The Orissa Gazette

EXTRAORDINARY

PUBLISHED BY AUTHORITY

No. 1707 CUTTACK, MONDAY, OCTOBER 18, 2010 / ASWINA 26, 1932

LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 21st September 2010

No. 8018–li/1(B)-53/2005-LE.–In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 24th July 2010 in I. D. Case No. 22 of 2006 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the Management of O. S. F. C., Cuttack represented through its Managing Director, General Manager (H.R.D.), Branch Manager, O. S. F. C., Paradeep Branch, Zonal In-charge, O. S. F. C., Kendrapara Zone, Kendrapara and its workman Shri Alekh Chandra Behera, ex-Security Assistant was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No.22 OF 2006

Dated the 24th July 2010

Present :

Shri S. K. Dash,
Presiding Officer,
Labour Court, Bhubaneswar.

Between :

The Management of O. S. F. C., Cuttack represented through its Managing Director, General Manager (H. R. D.), Branch Manager, O. S. F. C., Paradeep Branch, Zonal In-charge, O. S. F. C., Kendrapara Zone, Kendrapara. . . First party–Management

And

Its Workman Shri Alekh Chandra Behera, Ex-Security Assistant. . . Second party–Workman

Appearances :

For the First party–Management	. .	Shri B. K. Sahoo, Advocate
For the Second party–Workman	. .	Shri Susanta Dash, Advocate Shri B. B. Mohanty, Advocate

A W A R D

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 matter in dispute to this Court vide Order No.1475– Ii/I (B)-53/-2005-LE., Dt. 13-2-2006 of the Labour & Employment Department, Bhubaneswar for adjudication.

2. The terms of reference is as follows :

> "Whether the discharge from service of Shri Alekh Chandra Behera, Security Assistant with effect from 18-7- 2002 by the management of Orissa State Financial Corporation, Cuttack is legal and/or justified ? If not, to what relief the workman is entitled ?"

3. The case of the workman in brief is that he was appointed as a Security Assistant under the management vide order, Dt. 18/19-2-1981 on a consolidated salary of Rs.250 per month and accordingly he joined on 19-1-1981. He was working in the said organisation to the best satisfaction of the authority and was transferred to different places of its branches of the management. While working at Paradeep Branch he was transferred to Bhawanipatna Branch. He joined at Bhawanipatna on 1-2-1982. While posting at Bhawanipatna his service was terminated illegally and on the instruction of the Hon'ble High Court in O. J. C. No. 534 of 1991, Dt. 6-4-1993 the workman was reinstated in service at the rate of minimum wages of Rs. 750 per month. He has represented the management for regularisation of his service and when the management did not hear, he approached the Hon'ble High Court in O. J. C. No. 4401 of 1995 and the management was directed by the Hon'ble Court to consider the representation for regularisation of service of the workman as and when vacancy available in regular post. But instead of regularising of his service, the management transferred him frequently from one place to another. He was transferred to Paradeep Branch of the management and he was posted to guard the seized unit of M/s Baladevjew Power Loom Weaving Co-operative Society Ltd. at Kendrapara and was drawing wages at the rate of Rs. 1125 per month after reporting to duty. He was directed to work along with his two other colleagues. On 2-6-2002 while performing his duty, experienced severe pain in his knee and could not able to stand properly. He was shifted to his home with such pain. He was unable to resume his duty on 3-6-2002 at the site. When the pain in the knee of the workman aggravated further, he was rushed to the clinic of Dr. Kulamani Baral, M. D. (Medicine), District Headquarters Hospital, Kendrapara for treatment with the help of his wife. He submitted the leave application to the management at Zonal Office at Kendrapara on medical ground. After being declared fit to resume duty, the workman reported for duty on 22-7-2002 but the management did not allow him to resume the duty at Kendrapara and on that date he was served with the termination letter, Dt. 19-7-2002 wherein the management discharged the service of the workman with effect from 18-7-2002 on the ground of unauthorised absence from duty from 4-6-2002. The provisions of Section 25-F of the Industrial Disputes Act and the principle of natural justice has not been followed by the management at the time of termination of service of the workman. The absence of the workman from duty from 3-6-2002 to 21-7-2002 was beyond his control and not wilful or deliberate. The workman approached the Hon'ble High Court in

W. P. (C) No. 1881 of 2002 which was disposed of on 20-1-2003 with an order to seek appropriate remedy under the Industrial Disputes Act, 1947 before the appropriate forum. The discharge of the workman from service amounts to retrenchment. He has worked under the management for 21 years continuously. Thereafter the workman raised an industrial dispute before the labour authority and when the conciliation failed, this I. D. Case has been initiated and the workman has prayed for reinstatement in service with full back wages.

