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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 21st July 2011

No. 6134—li/1-(B)-60/1994 (Pt.)-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 9th November 2010 in I.D. Case No. 88 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Asian Paints (India) Ltd., College Square, Cuttack and its workman Shri Subash Candra Moharana represented by Cuttack Commercial Workers' Union, Ranihat, Cuttack was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 88 OF 2008

(Previously registered as I.D. Case No. 336 of 1995 in the file of the
P.O. Labour Court, Bhubaneswar)

The 9th November 2010

Present :

Shri Raghubir Dash, o.s.j.s. (Sr. Branch),
Presiding Officer, Industrial Tribunal,
Bhubaneswar.

Between :

The Management of M/s Asian Paints (India) Ltd., .. First-party—Management
College Square, Cuttack.

And

Shri Subash Chandra Maharana, .. Second-party—Workmen
represented by Cuttack Commercial
Workers' Union, Ranihat, Cuttack.

Appearances :

| | |
|----------------------------|-----------------------------------|
| Shri B. Tripathy, Advocate | .. For the First-party—Management |
| Shri T. Lenka, Advocate | .. For the Second-party—Workman |

AWARD

This is a reference under Section 10 of the Industrial Disputes Act, 1947 (for short the 'Act') made by the Government of Orissa in the Labour & Employment Department vide their Order No. 13215-LE., Dt. 22-9-1995 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-LE., Dt. 4-4-2008. The Schedule of reference runs as follows :—

“Whether the termination of services of Shri Subash Chandra Moharana, Store Boy/Godown Keeper by the Management of M/s Asian Paints (India) Ltd., College Square, Cuttack with effect from 23-4-1992 is legal and/or justified ? If not, to what relief Shri Moharana is entitled ?”

2. It is the case of the second party that M/s Asian Paints having its Branch Office at College Square, Cuttack had engaged him initially as a Peon with effect from 13-3-1991 on a monthly salary of Rs. 570. Two months thereafter he was engaged as a Store Boy. He used to perform the work of stacking and despatching materials in the Godown of the first party management. During the period of his employment when the Assistant Labour Officer, Cuttack had come to the Godown on 10-1-1992 on an inspection the workman had provided some information against the interest of the management. Therefore, on the next day the management refused him employment. On repeated request he was again allowed to work with effect from 1-2-1992. On 20-4-1992 he fell ill and on the advice of the E.S.I. Doctor he remained on leave till 22-4-1992. On 23-4-1992 when he came to attend to his duties, the First party refused him employment. This disengagement is the subject matter of the present reference.

3. In the written statement the first party has taken the stand that the officials at its Branch Office have no power to appoint any personnel for its establishment. The second party had never been employed by the first party. So, question of termination of his service by the first party does not arise. The second party was an employee of M/s Srimanta Enterprises, who was a cleaning & forwarding Agent (for short, the 'Agent') of the first party. The Agent had engaged the second party as a workman. On 16-6-1992 one Y. S. Rao, an employee of the first party had given Rs. 500 and his Pass Book to the second party to deposit the amount in the former's account in Union Co-operative Bank, College Square, Cuttack. After that the second party did never return. Even he absented from his duties from that date.

4. The following issues have been settled—

ISSUES

- (i) Whether the reference is maintainable ?
- (ii) Whether the reference is maintainable in absence of Srimanta Enterprises who was the employer of the second party workman ?

- (iii) Whether the termination of services of the second party workman by the first party management with effect from the 23rd April 1992 is legal and/or justified ?
- (iv) To what relief the workman is entitled ?

5. The second party has examined himself as W.W. No. 1 and another person as W.W. No. 2 who claims to have had worked with the first party along with the second party. On behalf of the management, its Office Assistant is examined as M.W. No. 1. Both sides have exhibited several documents.

FINDINGS

6. *Issue Nos. (ii) and (iii)*—There is no dispute that the workman was engaged continuously during the period from 13-3-1991 to 23-4-1992. So, there is no dispute that he had completed more than 240 days of work during the said period or in other words, during a period of twelve months preceding the alleged retrenchment. But, the real dispute is as to who is the employer of the workman.

