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## LABOUR & EMPLOYMENT DEPARTMENT

### NOTIFICATION

The 30th August 2010

No. 7326-li/1(BH)-12/2000-L.E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 7th August 2010 in I.D. Case No. 213 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the Industrial Dispute between the Management of Deputy Director, Horticulture, Baripada, Takatpur, Mayurbhanj and its workman Shri Khirod Naik, was referred to for adjudication is hereby published as in the Schedule below :

#### SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 213 OF 2008

Dated the 7th August 2010

Present :

Shri Raghubir Dash, O.S.J.S. (Sr. Branch),  
Presiding Officer, Industrial Tribunal,  
Bhubaneswar.

Between :

The Management of Deputy Director,  
Horticulture, Baripada. .. First-party Management  
Takatpur, Mayurbhanj.

And

Their Workman Shri Khirod Naik, .. Second-party Workman  
At/P.O. Sagunabasa, Via Laxmiposi,  
Dist. Mayurbhanj.

Appearances :

None .. For the First-party Management  

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Shri S. Mishra, Advocate .. For the Second-party Workman

## AWARD

This is a reference of an industrial dispute made by the Government of Orissa in Labour & Employment Department vide their Order No. 6370–li/1 (BH)-12/2000-L.E., dated the 15th May 2000 which was originally referred to the Presiding Officer, Labour Court, Bhubaneswar for adjudication but subsequently transferred to this Tribunal for adjudication vide Labour & Employment Department's Order No. 4138–li/21-32/2007-L.E., dated the 4th April 2008. The Schedule of reference runs as follows :

“Whether the termination of services of Shri Khirod Naik by the Management of Deputy Director, Horticulture, Baripada with effect from 11-8-1997 is legal and/or justified ? If not, what relief Shri Naik is entitled to ?”

2. The case of the second party-workman, in brief, is that has was employed by the first party management as a Choukidar-*cum*-attendant-*cum*-Nursery Worker in the scale of pay of Rs. 750-12-870-EB-14-940 per month with usual allowances vide Order No. 3610, dt. 11-8-1994. From 11-8-1994 till 1-9-1998 he continued as such. Thereafter, his services were terminated illegally without complying with the provisions laid down under Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as “the Act”). Nor any disciplinary proceeding was initiated against him before termination of his services. His termination being contrary to the provisions laid down under the Act, the workman claims reinstatement in service with full back wages.

Here, it may be noted that though the workman in his claim statement has stated that he continued in the said job till 1-9-1998 but in the schedule of the reference under consideration this Tribunal is required to decide whether the termination of services of the workman with effect from 11-8-1997 is legal and justified.

3. In the written statement the first party has admitted that the second party was engaged in different capacities in different spells but he had never completed 240 days of work in any of the years during which he was so engaged. First he was engaged as an Attendant for 44 days starting from 11-8-1994 and he was continued as such till 20-6-1995, each time giving extension of 44 days with one day break between every consecutive two spells. During that period he was in the scale of pay of Rs. 750-12-870-EB-14-940 per month with usual allowances. From 21-6-1995 the workman suddenly disappeared and did not report for duties. After seven months, on 21-1-1996 he made an application to reinstate him. Subsequently, on 27-1-1996 he made another prayer for his reinstatement. But the management could not reinstate him, because of the instructions of the Government not to engage outside employees on *ad hoc*/casual basis. Thereafter, the second party agreed to work as a casual labourer on daily wage basis and, accordingly, he was engaged as a casual labourer during the period from 29-1-1996 to 9-6-1996. Thereafter, the second party made an application to appoint him in the vacant post of Choukidar and, accordingly, he was appointed as a Choukidar for 44 days from 13-6-1996 to 26-7-1996. That appointment ceased to operate after joining of the regular Choukidar. Thereafter, he was engaged as a casual labourer from 30-12-1996 to 30-3-1997 on daily wage basis. Then he did not report for duties for few months. Again he was engaged on daily wage basis with effect from 28-7-1997 and continued till 10-8-1997. Thereafter, he did never report for duties.

