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**LABOUR & EMPLOYMENT DEPARTMENT**

**NOTIFICATION**

The 20th August 2011

No. 7664—ID-58/2010-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 4th June 2011 in Industrial Dispute Case No. 31/2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s R.C.M.S. Ltd., Balugaon, Dist. Khurda and its Workman Shri Bhubaneswar Panda, ex-Watchman was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 31 OF 2010

Dated the 4th June 2011

*Present :*

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

*Between :*

The Management of M/s R.C.M.S. Ltd., . . . First-party—Management  
At/P.O. Balugaon, Dist. Khurda.

And

Its Workman . . . Second-party—Workman  
Shri Bhubaneswar Panda,  
S/o Late Dasarathi Panda,  
Village Alaidiha,  
P.O. Balugaon, P.S. Banpur,  
Dist. Khurda.

*Appearances :*

Shri Manoranjan Maharathi, Secretary	.. For the First-party Management.
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Shri Bhubaneswar Panda	.. For the Second-party Workman himself.

## AWARD

The Government of Orissa, in the Labour & Employment Department, in exercise of its powers conferred upon them by sub-section (5) of Section 12, read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947), (for short 'the Act'), have referred the following disputes for adjudication vide their Order No. 4121—ID-58/2010-LE., dated the 20th May 2010. The Schedule of reference runs as follows :—

"Whether the action of the Secretary, R.C.M.S. Ltd., Balugaon, district Khurda in refusing employment to Shri Bhubaneswar Panda, ex-Watchman with effect from the 19th August 2000 is legal and/or justified ? If not, what relief Shri Panda is entitled to ?"

2. The case of the second-party—workman as narrated in his claim statement is that initially he was working as a Clerk-*cum*-Typist in the establishment of the first-party Marketing Society with effect from December, 1975 and continued as such till December, 1990. Thereafter, he was engaged in the same establishment as a Watchman and worked as such from 11-12-1990 to 2-12-1997. On 3-12-1997, the Secretary of the Society refused him employment. He was removed from employment but another person namely, Suresh Kumar Panda, was engaged in his place. He raised a dispute before the Labour Machinery. A conciliation proceeding was taken up by the local Assistant Labour Officer. During conciliation a settlement was arrived at on 8-8-2000. In terms of the settlement the workman was allowed to perform duty as a Truck Helper with effect from the 9th August 2000. Due to his ill-health he could not continue as a Truck Helper. So, on 19-8-2000 he made a representation to the Secretary of the Society to give him any other work which was never taken into consideration. Though the workman had been attending office regularly he was not allowed to do other work nor was he allowed to sign in the Attendance Register.

It appears from the conciliation failure report annexed to the Schedule of reference, out of which this I. D. Case arises, that on 10-1-2008 the workman filed a complaint before the Assistant Labour Officer, Balugaon alleging refusal of employment with effect from the 19th August 2000. The conciliation having failed, the Conciliation Officer submitted the conciliation failure report and thereafter the State Government made the reference.

3. The first-party—management has filed its written statement denying that the workman was refused employment with effect from the 31st December 1997, but admitting that with the intervention of the Conciliation Officer there was a settlement between the parties with the following terms and conditions :—

- (i) Shri Bhubaneswar Panda shall be reinstated in his service as Watchman/similar job with effect from the 9th August 2000 with continuity in service;
- (ii) It is agreed by the workman that he shall not claim any back wages for the period from 4-12-1997 to 8-8-2000.

The management has further pleaded that there was necessary compliance of the terms of the settlement. It is not specifically denied by the management that after the settlement the workman was appointed as a Truck Helper, that on 19-8-2000 the workman had made a representation to

allot him some other duties on his health ground; that his representation was never considered by the management and that since then he has been attending office regularly but he is not allowed to do any other work nor is he allowed to sign the Attendance Register. It is rather pleaded that the workman's own statement that due to his ill-health he could not continue as a Truck Helper establishes his inability to continue in service. It is further contended that the Society has been going through financial difficulties and not in a position to even afford its existing staff. It is further pleaded that the service of the workman is no more required and his reinstatement would make him a surplus staff which is not permissible under the bye-laws of the Society.

