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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 23rd December 2010

No. 10801—li/1(B)-11/2007-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 6th November 2010 in Industrial Dispute Case No. 28 of 2007 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the management of M/s Pressels Pvt. Ltd., Cuttack and its workman Shri Aswini Kumar Lenka was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 28 OF 2007

Dated the 6th November 2010

Present :

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

Between :

The Management of
M/s Pressels Pvt. Ltd.,
Cuttack.

.. First Party—Management

And

Its Workman
Shri Aswini Kumar Lenka.

.. Second Party—Workman

Appearances :

Shri B. K. Kar

.. For First Party— Management

Shri A. K. Lenka

.. Second Party—Workman himself

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, have referred the matter in dispute to this Court vide Order No.9105—li/1(B)-11/2007-LE., dated the 28th July 2007 of the Labour & Employment Department, Bhubaneswar for adjudication.

2. The terms of reference is as follows :

“Whether the action of the management of M/s Pressels Pvt. Ltd., Madupatna, Cuttack in terminating the services of Shri Aswini Kumar Lenka by way of refusal of employment with effect from 13th February 2003 is legal and/or justified ? If not, what relief the workman Shri Lenka is entitled to ?”

3. The case of the workman in brief is that he joined in service under the management on 1-8-1984 as Helper being appointed after duly selected in the interview conducted by the management. Initially he was getting Rs. 350 per month. After working sometime he was given the job of Store Assistant. In the year 2002 he was getting Rs. 2,200 per month after increasing of his increments. The establishment of the management is a profitable industry where more than 200 employees were working in the capacity of regular, casual contractor's employee in different category. The workman was performing his duty sincerely, and faithfully and continuously to the best satisfaction of the management till 12-2-2003 whereafter his service was terminated by the management. While on duty the workman was given both in the factory at Cuttack and also in the site in the country where the Company takes up the work of erection of Boilers as and when required. The workman was covered under E.S.I. and E.P.F. Scheme. On 11-11-2002 the workman was sent to Punjab whereat Sailkhurd Boiler erection work was going on in M/s ABC Paper Mills to work in the Store there. The workman went there and reported for duty to the then Site Engineer Mr. S.R. Choudhury and performed his duty from 13-11-2002 with all sincerity and honesty to the best satisfaction of the management. The workman was granted daily fooding allowance of Rs. 60 but it was actually paid at the rate of Rs. 20 daily and he was not paid his salary for the months of October, 2002 to January, 2003. On 13-2-2003 the workman was refused for duty from the site and all charges (registers, etc.) he was handling there was taken over from him by the then Site Engineer Mr. K.K. Singh and he was instructed by the Site Engineer to go back to Cuttack for report in the factory. Accordingly the workman left Punjab and when reported in the factory at Cuttack on 16-2-2003, he was not allowed to work and a letter was served to him on 18-2-2003 where a false allegation was made against him that he has left site without prior permission or even intimation to the Director of the management. It was also stated in the letter that the workman has not handed over the charges of the Store and has not taken the clearance from Site Engineer. The workman was directed to go back to Punjab site at his own expenses and take clearance from the Site Engineer and until that he will not be given any duty and the period will be treated not on duty. The workman submitted his reply on 20-2-2003 denying such allegations which were false and baseless. The workman requested for his duty and for unpaid salary and fooding allowance, he was refused the same and when he enquired for the assurance of the Director of the management regarding enhancement of Rs. 1,000 per month he was told that his service has been terminated from 13-2-2003. The workman requested time and again to the management for duty but he was not allowed to duty except an advance of Rs. 3,000 in February 2005 and further amount of Rs. 2,000 in March, 2005 paid to him in two occasions. He was given some extra assignment at

Bocaro site the management for 24 days and at Cuttack for 4 days but not reinstated in his original service and not allowed to his usual duty. He was not paid with any notice pay and retrenchment compensation at the time of termination of his service even though he has completed more than 240 days for every year continuously. The management has not only violated the principles of natural justice but also violated the provisions of Section 25-F and 25-N of the Industrial Disputes Act and the Rules framed thereunder. Further his juniors and new fresh hands are allowed to work violating the mandatory provisions of Section 25-G and 25-H of the Industrial Disputes Act and Rules thereunder. So in this background he has raised an industrial dispute before the labour authority and when the conciliation failed, the matter was reported to the Government and the reference has been received from the Government and this I. D. Case has been initiated wherein the workman has prayed for his reinstatement in service with full back wages.