4. In terms of the reference, the following issues have been framed :—

## ISSUES

- (1) Whether the termination of services of Shri Khirod Naik by the management of Deputy Director, Horticulture, Baripada with effect from 11-8-1997 is legal and/or justified ?
- (2) If not, to what relief Shri Naik is entitled ?

5. The workman has examined himself as W. W. No. 1. He has also exhibited some documents to substantiate his stand. On behalf of the management one Deputy Director of Horticulture has been examined as M. W. No. 1 who has also exhibited some documents to prove the plea taken by the management.

Here, it is pertinent to mention that on 21-1-2009 an Award was passed by this Tribunal but the same has been quashed by the Hon'ble High Court in W. W. (C) No. 6343 of 2009 vide Order No. 9, dated 21-1-2010 and the matter has been remitted back to this Tribunal for fresh adjudication with directions that while answering the reference the Tribunal should keep in view some observations made by the Hon'ble Court in the said order.

#### FINDINGS

6. *Issue No. 1*—In the claim statement the workman has taken the stand that his services were terminated with effect from 1-9-1998 whereas according to the reference the legality and/or justification of termination of services of the workman w. e. f. 11-8-1997 is to be decided by this Tribunal.

The workman has deposed to the effect that he had been working as a “Choukidar-cum-Attendant” in the office of the Deputy Director, Horticulture, Baripada from 11-8-1994 till his services were terminated on 11-8-1997. To prove this plea he has exhibited xerox copy of some orders which are marked Exts. 1 to 1/h. Copies of some of these orders have also been exhibited on behalf of the management. To be specific, copy of the orders marked Exts. 1/b to 1/f have also been marked on behalf of the management as Exts. A to A/5, respectively. I have examined all the documents exhibited by both the parties to ascertain the length of workman's employment and to find out the breaks, if any, in between 11-8-1994 and 11-8-1997 (the period of employment as claimed by the workman) and it is ascertained as follows :—

- (i) From 11-8-1994 to 20-6-1995 the workman used to be appointed for 44 days from time to time to work as an Attendant in the scale of pay of Rs. 750-12-870-EB-14-940 with usual allowances. During this period he was in continuous employment and he was engaged for 313 days. Appointment orders in this respect have been proved by the workman and marked as Exts. 1 to 1/f. There is no pleading by the workman as to what happened after the expiry of the term of 44 days of appointment vide the last order marked Ext. 1/f but on behalf of the management it is pleaded that from 21-6-1995 the workman suddenly disappeared from his services without giving any intimation to the employer. Though this discontinuance w.e.f. 21-6-1995 might amount to termination of services of the workman but that is not the subject matter of the dispute raised in the present reference.
- (ii) After that the workman was employed on daily wage basis from 29-1-1996 to 8-6-1996 (vide Ext. 2). Though some short breaks are there, the workman is deemed to have worked for 132 days during this period.
- (iii) Thereafter he was engaged as a Choukidar for 44 days, or till joining of the regular Choukidar whichever would be earlier (vide order dated 13-6-1996 marked Ext. 1/h) in the scale of pay of Rs. 750-12-870-EB-14-940 with usual allowances. However, Ext. 1/g reveals that the order of appointment was ceased to operate w.e.f. 5-7-1996. Thus, it is found that the workman was employed as a Choukidar for the period from 13-6-1996 to 5-7-1996. However, the workman has not taken any specific plea on this appointment and its termination.

- (iv) The workman further worked on daily wage basis under the same management from 5-1-1997 to 30-3-1997 and thereafter from 28-7-1997 to 10-8-1997. The total number of days worked during these two spells is 99 days.

7. According to the management, there was departmental instruction not to engage any outsider on *ad hoc*/casual basis for which the representation made by the second party for his further appointment for 44 days could not be allowed and for that the second party made a prayer to engage him as a casual labourer on daily wage basis and accordingly, he was so engaged during the period from 29-1-1996 to 9-6-1996. Thereafter, it is pleaded, on the application of the second party he was appointed in the vacant post of Choukidar (owing to transfer of the regular Choukidar) in which post he worked from 13-6-1996 to 26-7-1996 i. e., till the regular Choukidar joined in the post. It is further pleaded that in between 30-3-1997 and 28-7-1997 the workman was not given any employment as his whereabouts could not be ascertained. It is further pleaded that with effect from 11-8-1997, i. e., the alleged date of illegal retrenchment, the workman did not turn-up for work and his whereabouts were also not known to the management. There is no pleading from the side of the workman to explain the aforesaid interruptions for the periods from 27-7-1996 to 4-1-1997 and from 31-3-1997 to 27-7-1997.

