M/s OSWAL and there is a double entry in respect of workman Khageswar Samal at Sl. Nos. 87 and 137, 6 workmen were working with the contractor, M/s D. K. Entreprises and were not on the rolls of M/s OSWAL and 101 workmen had submitted their resignation and voluntarily left the services of OSWAL. Further it is stated that out of the 101 workmen, who had resigned from service, 59 have already received their dues towards full and final settlement, 37 persons, whose accounts have been finalised did not turn-up to receive the same and the other 5 workmen after submitting their resignation did not turn-up to settle their accounts with M/s OSWAL and as such, the allegation of the Union that the management of M/s OSWAL has refused them employment is false, baseless and connected with *mala fide* intention to gain over the dispute and get double benefit of further employment and back wages. With the above averments, the management of M/s IFFCO has prayed to pass an award sissentitling the workers to any relief in the present proceeding.

5. In their rejoinders to the written statements filed by the Union, it is asserted that the workmen having rendered services under the management for more than 240 days prior to the dates of their termination by way of refusal of employment and further since the date of their termination they are not gainfully employed elsewhere, they are entitled to reinstatement in service with full back wages and other benefits with continuity of service.

6. Basing on the pleadings of the parties, the following two issues have been framed—

ISSUES

- (1) Whether the reference is maintainable ?
- (2) Whether the action of the management of M/s OSWAL Chemicals & Fertilizers Ltd., Musadia, Paradeep in refusing employment to Shri Biswanath Choudhury and 49 others from dt. 29-7-2004 (as per list), Shri Ajay Sahoo and 46 others with effect from dt. 3-8-2004 (as per list) (and Shri Guru Charan Rout and 53 others with effect from dt.7-8-2004 (as per list) is legal and/or justified ? If not, what relief they are entitled to ?

7. In order to substantiate their respective stand, the Workers Union besides examining nine witnesses have filed and proved documents which have been marked as Exts. 1 to 27. The Management of M/s OSWAL though filed affidavit evidence of two witnesses but despite opportunity did not produce them for cross-examination for which their testimony submitted in the form of affidavit carries no evidenciary value. The Management of M/s IFFCO cited one witness on its behalf and got mark a document which has been marked as Ext. A.

Issue No. 2

8. As held by the Hon'ble Apex Court in a catena of decisions onus lies on the workmen to prove that they had rendered continuous service for 240 days preceding the date of their termination so as to claim the benefit of the provisions of Section 25-F of the Industrial Disputes Act. Therefore, it is to be considered first as to whether the workmen have led cogent evidence to substantiate their stand that they had all completed more than 240 days of continuous service under the management preceding the date of their so-called refusal of employment. In this connection, it is seen that the union has taken the stand of refusal of employment to the workmen in three phases i. e., on dt. 29-7-2004, dt. 3-8-2004 and

dt.7-8-2004. Though the union has alleged that all its members have been refused employment, yet it has produced documentary evidence in support of eight of those workmen and so also examined them in the dispute. All the witnesses i. e. W. W. Nos. 1 to 8 examined on behalf of the union have categorically stated in their Examination-in-Chief that they all entered into job of M/s OSWAL in the year 2000 in different posts and while continuing so the management refused employment to workmen Ajay Kumar Sahoo, Alekh Kumar Das and Niranjan Thatoi on dt. 3-8-2004 and again to workmen Gurucharan Rout, Prafulla Kumar Barik, Prafulla Biswal, Himanshu Ranjan Mohanty and Basant Jena on dt. 7-8-2004 without assigning any reason nor paying them any retrenchment benefit as provided under the Industrial Disputes Act. W. Ws.1 to 8 have proved the copies of their appointment letters which have been marked as Exts. 2, 5, 10, 13, 15, 18, 22 and 25 respectively. Added to the above, W. W. No. 1 Ajay Kumar Sahoo has proved Ext. 1 the identity card issue in his favour, Ext. 3, intimation to him regarding his selection in the interview and Ext. 4, the Provident Fund slips. W. W. No.2 Alekh Kumar Das has proved Exts. 6 and 7. W. W. No. 3 Gurucharan Rout proved Ext. 11, W. W. No. 4 Prafulla Kumar Barik has proved Exts.12 and 14, W. W. No. 5 Niranjan Thatoi has proved Exts. 16 and 17, W. W. No. 6 Prafulla Biswal has proved Exts. 19, 20 and 21, W. W. No. 7 Himanshu Ranjan Mohanty has proved Exts. 23 and 24 and W. W. No. 8 Basant Jena has proved Exts. 26 and 27. The oral evidence of W. W. Nos. 1 to 8 read with the documentary evidence, as referred to above, clearly indicates that they were all working under the management of OSWAL being appointed under different posts on regular basis and thus it can be said that the burden is well discharged by the union in establishing the fact of rendering continuous service under the management in respect of its members named above (W. W. Nos. 1 to 8). As regards the other members of the Union, though W. W. Nos. 1 to 8 have stated that they were also working with them and faced the same consequence as of them but in absence of any documentary proof that cannot be regarded as sufficient evidence to arrive at the same conclusion like that of W. W. Nos. 1 to 8. Hence, it is held that excepting the workmen named above (W. W. Nos.1 to 8) the Union had failed to establish its case in respect of the other members in the matter of their rendering continuous service under the management of OSWAL as provided under Section 25-B of the Industrial Disputes Act.