4. The management appeared and filed written statement partly admitting and partly denying the plea of the workman. According to him, according to the provisions of the Certified Standing Order all workman are liable to be transferred from one section to another, from one department to another and from the factory to sites and *vice versa*. Accordingly the management has transferred the workman to its site office at Sialkhard in the State of Punjab where the management had given the work of repairing and erecting the Boiler of ABC Paper Mills Ltd. He was required to work there as a Store Assistant and was deployed therein the month of November, 2002. He worked there till 13-2-2003 but suddenly left his assigned place of working in Punjab and came back to Cuttack and met the Director of the management on 18-2-2003. He did not give anything in writing to the Director of the management as to why the workman left his assigned job before its completion and without taking prior permission from the Site Engineer. As the workman failed to give any satisfactory reply, the workman was directed in writing vide Office Order, Dt. 18-2-2003 to go back to the site at his expenses, take clearance from the Site Engineer, and until that time he will not be given any duty of this work and this period will be treated as not on duty. The workman did not go back nor obtained any clearance from the site engineer but absconded without any intimation to the management, but he direct filed the complaint before the District Labour Officer. The reference of the dispute was not a dispute of refusal of employment but clearly fell in the reain of voluntary abandonment of service or relinquishment of service for not going back to his place of posting in ABC Paper Mills Ltd. at Punjab. When the workman denied payment of his arrear wages, a further advance of Rs. 3,000 was paid to him pending due scrutiny of his accounts. Though the workman orally requested for re-employment that was not agreed to. However he was advised to make a paper written representation for re-employment to be considered on merit. Thereafter he did not give any written representation but met the Director again on 18-5-2005 demanding full and final settlement of his dues including bonus, gratuity and leave salary. As it was not possible immediately, he again requested for some further advance of Rs. 1,000 was paid to him to be adjusted against his full and final settlement of dues and that was fixed for the same to be on 24-5-2005. His gratuity, leave salary, bonus and wages were calculated and the advances paid to him were recovered and the balance amount was paid to him which he had received by signing in the pay bills and separate vouchers. So in this background the question of violation of Section 25-F and 25-N of the Industrial Disputes Act are wholly irrelevant. So in this background the management has prayed for answering the reference in negative.

5. The workman has filed a rejoinder denying to have received the gratuity, leave salary, bonus, etc. as disclosed by the management in the written statement and according to the workman some papers have perhaps been manufactured by some subordinate staff against the workman and the workman did not admit the same.

6. In view of the above pleadings of the parties, the following issues are settled :

ISSUES

- (i) "Whether the action of the management of M/s Pressels Pvt. Ltd., Madhupatna, Cuttack in terminating the services of Shri Aswini Kumar Lenka by way of refusal of employment with effect from 13th February 2003 is legal and/or justified ?
- (ii) If not, what relief the workman Shri Lenka is entitled to ?"

7. In the order to substantiate his plea, the workman has examined himself as W.W.1 and proved documents marked as Exts. 1 to 7. Similarly the management has examined two witnesses altogether out of which, M.W.1 is the Director of the management and M.W.2 is an Accounts Assistant of the management and proved documents marked as Exts. A to E on his behalf.

FINDINGS

8. *Issue Nos. (i) and (ii)* —Both the issues are taken up together for discussion for convenience.

It has been argued by the workman that his service was terminated by the management by way of refusal of employment with effect from the 13th February 2003 without sufficient reason and without complying the mandatory provisions of Section 25-F of the Industrial Disputes Act for which he is entitled to be reinstated in service with full back wages. On the other hand, it has been argued by the management that the workman has abandoned his service and thereafter he voluntarily came and settled his dues as full and final with the management and has received his gratuity, leave salary, bonus, arrear salary, etc, by signing in the vouchers and registers, respectively. So when his service has been came to an end after receipt of all his dues including gratuity amount, the workman has no *locus standi* to raise the question again for reinstatement in service. But the employee and employer relationship is admitted and it is also admitted that the workman was working under the management and was deputed to Saikhurd in the State of Punjab to work in ABC Paper Mills Ltd. So in view of the above argument of the parties, now I have to see the materials available in the case record in this regard. As per Ext.3 the workman was directed by the management to go back to the site at his expenses, take clearance from the Site Engineer. Until that time he will not be given any duty at this works and this period will be treated not on duty. But the workman did not go to the site and get the clearance from the site engineer. Rather according to the management, the workman came forward for full and final settlement of his dues and accordingly the management has settled his dues. The management paid the gratuity for Rs. 17,769.23 for the periods from 1988 to 2003 for 14 years vide Ext.C which contain five vouchers and other vouchers are regarding leave with wages, advances, etc. Payment of bonus has been paid vide Ext. D and payment of