8. From the materials available on record, this Tribunal finds that the workman was engaged from time to time on daily wage basis w.e.f. 29-1-1996 till the alleged termination of services effected on 11-8-1997 except for a short term from 13-6-1996 to 26-7-1996 during which he worked as a Choukidar in the scale of pay of Rs. 750-12-870-EB-14-940. He did not work in any capacity from 27-7-1996 to 4-1-1997. The workman does not plead specifically as to why he was not engaged during this period. In the absence of pleadings it cannot be said that during the period from 27-7-1996 to 4-1-1997 the workman was denied employment. The same presumption is to be taken in respect of the non-employment of the workman from 31-3-1997 to 27-7-1997.

Thus, it is found that the workman was not in continuous service during the entire period of his engagement on daily wage basis. It is not shown by the workman that the interruptions were on account of sickness or authorised leave or for any other reason which was not due to any fault on his part. On the other hand, it transpires from the pleadings of the management that it was the workman who did not report for duties for which he could not be engaged during the periods of interruption. So, it can be presumed that job was available but the workman was not available to be engaged by the management. The workman having not raised any dispute in respect of these two spells of non-engagement the plea taken by the management is to be accepted.

9. So far the alleged illegal termination of services w.e.f. 11-8-1997 is concerned the plea taken by the management is that the workman did not report for duties and voluntarily remained absent. However, it is not pleaded by the management that it had issued notice to the workman to report for duties soon after he was found remaining absent from duties. Therefore, there may be a presumption in favour of the workman that he was denied employment w.e.f. 11-8-1997 which amounts to termination of services.

10. Admittedly, the provisions laid down u/s 25-F of the Act have not been complied with by the management. Therefore, while going to decide the legality of the termination of services it is to be decided as to whether the workman, during a period of 12 calendar months preceding the date of alleged termination of services, had actually worked under the employer for not less than 240 days. It is found that during the period of 12 calendar months preceding 10-8-1997 the workman had worked for 99 days only. Even the documents exhibited by the workman establish this factual position.

11. The workman has relied on a certificate granted by the Deputy Director of Horticulture, Baripada which is marked as Ext. 3. In this certificate it is mentioned that the workman was working as an Attendant-*cum*-Choukidar from 11-8-1994 to 11-8-1997 continuously on monthly wages of Rs. 750. Putting much emphasis on this certificate it is argued that the workman was in continuous service for three years and therefore, the retrenchment in contravention of Section 25-F of the Act is illegal. No reliance can be placed on this certificate for the reasons to follow. First of all, the facts mentioned in the certificate are completely inconsistent with the facts mentioned in Ext. 2 on which the workman himself has placed reliance. Ext. 2 clearly reflects that the workman used to be engaged on daily wage basis, initially @ Rs. 25 per day and subsequently @ Rs. 30 per day. While in the certificate it is mentioned that the workman was working as an Attendant-*cum*-Choukidar, Exts. 1 to 1/f reflect that he was working as an Attendant. Nowhere in these exhibits it is mentioned that the workman was being engaged as an Attendant-*cum*-Choukidar. Secondly, the certificate has been filed at a belated stage. Though it was purportedly issued on 31-8-1997 the workman did not bring it on record till evidence of both sides was closed and an Award was passed by this Tribunal on 21-1-2009. The certificate was filed before this Tribunal only after the Award dated 21-1-2009 was set aside by the Hon'ble High Court with a direction for fresh adjudication. Thirdly, a document like Ext. 3, i.e., the certificate can be created at any point of time as it does not bear any office letter/memo number and date.