4. The management appeared and filed written statement denying the plea of the workman. According to the management the provisions of the Industrial Disputes Act is not applicable in view of Section 48 of the State Financial Corporation Act, 1951 and O. S. F. C. Regulation, 1975. The discharge of the workman from service is not a retrenchment within the meaning of the provisions of the Industrial Disputes Act, 1947. The workman has not worked continuously for 21 years as he was terminated from service on 13-5-1982 and reinstated on 11-5-1993. The discharge of the workman from service is as per the terms of appointment order which is a contractual and the workman is not a workman and the management is not an industry as per the provisions of the Industrial Disputes Act. So in this background, the workman is not entitled to get any relief as prayed for.

5. On the above pleadings of the parties, the following issues have been settled :–

ISSUES

(i) "Whether the discharge from service of the workman with effect from 18-7-2002 by the management is legal and/or justified ?

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

6. In order to substantiate his plea, the workman has examined himself as W. W. 1 and proved the documents marked as Exts. 1 to 10. Similarly the management has examined the Deputy Manager, Law of the management as M. W. 1 and has proved the documents marked as Exts. A to F on behalf of the management.

FINDINGS

7. *Issue Nos. (i) and (ii)* :– Both the issues are taken up together for discussion for convenience.

It has been argued by the advocate for the workman that when the absence of the workman from duty was beyond his control on the ground of his ill-health and specifically when he was under the treatment of the doctor who gave medical certificate with fitness certificate to join in duty without allowing the workman in duty terminating his service is not only violation of the provisions of the Industrial Disputes Act but also violation of the principle of natural justice. On the other hand, it has been argued by the advocate for the management when the appointment of the workman was purely temporary and when in his appointment order it has been mentioned that it can be terminated without any prior notice, the termination of service of the workman for his long absence nowhere violated the provisions of the Industrial Disputes Act and the principle of natural justice. Further plea of the management is that the management is not an industry and the workman is not a workman as per the provisions of the Industrial Disputes Act. So now I have to see basing on the materials

available in the case record how far the plea of the management is correct. The industry has been duly defined in Section 2 (j) of the Industrial Disputes Act and the workman has been defined in Section 2 (s) of the Industrial Disputes Act. In the instant case the workman was appointed as Security Assistant on a consolidated pay. His duty was to guard the seized unit of M/s Baladevjew Power Loom Weaving Co-operative Society Ltd. at Kendrapara along with his two colleagues and accordingly he was performing his duty till his illness and after recovery from illness when he came to join in duty, the order of discharge from service was communicated to him. Perused the evidence of both the sides and the documents marked as exhibits. After going through such materials and hearing from both the sides, I came to the finding that the management is an industry as defined in Section 2 (j) of the Industrial Disputes Act and the workman is also a workman as defined in Section 2 (s) of the Industrial Disputes Act. Further it has been argued by the advocate for the management that as the service of the workman was purely temporary, in view of the provision of Section 2 (oo) (c) of the Industrial Disputes Act, the discharge from service of the workman is not a retrenchment. The xerox copy of the appointment order has been marked as Ext. 1. In such appointment order it has been mentioned that :

> 'The terms of your appointment is purely temporary and can be terminated at any time without prior notice.'

In such appointment order no specific time limit has been given. Further in the instant case the workman remained absent for a short period for the period from 3-6-2002 to 21-7-2002 as stated by the management and he was discharged from service with effect from 18-7-2002 as per order communicated to him. Such discharge order has been marked as Ext. 9 wherein it has been mentioned that :

> 'Whereas you are fully aware of the fact that your service on consolidated pay is purely temporary and can be terminated at any time without notice and assigning any reason thereof.'

Further it has been held that :

> 'Whereas such acts and omission on your part amounts to gross negligence of duties.'

But no domestic enquiry has been held for his such negligency in duty. So on careful consideration of all the materials available in the case record, the plea taken by the management regarding applicable of provision of Section 2 (oo) (c) of the Industrial Disputes Act is not sustainable at all.

