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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 6th November 2010

No. 9343–Ii/1(BH)-55/1999(pt.)-LE.–In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 27th August 2010 in I. D. Case No. 215 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Darshan Singh, a Contractor of M/s Birla Tyres Ltd., Balasore and its workman Shri Aarun Kumar Das was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No.215 OF 2008

(Previously registered as I. D. Case No.68/2000
in the file of the P.O. Labour Court, BBSR).

The 27th August 2010

Present :

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

Between :

The Management of M/s Darshan Singh, a Contractor of M/s Birla Tyres Ltd., Balasore. . . First party–Management

And

Its Workman Shri Aarun Kumar Das, S/o Late Hirendranath Das, C/o O.L.I.C. Employees' Union Building, At Padhuanpada, Proof Road, Balasore-756001 . . Second party–Workman

Appearances :

Shri Darshan Singh	. .	For the contractor himself
Shri A. K. Das	. .	The workman himself

A W A R D

This is a reference of an industrial dispute made by the Government of Orissa in Labour & Employment Department vide their Order No.8786-li/1 (BH)-55/1999–LE., Dt. 1-7-2000 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.4133–li/21-32/2007–LE., Dt. 4-4-2008. The Schedule of reference runs as follows :

> "Whether the termination of service of Shri Aarun Kumar Das with effect from 11-5-1999 by the management of M/s Darshan Singh, a Contractor of M/s Birla Tyres, Chhanpur, Balasore is legal and/or justified ? If not, what relief Shri Das is entitled to ?"

2. The stand taken by the workman in his claim statement is that the first party-management is a contractor of M/s Birla Tyres running a Canteen on contract basis. The workman was employed by the first party to work as a Waiter in the Canteen. He was continuously engaged from 27-5-1992 to 7-5-1999 on 8-5-1999 when he went to his work place he was not allowed to enter inside the factory. It is specifically pleaded that the workman was on leave from 4-5-1999 to 7-5-1999 and on 8-5-1999 when he reported for duty the Security Officer did not allow him to enter into the factory premises. On 10-5-1999 the Union raised a dispute on the refusal of employment to the workman. Therefore, the first party struck off the workman's name on 11-5-1999. This termination of service of the workman with effect from 11-5-1999 is under challenge.

3. The first party in its written statement has taken the plea that that the workman's name was struck off the rolls on 11-5-1999 on the ground of his continuous absence from duties for more than 5 days, i.e. from 4-5-1999 to 10-5-1999 without prior intimation which is in confirmity with Clause 12(5) of the Notification No. 23690, Dt. 4-9-1985 issued by the Labour Commissioner, Orissa, in exercise of powers conferred under Clause (b), sub-rule 2(v) of Rule 25 of the Orissa Contract Labour (Regulation & Abolition) Rules, 1975 (for short 'the Rules'). It is further pleaded that while terminating his services the workman was intimated to collect his legal dues from the office on any working day.

4. Though both sides have filed their respective pleadings, they have failed to adduce any evidence. Therefore, this reference is going to be adjudicated on facts admitted by the parties in their pleadings.

5. For proper adjudication of the reference the following points are to be determined :

(i) "Whether the termination of services of Shri Aarun Kumar Das with effect from 11-5-1999 by the management of M/s Darshan Singh, a Contractor of M/s Birla Tyres, Chhanpur, Balasore is legal and/or justified ?

(ii) What relief Shri Das is entitled to ?"

6. The first party does not dispute that the second party was a workman under it and he had been working as a Waiter in the Canteen with effect from 27-5-1992 till the retrenchment in question. According to the workman, he had applied for leave from 4-5-1999 to 7-5-1999 and reported for

duty on 8-5-1999 but he was refused entry into the factory premises. According to the first party, the workman absented himself from duties for more than five days without any leave application and therefore, his name has been struck off of the Rolls on 11-5-1999. It is also pleaded by the first party that the workman absented from duties with effect from 4-5-1999 till his name was struck off the Rolls on 11-5-1999. The first party claims to have terminated the workman's service in accordance with the recommendations of the Labour Commissioner in exercise of powers conferred under Clause (b) of sub-rule 2 (v) of Rule 25 of the Rules vide Notification No.23690, Dt. 4-9-1985. I have gone through the said Notification. It has been issued in exercise of powers conferred under Clause (b), sub-rule (2) (v) of Rule 25 of the Orissa Contract Labour (Regulation & Abolition) Rules, 1975 by the Labour Commissioner, Orissa prescribing conditions of service, rates of wages, holidays and hours of work for the workmen employed by the contractors, who do not perform the same kind of work as the workmen directly employed by the principal employer of an establishment. Clause12 of the said Notification is in respect of the procedure for termination of services of such workmen.