According to the second party, he was directly employed by the first party but according to the first party, the workman was employed through a contractor to work in the Godown of the first party for the purpose of loading, unloading, storing and despatching of materials. Both sides have exhibited documents in support of their respective contention. The workman has exhibited xerox copy of two Wage Slips marked Exts. 2 and 2/a. On these Wage Slips there appears the impression of Rubber Seal of M/s Asian Paints (first party). So, it is argued on behalf of the workman that the Wage Slips were issued by the first party. To disprove it the management has exhibited carbon copy of the Original Wage Slips marked Ext. A series. It is submitted that Exts. A/1 and A/2 correspond to Exts. 2 and 2/a, respectively. Exts. A/1 and A/2 are the Original Carbon Copy of the Wage Slips whereas Exts. 2 and 2/a are the xerox copies. On comparison this Tribunal is satisfied that Exts. 2 and 2/a are manipulated xerox copy of the originals. Because, on the original (carbon copy) Rubber Seal impression of M/s Asian Paints is not there but on the xerox copy it appears. Similarly, in Ext. A series there is the seal impression of M/s Srimanta Enterprises and over the space meant for employer's signature someone's signature appears on each of the Wage Slips (Ext. A series). But in Ext. 2 series the Rubber Seal impression of M/s Srimanta Enterprises and also the employer's signature are missing. The management has been taking the stand that Ext. 2 series are not the true xerox copies of the original Wage Slips. On a comparison between Exts. A/1 and A/2 with Exts. 2 and 2/a it is found that Exts. 2 and 2/a are the xerox copy of Exts. A/1 and A/2 (or their originals) but the same has been doctored to omit the signature of the employer and the Rubber Seal impression of M/s Srimanta Enterprises and to introduce the Seals of M/s Asian Paints. Thus, it is found that an attempt has been made to suppress the fact that the Wage Slips were issued by M/s Srimanta Enterprises and also to give an impression that those were issued by M/s Asian Paints.

7. The workman has relied on xerox copy of the salary extracts marked Exts. 3 and 3/a. The management in order to discredit the genuineness of the xerox copies has furnished the carbon copies of the salary extracts which are marked as Exts. P and N, respectively. On a comparison of the two sets of documents the same result is found. In the original carbon copy of salary extracts the signature of the contractor with the Seal impression of Srimanta Enterprises appears clearly

but in the xerox copy marked Exts. 3 and 3/a the same are missing. Exts. N & P clearly show that in the relevant columns the signature of the contractor and the signature of the Branch Manager of M/s Asian Paints are present, but in Exts. 3 and 3/a signature of the contractor has been omitted by way of interpolation while obtaining xerox copy from the original and only the signature of the Branch Manager of M/s Asian Paints is left untouched thereby making an attempt to mislead someone that the salary extracts were issued by M/s Asian Paints and not by the contractor. Therefore, no reliance can be placed on Exts. 3 and 3/a, so also Exts. 2 and 2/a. On the other hand, the Wage Slips and salary extract exhibited on behalf of the first party are found to be genuine and reliable.

8. The management has exhibited many other documents in order to prove that the workman was employed through the Agent, namely Srimanta Enterprises. Ext. L is the Muster Roll in original which is found to have been maintained by the Agent. Ext. H is xerox copy of notice of daily hours of employees of the establishment of M/s Srimanta Enterprises wherein the name of the workman appears as an employee. Ext. G is a xerox copy of leave application purported to be signed by the workman and addressed to M/s Srimanta Enterprises, but the signature of the applicant appearing thereon does not tally with any of the signatures of the workman those are available on record of this case. Therefore, no reliance is placed on this document. Exts. E and E/1 are xerox copy of Register of wages maintained by M/s Srimanta Enterprises wherein the name and signature of the workman appear showing receipt of payment of wages. Ext. D is xerox copy of Daily Record of Works purporting to be in respect of the workman and there also it is mentioned that the workman was an employee of M/s Srimanta Enterprises. In Ext. F (xerox copy of the inspection report prepared by the District Labour Officer, Cuttack under the Orissa Shops & Commercial Establishment Act, 1956) the name of the second party appears along with several other names as the employees of M/s Srimanta Enterprises. Thus, relying on the documents exhibited by the first party it is to be held that the second party was engaged through the Agent. According to the management, the C & F Agent was engaged in the Godown of the first party and the said Agent had engaged the workman. Now, it is to be decided as to whether the second party should be deemed to be an employee of the principal employer even though he used to be engaged through a contractor. The workman has attempted to suppress the fact that he was engaged through the Agent. Accordingly, he has adduced evidence. The management's witness has admitted in his cross-examination that no advertisement was made for the appointment of the contractor ; no written instruction was received from the Head Office for appointment of a contractor ; no permission was obtained from the labour machinery for engagement of the contractor ; the workman used to work under "our direction" ; and the work of the workman was being supervised "by us". Relying on these admissions of the management's witness it is argued on behalf of the workman that the workman being under the control and supervision of the first party was infact an employee of the first party and the Agent was a mere namelender. It is also argued that the contractor had not obtained any licence under the contractor Labour (Regulation & Abolition) Act to engage contract labourers in the establishment of the first party. Since there is no convincing material showing the number of employees engaged by the contractor in the first party's establishment, it is not possible to give a conclusive finding that the contractor was under a legal obligation to obtain a licence. So, absence of any such licence will not have any effect on the point under discussion. The only material in support of the contention that the contractor was a mere name lender is that according

to M.W. No.1 the workman used to work under the direction and supervision of some officials of the first party. On the other hand, the management has exhibited xerox copy of the Agreement between the Agent and the management marked Ext. C. The Agreement is dated 27-11-1990. Following are some of the relevant terms and conditions of the Agreement—