9. It was contended on behalf of the Management that workmen Prafulla Kumar Barik, Himanshu Ranjan Mohanty and Prafulla Biswal having absconded from their job voluntarily and workmen Ajay Kumar Sahoo, Niranjan Thatoi, A. K. Das , G. C. Rout and Basant Jena on their submitting resignation having not turned-up to receive their full and final settlement, they are all not entitled to the benefits claimed. Objecting to the aforesaid contention it was contended on behalf of the workmen that except taking the aforesaid stand the management has neither produced any oral nor documentary evidence in support of its contention and as such, the workmen are entitled to the reliefs claimed.

The record does not reveal that at any point of time the workmen alleged to have voluntarily left the job were noticed to resume their duties nor the workmen alleged to have tendered their resignation and did not come thereafter were intimated in writing to collect their dues owing to acceptance of their resignation. The Management of OSWAL, as also, the Management of IFFCO have taken no steps to produce the so-called resignation letters offered by the workmen named above. Only a statement, Ext. A is filed on behalf of M/s IFFCO showing therein the names of some workmen out of the 151 named in the reference, who are presently working with M/s IFFCO. In absence of any documentary proof it can safely be said that on presumption only the Management struck-off the names of the aforesaid

workmen from its Roll and consequently to cover-up its lacuna came forward with the plea of voluntary abandonment of job by some of the workmen and intentional avoidance to receive their full and final outstanding dues by the remaining workmen. In the context, it is appropriate to refer to the decision of the Hon'ble Supreme Court in the case of D. K. Yadav Vrs. J. M. A. Industries, reported in 1993 (67) FLR-111, wherein their Lordships have held that "Abandonment or Relinquishment of service is always a question of intention and normally such an intention cannot be attributed to the workman without adequate evidence under law and holding of an inquiry is imperative to ascertain the intention of the workman". To the same effect there is yet another decision of the Hon'ble Apex Court in the case of M/s Nicks (India) Tools Vrs. Ram Surat and another, reported in 2004 (103) FLR-102, wherein their Lordships have held that "the burden of proving that the workman has voluntarily left the services is upon the management". Our own Hon'ble High Court in the case of Divisional Manager, OFDC Ltd., Vrs. Kanista Bisoi and another, reported in 2004 (Supp.)OLR 694 have also held that "to constitute 'abandonment of service' there must be total or complete giving-up duties and/or expression of the intention not to serve any further. This being a question of fact, onus lies on the management, which took such a plea to prove with cogent evidence that infact the workman had abandoned his service".

On the face of the short comings indicated above and in view of the observations of the Hon'ble Apex Court as also of our own Hon'ble High Court, the argument advanced on behalf of the management has no leg to stand and accordingly it is held that the workmen named above have all been refused employment on dt. 3-8-2004 and dt. 7-8 2004. Since the action of the Management amounts to termination of their services as per the provisions of Section 2 (oo) of the Industrial Disputes Act, it was the boundant duty of the management to comply with the provisions of Section 25-F of the Industrial Disputes Act and non-compliance thereof, which is an admitted fact, renders its action to be illegal as well as unjustified.

10. Now coming to the question of relief to which these workmen are entitled, it was argued on behalf of M/s IFFCO that since it has purchased the company under a Sale Agreement and as per the terms and conditions thereof it is in no way liable to bear the extra burden, the Management of OSWAL be held responsible for any act or omisson which occurred prior to taking over of the factory by M/s IFFCO. Be that as it may, when the Management of IFFCO has purchased the assets and liability of M/s OSWAL and the workmen, who were regular workmen of M/s OSWAL, for no fault of theirs have suffered termination of their services, it is quite unreasonable to deny them employment under the management of IFFCO on the pretext that the erstwhile management M/s OSWAL is no more there to absorb the workmen, which is also contrary to the provisions of the Industrial Disputes Atc. Hence, workmen S/Shri Ajay Kumar Sahoo, Niranjana Thatoi, Alekh Kumar Das, Guru Charan Rout, Basant Jena, Prafulla Kumar Barik, Himansu Ranjan Mohanty and Prafulla Biswal are held entitled to reinstatement in service under the Management of IFFCO on the same terms and conditions of employment of other workmen, who were absorbed by the Management of M/s IFFCO on its taking over of the factory from M/s OSWAL. Since nothing is there in the evidence of the workmen that after their termination from service they have not been gainfully employed elsewhere, they are held not entitled to any back wages for the period.

11. *Issue No. 1*—Though maintainability of the reference is challenged by the Management on the ground that the union which has espoused the cause of the workmen was not in existence during the period and that the Government without considering that

aspect has made the present reference, yet no evidence was adduced by either Management to substantiate the aforesaid stand. It however, appears from record that the union participated in the conciliation of the dispute in which the Management of M/s OSWAL being noticed expressed its views in writing and on failure of the conciliation the dispute culminated into the present reference. In the circumstance therefore, it is held that the reference of the dispute is maintainable.

12. In the net result, therefore, it is held that the action of the Management in refusing employment to workmen S/ Shri Ajay Kumar Sahoo, Niranjana Thatoi, Alekh Kumar Das, Guru Charan Rout, Basant Jena, Prafulla Kumar Barik, Himanshu Ranjan Mohanty and Prafulla Biswal, w. e. f. the 3-8-2004 and the 7-8-2004 is neither legal nor justified. The OSWAL being no more in existence and in the meantime it has been taken over by the management of M/s IFFCO, the IFFCO is directed to reinstate the workmen, named above in its organisation. The workmen are however, held not entitled to any back wages for the period they remained unemployed. As discussed above, all other workmen excepting the eight, named above, are not entitled to any relief in the present proceeding.

The reference is answered accordingly.

Dictated and corrected by me.

P. C. MISHRA
18-5-2009
Presiding Officer
Industrial Tribunal, Bhubaneswar

P. C. MISHRA
18-5-2009
Presiding Office
Industrial Tribunal, Bhubaneswar

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