Sub-clause (5) of Clause 12 of the Notification runs as follows :

> "If a workman absents himself for more than five continuous working days without leave application or making a representation to the contractor and without sufficient cause, his service shall be liable for termination without notice."

7. According to the management, the workman absented himself from work for more than five continuous working days without any leave application for which the workman's service was terminated. But it is not pleaded in the written statement nor proved by the first party that the absence was without sufficient cause. What sub-clause (5) of Clause 12 of the Notification contemplates is that the workman should not absent himself for more than 5 continuous working days without leave application and without sufficient cause. The management before terminating his service did not ascertain as to whether the workman had sufficient cause for having absented from duties for more than 5 continuous working days. Since the management preferred termination of the services of the workman it ought to have strictly complied with the requirements of Clause 12(5) of the Notification. Absence from duty for more than 5 continuous working days without leave application will not authorise the Contractor to terminate a workman's service unless the absence is found to be without sufficient cause. Therefore, even if the contractor/management is entitled to take action under Clause 12(5) of the Notification, the termination of service of the workman is not valid in as much as the absence is not proved to be without sufficient cause. The management does not claim that it had called upon the workman to explain why he remained absent for more than 5 continuous working days to ascertain whether he had sufficient cause for such absence. It did not offer a chance to the workman to show sufficient cause before terminating his services. Therefore, in my considered view the termination even in terms of sub-clause (5) of Clause 12 of the Notification is not legal and valid.

However, it is highly doubtful whether the first party can be permitted to avail the Notification issued by the Labour Commissioner in exercise of powers conferred under Clause (b), sub-rule (2) (v) of Rule 25 of the Rules. The first party has not brought it on record that he had employed 20 or more workmen on any day of the twelve months preceding the date of the alleged retrenchment nor has he proved that the appropriate Government by notification have made the provisions of the Contract Labour (Regulation & Abolition) Act, 1970 (hereinafter referred to as the Act of 1970) applicable to contractors employing less than 20 workmen. In view of the clear provision laid down u/s 1 (4) of the Act of 1970 and in absence of any plea on the number of workmen the contractor

used to employ during the relevant period, the provisions of the Act, 1970 and the rules made thereunder cannot be made applicable to the first party.

8. If at all the workman absented from duties for more than 5 days without prior intimation, then it amounted to misconduct and before going to terminate his services the management ought to have initiated action in the nature of a disciplinary proceeding. The management has not taken any specific plea as to whether the second party was a regular or casual worker. Even in case of a casual worker a regular departmental enquiry is to be conducted before terminating a workman's service on the ground of misconduct. In this regard the observations made in M. C. D. *Vrs.* Pravin Kumar Jain and others, reported in 1999 Lab. I. C. 619 (S. C.) may be referred to. In that case the workman was a casual worker. The management disallowed the workman to work with effect from 31-7-1981. Hon'ble Supreme Court have observed that if it is by way of penalty, then at least a regular departmental enquiry has to be conducted and if it is a simpliciter discharge order it is violative of Section 25 of the Act and if it is a penalty order it would fail on merit as not having followed the procedure of departmental enquiry.

9. The management admits termination of workman's service with effect from 11-5-1999 but neither the provisions contained in Section 25-F of the Industrial Disputes Act, 1947 has been complied with nor has the employer initiated any disciplinary proceeding to find out whether the workman committed any such misconduct which would justify the workman's removal from service. Therefore, even though neither side adduced any evidence the reference can be disposed of on merit on the basis of the pleadings of the parties which clearly show that the termination of service of the workman with effect from 11-5-1999 is illegal and not justified.

10. As it appears from the pleadings, the workman was continued in his service continuously for a period of five years and all on a sudden his services were terminated on 11-5-1999 without following the statutory provisions. It is not the case of the management that the workman was a casual labourer. It is also not pleaded that from a certain date no work would have been available for the workman. On the other hand, the workman has failed to plead that he has not been gainfully employed during the whole or a part of the period of his disengagement. Under such circumstance, this Tribunal is of the considered view that the workman be reinstated in service with 25% of back wages.

The reference is answered accordingly.

Dictated and corrected by me.

R. B. DASH
27-8-2010
Presiding Officer
Industrial Tribunal
Bhubaneswar.

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Presiding Officer
Industrial Tribunal
Bhubaneswar.

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

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