4. On the basis of the pleadings of the parties, the following issues have been settled :—

#### ISSUES

- (1) Whether the action of the Secretary, R.C.M.S. Ltd., Balugaon, Dist. Khurda in refusing employment to Shri Bhubaneswar Panda, ex-Watchman with effect from the 19th August 2000 is legal and/or justified ?
- (2) If not, what relief Shri Panda is entitled to ?

5. The workman has examined himself as W.W. No. 1 and has exhibited documents marked Exts. 1 to 7. The management has examined its present Secretary as M.W. No. 1. Exts. A to G have been marked on behalf of the management.

#### FINDINGS

6. *Issue Nos. (i) and (ii)*—Thus, it is found from the pleadings of the parties that way back in December, 1997 the workman was once kept out of employment for which there was a conciliation and a settlement (Ext. 3) was signed by both the parties with the intervention of the local Labour Officer. According to the terms of the settlement, the workman was to be reinstated in service "as a Watchman/similar job with effect from the 9th August 2000 with continuity in service." According to the management, it complied with the terms of the settlement by reinstating the workman in the job of a Truck Helper. According to the management, the settlement was duly complied with, in as much as the terms of the settlement postulate that the workman should be reinstated either as a Watchman or in any other similar job. But, it appears, the workman was not satisfied being asked to join as a Truck Helper. Soon after his joining on 9-8-2000 on the strength of the settlement the workman made a representation asking the management to give him some other job. The management does not deny the second-party's plea that his representation was never taken into consideration. According to the workman, he made the representation on 19-8-2000 and from that date the management did not allot him any work other than the work of a Truck Helper, even though he used to attend office regularly. It is the further case of the workman that he was not allowed to sign in the Attendance Register. As already stated, the management has not specifically denied these averments.

On behalf of the management it is submitted that it is not a case of refusal of employment in as much as the second-party expressed his inability to work as a Truck Helper because of his ill-health. It is also argued that the management had never denied him employment. Rather, it is the workman who refused to work as a Truck Helper. In view of such submission, it is to be thrashed out as to whether there was refusal of employment with effect from 19-8-2000.

It is admitted by the workman that on 19-8-2000 he put it on record that since he was not able to discharge the duties of a Truck Helper because of his ill-health he should be given some other work. The management has not denied in its written statement that the workman had made

such a representation but while adducing evidence M.W. No. 1 has denied that on 9-8-2000 the workman had made such a representation. The management takes the stand that from 19-8-2000 the workman did not report for duty. Ext. A is an Advocate's notice issued to the workman on behalf of the management wherein it is mentioned that the workman, having joined as Truck Helper on 10-8-2000 in terms of the settlement, worked up to 12-8-2000 and thereafter from 13-8-2000 he remained absent from duties unauthorisedly. In the Advocate's notice the workman was called upon to explain as to why disciplinary action should not be taken against him for such unauthorised absence. Ext. B is a reply submitted by the management to the Assistant Labour Officer, Balugaon wherein it is mentioned that having joined in duties on 10-8-2000 the workman worked up to 11-8-2000 and thereafter, remained absent unauthorisedly for which disciplinary action had already been initiated against him. But, it is neither pleaded nor proved by the management that any disciplinary proceeding was taken up against the workman for his unauthorised absence or refusal to work as a Truck Helper.