12. Thus, on scrutiny of the materials available on record it is found that the workman was engaged as an Attendant from 11-8-1994 to 20-6-1995 with scale of pay of Rs. 750-12-870-EB-14-940 and thereafter he was not engaged in any capacity for about seven months. According to the management, the workman disappeared from his service from 21-6-1995 without any intimation to his employer. The workman has not taken any plea on the aforesaid discontinuation. He has not raised any dispute on that discontinuation. Therefore, the plea of the management that he had suddenly disappeared from service is to be accepted. After that disengagement he was again employed on daily wage basis from 29-1-1996 to 8-6-1996. In that spell he worked for 132 days. Thereafter he was appointed as a Choukidar from 13-6-1996 to 5-7-1996. This appointment was against the vacancy of the post of Watchman and it was in the scale of pay of Rs. 750-12-870-EB-14-940. Thereafter, the workman was not engaged from 26-7-1996 till 5-1-1997. Though it amounted to discontinuation in his employment the workman did not raise any dispute thereon. From 5-2-1997 to 30-3-1997 he was again engaged on daily wage basis. Again there was discontinuation from 31-3-1997 to 27-7-1997. Also no dispute is raised by the workman on this disengagement. According to the management, the workman was not available to be employed on daily wage basis during the periods of the aforesaid disengagement. In the absence of any pleading and evidence from the side of the workman the plea taken by the management is to be accepted. These disengagements cannot be treated as artificial disengagements effected by the management in order to deprive the workman of the benefit of Section 25-F of the Act. If the periods in the two spells of disengagement are not counted as duty period, then the workman cannot be said to have been engaged by the management continuously from 11-8-1994 to 10-8-1997.

13. The workman is found to have worked continuously for 313 days as an Attendant against a permanent post. He used to get monthly salary with allowances. When he was disengaged from that post w.e.f. 21-6-1995 he did not raise any dispute. Therefore, in my considered view that term of employment cannot be tagged with his subsequent engagement which is on daily wage basis. No doubt, as a daily wage worker he was being engaged from time to time during the period from 29-1-1996 to 10-8-1997, except for a short period during which he was engaged as a Choukidar from 13-6-1996 to 5-7-1996 getting monthly salary with allowances. It is found that there were

intermittent breaks and the periods of disengagement on daily wage basis cannot be counted as duty period in the absence of pleadings as well as evidence to the effect that he was illegally refused employment. Once the period of intermittent disengagement are not counted as duty period the workman cannot be deemed to have been in continuous service for the period from 11-8-1994 to 10-8-1997 to compute the length of his continuous service even in terms of Section 25-B (i) of the Act.

14. If the workman is deemed to have worked continuously from 29-1-1996 (the date of his engagement on daily wage basis) till 10-8-1997 (the date of termination of service) then the disengagement can be said to be illegal because the management has not shown to have taken any action against the workman on his allegedly remaining unauthorisedly absent from duties from 11-8-1997. But, in the facts and circumstances of the case, the workman is not found to have completed 240 days of engagement in 12 calendar months preceding the date of disengagement and therefore, the termination of his service in contravention of the provisions of Section 25-F of the Act cannot be said to be illegal.

However, it is found that the disengagement of the workman w.e.f. 11-8-1997 was effected by the management even though work was available for the workman to be engaged on daily wage basis. Even though the management takes the plea that the workman voluntarily remained absent with effect from the said date, the same cannot be accepted, in as much as the management has failed to show that any notice was served on the workman after the alleged voluntary absence from duties. Therefore, it amounts to termination of his service which, though held to be legal, is unjustified.

15. *Issue No. 2*—Since the termination is not justified the question of granting relief in favour of the workman is to be decided. In the facts and circumstances, the workman is not found entitled to get back wages though he may be directed to be reinstated on daily wage basis provided the management is still in need of engaging labourers on daily wage basis and, if not, he may be paid compensation for such unjustified retrenchment. In my considered opinion the amount for just compensation would be Rs. 10,000.

16. In the result, the termination of services of the workman w.e.f. 11-8-1997 is held to be legal but unjustified and the workman is entitled to be reinstated on daily wage basis if the management is still engaging labourers on daily wage basis to execute its work. In the event, such reinstatement is not possible, then the workman be paid compensation of Rs. 10,000 (Rupees ten thousand only).

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH  
7-8-2010  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

RAGHUBIR DASH  
7-8-2010  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

By order of the Governor

P. K. PANDA

Under-Secretary to Government