- (i) The agreement shall operate till 1-11-1993 unless terminated by either party by giving two months notice in writing ;
- (ii) The C & F Agent shall efficiently carry-out the operation of Clearing and Forwarding himself and shall not sub-contract those operations ;
- (iii) The Agent shall carry-out the operation as per the requirement of the Company to be indicated from time to time ;
- (iv) The Agent will properly account for the goods received, stored and despatched from the Godown ;
- (v) The Agent shall compensate the Company for the value of materials damaged or lost during clearing and forwarding operations ;
- (vi) The Agent shall be allowed to use and occupy the Company's Godown premises strictly as a Licensee of the Company during the subsistence of the Agreement ;
- (vii) The Agent shall be paid for the C & F operations @ Rs. 65 per tonne of net sale during the calendar month ;
- (viii) The Agent shall be responsible for keeping the premises clean and filling-up of Company related documents for which he shall be paid an amount not exceeding Rs. 2600 per month towards expenses incurred by him for that purpose ;
- (ix) The Agent shall pay minimum wages to its employees employed in the Godown and shall ensure recovery of contributions towards Provident Fund, E.S.I. Scheme etc. from the wages of the employees.

There is nothing in the terms and conditions of the Agreement as to how many employees the Agent must employ in the operations under the Agreement and how much should be paid to each of the employees. It is also not forthcoming as to whether the first party had reserved the power to select and dismiss the employees and what should be the mutual obligations between the employees engaged by the Agent on one hand and the management on the other. It transpires from the Agreement that the Agent had been engaged to produce a given result for the establishment i.e., for loading, unloading, storing and despatching of materials in the Godown. In *Ram Singh Vrs. U. T. Chandigarh*, reported in AIR 2004 (S.C.) 969, it is held that in determining the relationship of employer and employee "control" is one of the important test but all other relevant facts and circumstances are required to be considered including the terms and conditions of the contract. It is further observed that "integration" test is one of the relevant tests which is applied by examination whether the person was fully integrated into the employer's concern or remained apart from an independent of it. It is further observed that other facts which may be relevant are who has the power to select and dismiss to pay remuneration, deduct insurance contribution organise the work, supply tools and materials and what are the mutual obligations ; between them. The terms of the Agreement do not contain any such facts which may be applied in favour of the workman to say that the contract was not genuine and the workman was, infact, an employee of the first party.

Even in a genuine case the Principal Employer can have supervision over the contract workers and may given direction to them in order to get the work executed in the desired manner. Therefore, merely on the oral statement of M.W. No. 1 that the workman used to work under the direction of and being supervised by some personnel of the first party is not sufficient to record a finding that even though he was engaged by a contractor he was actually an employee of the first party.

9. It is argued on behalf of the second party that in order to prove that the workman was a contractor's employee that first party ought to have examined the contractor and the contractor, instead of the first party, should have produced documents from his custody. This submission is not found to be tenable. The workman has intentionally suppressed that he was employed through the contractor. Even he has gone to the extent of furnishing tampered documents which actuated the first party to produce and prove documents of M/s Srimanta Enterprises. Reliance has been placed on the E.S.I. Identity Card (Ext. 4) and the E.S.I. Card (Ext. 5). There is nothing in these documents wherefrom it can be said that the workman was accepted as an employee of the first party. Exts. 6 and 7 are not relevant for the purpose of this case. It relates to W.W. No. 2 and has no bearing on the present dispute.

10. In the result, it is held that the termination of services of the second party, if any, with effect from 23-4-1992 may be said to be illegal as it is not shown that it was in accordance with the provisions of Section 25-F of the Act but it cannot be said that the termination was effected by the first party. It is true that the Agent is not a party to this dispute but no authority is cited to support the contention that in the absence of the Agent the reference is not maintainable. Had there been sufficient evidence in support of a possible argument that the Agent or the contractor was a mere namelender the reference could have been answered in favour of the second party even in the absence of the Agent.

Both the Issues are answered accordingly.

11. *Issue No. (i)*—On the maintainability of the reference no other ground has been raise, Therefore, it cannot be said that the reference is otherwise not maintainable.

12. *Issue No. (iv)*—Since it is held that there is no employer-employee relationship between the parties, the workman is not entitled to any relief.

The reference is disposed of accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
9-11-2010
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
9-11-2010
Presiding Officer
Industrial Tribunal
Bhubaneswar

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