8.In view of the authority reported in 2001 L. L. R. (SC) 54 held that even when a workman fails to report for duty, the management cannot presume that the workman has left the job despite being called upon to report failing which his name will be removed from the rolls. Similarly in the authority reported in 1993 L. L. R. (Punjab & Haryana High Court) 876 it has been held that without holding enquiry or serving any charge-sheet terminated on the ground of absence violates the principle of natural justice. Holding of enquiry is imparative. But in the instant case no enquiry has been held as mentioned earlier. Similarly in the authority reported in 1993-SCC-3-259 it is held that principle of natural justice must be read into the Standing Order the termination of service. Action

must be fair, just and reasonable and the principle of natural justice are to be followed. But in the instant case even if the appointment order discloses certain condition that his appointment is purely temporary and can be terminated at any time without prior notice, before termination principle of natural justice as well as the provisions of Section 25-F of the Industrial Disputes Act is required to be followed, but no such principle has been followed specifically when the workman has produced his medical certificate and fitness certificate vide Ext. 8.

9. In order to follow the provisions of Section 25-F of the Industrial Disputes Act, the workman should have worked 240 days in 12 calendar months preceding to the date of termination. In the instant case the workman has taken the plea that he has completed 240 days continuous service preceding to the leave on medical ground with effect from Dt. 3-6-2002. In the cross-examination he has denied to the suggestion of the management that he has not worked for such 240 days as per law. It has been argued by the advocate for the management that except in his affidavit evidence, the workman has not produced any document to establish that he has worked for 240 days in 12 calendar months preceding to the date of his termination. Further it has been argued that in view of the authority reported in 2002 (3) SCC 25 and 2005 (8) SCC 481 burden of proof lies on the workman that he has worked for 240 days continuously as requied under law and it would for the workman to adduce evidence apart from examining himself or filing any affidavit evidence was not sufficient. But on the other hand, it has been argued by the advocate for the workman relying on the authority reported in A. I. R. 2010 SC, 1236 when workman claimed and deposed that he worked for 240 days, burden of proof shifts to the employer to prove that he did not complete 240 days of service in requisite period to constitute continuous service. Similarly in the authority reported in 2008 L.L.R. 549 (SC) it has been held that the burden of proof would be on the workman to prove that he had worked for 240 days but certain records may be under exclusive custody of the employer and the workman may not be able to lay their hands thereupon and prove that he worked for requisite number of days. If the employer withholds those records adverse inference may be drawn. The adverse inference may be expressed or implied and must be considered upon reading the entire Award. But in the instant case management withhold those records and has not produced in this Court to show that the workman had not worked for requisite number of days. So adverse inference should be drawn against the management in this regard. Now it can safely be concluded that the workman had completed required number of days in serving under the management to get the protection under Section 25-F of the Industrial Disputes Act. Admittedly no prior notice or notice pay in lieu of notice and retrenchment compensation has been paid to the workman. So the mandatory provisions of Section 25-F of the Industrial Disputes Act has not been followed at all. So now on careful consideration of all the materials available in the case record, I came to the finding that the discharge of the services of the workman with effect from 18-7-2002 by the management is neither legal nor justified. Hence the workman is entitled to be reinstated in service.

10. Regarding back wages it has been argued that the workman has not gainfully employed in any establishment and he is sustaining his livelihood and of his family with much hardship. But in view of the settled principle of law reported in 2004 (Supp.) O. L. R. 694 when the workman had not worked for the management during the period in question and he had not proved by cogent evidence that he was not gainfully employed elsewhere, payment of back wages is not justified. Similarly in

the catena of decisions, the Hon'ble Supreme Court has held that the relief of reinstatement with full back wages would not be granted automatically only because it would be lawful to do so. For the said purpose, several factors are required to be taken into consideration. However on careful consideration of all the materials available in the case record, I am of the opinion that instead of giving full back wages, a lump sum amount of Rs. 25,000 as compensation in lieu of back wages will meet the ends of justice in this case. Hence both the issues are answered accordingly.

11. Hence ordered :

That the discharge from service of Shri Alekh Chandra Behera, Security Assistant with effect from Dt. 18-7-2002 by the management of Orissa State Financial Corporation, Cuttack is neither legal nor justified. The workman Shri Behera is entitled to be reinstated in service with a lump sum amount of Rs. 25,000 (Rupees twenty-five thousand) only as compensation in lieu of back wages. The management is directed to implement this Award forthwith.

The reference is answered accordingly.

Dictated and corrected by me.

S. K. DASH
24-7-2010
Presiding Officer
Labour Court
Bhubaneswar

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24-7-2010
Presiding Officer
Labour Court
Bhubaneswar

By order of the Governor
P. K. PANDA
Under-Secretary to Government

Printed and published by the Director, Printing, Stationery and Publication, Orissa, Cuttack-10
Ex. Gaz. 1141–193+11