As to the date from which the workman allegedly remained absent, the management appears to be very much inconsistent. The written statement is silent on this point. In Ext. A it is mentioned that the workman absented from 13-8-2000. In Ext. B it is mentioned that he absented from 12-8-2000. In Ext. G, another letter of the management addressed to the Assistant Labour Officer, Balugaon, it is mentioned that the workman worked as a Truck Helper from 9-8-2000 to 18-8-2000. During cross-examination M.W. No. 1 admits that the workman worked till 18-8-2000. All the inconsistent statements of the management seriously reflect on the veracity of its plea that the workman voluntarily abandoned his job by remaining absent from duties.

7. On the basis of Exts. A and B it can be presumed that initially the management treated it as a case of unauthorised absence amounting to misconduct. But, the management has not shown to have drawn any disciplinary action against the workman. The proper course the management should have taken was a disciplinary action against the workman on the alleged misconduct. Ext. A further reflects that the management contemplated disciplinary action against the workman but such action does not appear to have been taken. The contents of Exts. A and B give rise to a presumption that the employer-employee relationship had not yet disrupted by the time those letters were issued. Therefore, the management cannot be allowed to take the plea that the workman had voluntarily abandoned his job as on 19-8-2000. In *M. G. Patel Vrs. Mastanbaug Consumers' Co-op. W. & R. Stores Ltd.*, reported in 1997 Lab. I.C. 2537 (Bombay High Court), it is held that burden lies on the employer to establish and prove that the employee had abandoned service, with further observation that even in the case of abandonment of service the employer has to give notice to the employee calling upon him to resume his duty. In *M/s Laxmi Precision Screws Ltd. Vrs. Ram Bhagat*, A.I.R. 2002 (S.C.) 2914, it is observed that even in a case where the Standing Order applicable to the parties contemplates that unauthorised absence for a specific consecutive number of days amounts to automatic termination of service, doctrine of natural justice by giving an opportunity to the workman to be heard must be complied with before the employer terminates the service of the employee. In *M.C.D. Vrs. Pravin Kumar Jain and others*, reported in 1999 Lab. I.C. 619 (S.C.), the workman was a casual worker. By an order, the management disallowed the workman to work with effect from a certain date. In the said case Hon'ble Supreme Court have held that if it was by way of a penalty, then at least a regular Departmental Enquiry had to be conducted and if it is a simpliciter discharge order it is violative of Section 25-F of the Act. In the case on hand there is neither a domestic enquiry nor compliance of Section 25-F of the Act is claimed. Therefore, the management's plea that the second-party was a daily wager does not make any difference.

As already stated, the workman's plea that he was not allowed to put his signature in the Attendance Register and that he was not allotted with any other work is not denied by the management. It appears, the workman being not satisfied for having been reinstated to work as a Truck Helper had made a prayer to the management to allot him any other work. It is quite possible that the workman refused to work as a Truck Helper and for that the management did not allow him to sign in the Attendance Register. In that event, the management ought to have taken disciplinary action against the workman. But, it refused employment to the workman with effect from the 19th August 2000 by not permitting him to even sign in the Attendance Register. Having considered all the facts and circumstances this Tribunal comes to a conclusion that the services of the workman were terminated with effect from the 19th August 2000 by way of refusal of employment.