arrears wages from October 2002, to January, 2003 has been paid vide Ext. B. However, perused all the documents marked on behalf of both the parties, the workman in his rejoinder has challenged that he has not received the gratuity, leave salary, bonus, etc. as claimed by the management. Accordingly to him some papers perhaps manufactured by some sub-ordinate staff against him. While giving evidence by way of affidavit evidence the workman has stated that though he has completed 240 days in every year and have completed 16 years of continuous service, without giving him any natural justice without any notice, notice pay, compensation, gratuity, leave salary, annual bonus, provident fund, pensionary benefits, he was refused employment and terminated from service illegally from 13-2-2003. Accordingy to the settled principle of law as reported in (1993) ILLJ 696 SC it has been held that without conducting domestic enquiry and without giving opportunity of being heard termination of service offended Article 14. But in the instant case the plea of the management is that the workman had voluntarily abandoned his service and finally settled his claim with the management and received all his dues. So it cannot be said that it is a termination of service. According to the settled principle of law as reported in 2001 LLAR 54 it has been held by the Hon'ble Supreme Court that even when the workman remained absent failed 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. Even when the workman remained absent failed to report for duty, it was imperative to follow the principles of natural justice by giving the opportunity. Further in the authority reported in 2004 (Supp.) OLR 694 it has been held that the 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 lay on the management which took such a plea to prove with cogent evidence that in fact the workman had abandoned his service. But in the instant case the management has not taken any such action against the workman. On the other hand, it took the plea that full and final settlement has been made with the workman as per his prayer orally. No written document is available in this regard. The workman has requested the management to receive the full and final settlement dues. The management has not confronted the document marked as exhibit towards payment of dues including the gratuity while the workman was in the witness box. But strangely enough while such xerox copies of documents were proved by the management through M.W.1 the workman has only raised objection in respect of Ext. B which is the xerox copy of pay bill for the period from October, 2002 to February, 2003 but rest other documents including the vouchers regarding payment of gratuity, leave salary, advance, etc. are marked without objection. In the cross-examination the workman has not put any question to M.W.1 in this regard. The workman is totally silent about such documents except Ext.B. M.W.2 has stated that he has made payment to the workman as per vouchers. In the cross-examination the workman has also not put any question to this witness challenging about payment of such dues. According to the settled principle of law that burden of proving that workman left his service is on the management. But in the instant case the materials available shows that the management has not proved the same. Merely because the workman has received the gratuity and other dues he cannot raise his plea for reinstatement in service subsequently as argued by the workman. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly,

reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the person concerned. The originals of the documents marked as exhibits on behalf of both the parties has not been filed. But the workman has not challenged about receipt of gratuity and other dues like bonus, leave salary, arrears wages, etc. from the management while cross-examining the M.Ws. 1 and 2 earlier. It has been argued by the management that when the workman has settled his claim finally and received all his dues including gratuity, the chapter stands closed and it is no more opened to the workman to challenge the same. But according to the settled principle of law as reported in AIR 2000 SC 1401 when retrenchment compensation was paid to the workman this does not mean that he had surrendered all his constitutional right in favour of the respondents. Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. So in the instant case from the materials available particularly when the payment of gratuity and other dues are remained unchallenged during the cross-examination of M.Ws. 1 and 2 it can safely be concluded that the workman has received the same. But now the question arises whether he can raised the claim for reinstatement in service as the mandatory provisions of the Industrial Disputes Act has not been fulfilled and the principle of natural justice has not been followed. From the materials it shows that the workman has received the amount from the management. But there is no material available under what basis he has received the same as there is no written application from the workman for full and final settlement of his dues though the management took the plea that it is on the verbal request of the workman such final settlement was made and he received the dues. In my opinion when mandatory provisions of the Industrial Disputes Act has not been followed merely because he has received the gratuity and other dues, the workman is entitled for benefit as prevailed under the law. The management has failed to prove that under what circumstances the workman has received his dues as full and final settlement. So it cannot be said that it is a case of abandonment of service. On the other hand, it can be said that it is a case of termination by refusal of employment. So on careful consideration of all the materials available in the case record I am inclined to hold that the action of the management in terminating the services of the workman by way of refusal of employment with effect from the 13th February 2003 is neither legal nor justified and he is entitled to be reinstated in service.

9. Regarding back wages, according to the settled principle of law is 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. Further in view of the authority reported in 2004 (Supp.) OLR 694 it has been held that 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. However on careful consideration of all the materials available in the case record, I am of the opinion that it is a fit case not to grant any back wages to the workman. Hence both the issues are answered accordingly.

10. Hence ordered :

That the action of the management of M/s Pressels Pvt. Ltd., Madhupatna, Cuttack in terminating the services of Shri Aswini Kumar Lenka by way of refusal of employment with effect from 13th February 2003 is neither legal nor justified. The workman Shri Lenka is entitled to be reinstated in service but without any back wages. The management is directed to implement this Award forthwith after publication of it in the official Gazette.

The reference is answered accordingly.

Dictated and corrected by me.

S. K. DASH
6-11-2010
Presiding Officer
Labour Court
Bhubaneswar

S. K. DASH
6-11-2010
Presiding Officer
Labour Court
Bhubaneswar

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