8. It is argued that since there was no other work available for the workman and since the workman refused to work as a Truck Helper, the management cannot be said to have refused employment to the workman. But, it is argued by the workman that since he was holding the regular post of Watchman immediately before his services were illegally terminated by the management on 3-12-1997 the management, while reinstating him in terms of the settlement marked Ext. 3, should have engaged him as a Watchman and not as a Truck Helper. It is not in dispute that the second-party was working as a Watchman before his services were terminated on 3-12-1997. It is also not in dispute that when the second-party raised a dispute challenging the said retrenchment the local Labour Officer entered into conciliation and in course of the conciliation a settlement marked Ext. 3 was signed by both the parties. As per the terms of the settlement the second-party was to be reinstated in his service "as a Watchman/similar job with continuity in service". This term pre-supposes that the retrenchment with effect from the 3rd December 1997 being not sustainable in the eye of law the management agreed to reinstate the workman in his service with service continuity. It is fairly admitted by the management that soon after the retrenchment of the second-party with effect from the 3rd December 1997 the management appointed one Suresh Kumar Panda as Night Watcher on daily wage basis in place of the second-party and said Suresh Kumar Panda has been continuing as such till date. It is true that during conciliation the parties had agreed to the terms that the second-party should be reinstated in his service either in the post of Watchman or in other post having job similar to that of a Watchman. It is also true that the management reinstated the workman to work as a Truck Helper and the workman also resumed his duties to work as a Truck Helper. However, he was not satisfied with his reinstatement as Truck Helper and he prayed the management to give him the post of Watchman. Since the workman was previously working as a Watchman and after his illegal retrenchment the management had engaged a new workman in that post, the management ought to have reinstated him in the post of Watchman and if necessary the workman junior to him should have been either retrenched or given any other job in the establishment of the first-party. That apart, the job of a Watchman is not similar to the job of a Truck Helper. Under such circumstances, the second-party was justified in making a demand before the management to give him some other work. On the other hand, the management was not justified in reinstating the second-party to work as a Truck Helper. So, the denial on the part of the first-party to reinstate the second-party as a Watchman is not justified. Rather, it amounts to victimisation. Consequently it amounts to refusal of employment, which is neither legal nor justified.

In the facts and circumstances of the case the second-party is entitled to be reinstated to work as a Watchman in the establishment of the first-party with continuity in service. However, it is pleaded by the first-party that the second-party is no more required and that in case he is allowed to continue it will cause financial burden to the first-party. It is also contended that the bye-laws of the Society do not permit any surplus staff to be retained in the establishment. Keeping this stand of the first-party in mind this Tribunal observes that in case the reinstatement of the second-party leads to surplus of staff, then the employee who is the last person to have been employed in the

establishment of the first-party in the category of daily wagers should be retrenched. But, for that matter reinstatement of the second-party cannot be refused.

9. So far the entitlement of back wages of the second-party is concerned, several factors are to be taken into consideration. It is found that the second-party refused to work as a Truck Helper on the ground of his ill-health. The impugned retrenchment took place on 19-8-2000 but he raised the dispute on 10-1-2008. However, Exts. B, C, D and E reflect that from the very beginning the second-party had been complaining before the Assistant Labour Officer, Balugaon that the management did not implement the terms of the settlement in its true spirit. The second-party is now aged about 53. He has remained out of employment for more than ten years. It is claimed by the first-party that he was working on daily wage basis. Though the workman, relying on Ext. 5, says that his services were regularised in the post of Watchman and he was allowed to draw the salary of a Class-IV employee with effect from 15th March 1991, this plea cannot be readily accepted. Because, Ext. 5 is neither a certified copy nor a xerox copy of the original document. It is not an authentic copy and such type of document can be prepared by any one at any point of time. The workman ought to have made a prayer to this Tribunal to call for the relevant Register/document from the custody of the first-party. Ext. 5 has been marked with objection. So, basing on Ext. 5 it cannot be said that the management had regularised the services of the second-party. On a previous occasion also the workman was refused employment and he remained out of employment for a period of about three years. During conciliation proceeding the management had taken the plea that during the tenure of his service, the second-party was very much negligent in his duties and for that outsiders had stolen away valuable properties of the first-party. This is evident from Ext. G. But, such a plea is not taken before this Tribunal. No disciplinary action was taken against him for such negligence in duty. From the conduct of the first-party, it can be presumed that the workman has been a victim of victimisation. Considering all these facts and circumstances, this Tribunal awards reinstatement of the second-party with 50% back wages, besides continuity of service with all other service benefits in favour of the second-party. The first-party to implement the Award within a period of two months of the date of its publication in the Official Gazette.

The reference is answered accordingly.

Dictated and corrected by me.

R. DASH  
4-6-2011  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

R. DASH  
4-6-2011  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

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