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LABOUR & EMPLOYMENT DEPARTMENT
NOTIFICATION

The 29th August 2011

No. 7916—li/1 (B)-103/2003-L. E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 18th March 2011 in Industrial Dispute Case No. 316 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the management of the Orissa Co-operative Milk Producers Federation Ltd., Bhubaneswar and their workman Mr. Bhagaban Nayak was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR
INDUSTRIAL DISPUTE CASE No. 316 OF 2008
The 18th March 2011

Present :

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

Between :

The Management of . . . First-party Management
The Orissa State Co-operative Milk
Producers' Federation Ltd.,
At D-2, Saheednagar, Bhubaneswar.

And

Their workman Mr. Bhagaban Nayak . . . Second-party Workman
Office of the Chief Inspector of Factories &
Boilers, Unit-III, Kharbelanagar, Bhubaneswar.

Appearances :

Shri Pramod Kumar Samal . . . For the First-party Management
Assistant Manager, Legal
Shri Bhagaban Nayak . . . For the Second-party Workman
Himself.

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. 6204—li/1(B)-35/2004-L.E., dated the 27th July 2004 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. 10666—li/1(B)-108/2003-L.E., dated the 4th October 2008. The Schedule of Reference runs as follows :

"Whether the misconducts committed by Shri Bhagaban Nayak are major misconducts as defined under the conduct Discipline and Appeal Rules, 1984 of OSCO-OP-MP. Fed. Ltd. and (b) whether the action of the management in refusing employment/terminating Shri Bhagaban Nayak, Sweeper with effect from the 20th November 2002 as a major penalty as per the provisions of CD & A Rules 1984 is legal and/or justified ? If not, what relief Shri Nayak is entitled to ?"

2. Leaving aside unnecessary details described in the claim statement, the stand taken by the workman on the alleged wrongful dismissal may be stated as follows :

The workman while under the employment of the first-party had been in Trade Union activities since 1982. He was strongly opposing the anti-workmen policy of the management for which he was subjected to discrimination and victimisation. In October, 2001 he was pressurised to opt for V. R. S. On his refusal the management on 20th October, 2001 served on him a charge-sheet-*cum*-suspension order. All the charges were false, baseless and fabricated. One of the Officers of the establishment of the first-party was appointed as the Enquiry Officer (for short, 'E. O. ') to conduct domestic enquiry on the charges. That enquiry continued from the 21st November 2001 to the 21st January 2003. The workman fully co-operated and participated in the enquiry. During continuance of that enquiry proceeding the management on the 26th December 2001 served another charge- sheet on the workman. On the 22nd February 2002 the workman submitted his reply to the second charge-sheet. The management appointed one outsider namely, Mr. A. Acharya, an Advocate and Labour Law Consultant as the E. O. to conduct enquiry into the charges made in the second charge-sheet. Since the Advocate was an outsider, the Kansbahal Mazdoor Union (for short, the 'Union') decided to oppose the management's move to have the enquiry conducted by an outsider mostly on the ground that never before the management had engaged an outsider to conduct domestic enquiry and that such discriminatory move raised an apprehension that the workman would be victimised. The Union prohibited the workman from attending the enquiry proceeding. Accordingly, the workman intimated the E. O., not to proceed with the enquiry till a settlement was arrived at by the management with the Union. But, the E. O. being biased proceeded with the enquiry *ex parte* and completed it in a haste recording a finding that all the charges were substantiated. The disciplinary authority, in turn, without appreciating the facts and circumstances in proper perspective passed the order of dismissal which is shockingly disproportionate to the charges of misconduct. It is pleaded that the management in order to be fair to the workman should not have opted for a second enquiry to be conducted by an outsider when the first domestic enquiry on charges of similar nature was still pending, inasmuch as the new charges could have been incorporated as additional charges to the first charge-sheet so that the same insider E. O. could very well have conducted the enquiry on all the charges without prejudice to either side. It is also pleaded that since the Union prevented the workman from taking part in the enquiry it would have

been prejudicial to the workman to take part in the proceeding inasmuch as the co-workman who was assisting him to defend him in the domestic enquiry being the Joint Secretary of the Union would have withdrawn himself from the enquiry proceeding to give respect to the decision of the Union. It is further pleaded that the management in an unusual manner adopted discrimination against the workman by appointing an outsider as the E. O. which course in the long past was never adopted against any workman.

3. Refuting all the allegations made by the workman, it is pleaded by the management that the first-party is an Engineering Industry and is covered under the Employees' Provident Fund and Miscellaneous Provisions Act. As provided in the said Act and Scheme thereunder, the contribution of the employees under the said Act is managed by a Board of Trustees and the first-party provides managerial support to the said Board of Trustees. The second-party who was working in the Accounts Department as a Clerk was attached to the Provident Fund Section of the said Department. Also he was a Trustee of the Trust Board to represent the workmen. Being a Clerk attached to the Provident Fund Section he was responsible for scrutinising applications for loan from Provident Fund, maintaining records, preparing cheques for sanctioned loan amount and the like. While working as such he was found to have committed misconduct for which he was charge-sheeted as follows :—

"You were working in Provident Fund Section of Accounts Department from September, 1996 to August, 2001. As a part of your duty, you were to scrutinize the application for loan (Refundable and non-refundable), feed the same in relevant records for recovery/adjustment from the accounts of the concerned employee, prepare cheque and deliver the same after the loan is sanctioned or final settlement is made as the case may be—

- (1) Shri Min Bahadur Thappa, PS No. 67939 and P. F. Account No. 2651 had applied for a non-refundable loan of Rs. 12,000 (Rupees twelve thousand only) and the Trustees had sanctioned Rs. 11,817 (Rupees eleven thousand eight hundred seventeen only) which was paid to him vide Cheque No. 736877, dated the 1st February 1991. Shri Min Bahadur Thappa again applied for a loan of Rs. 50,000 (Rupees fifty thousand only) vide his application, dated the 16th May 2001. While scrutinizing the paper, you did not reflect that he had availed a non-refundable loan of Rs. 11,817 (Rupees eleven thousand eight hundred seventeen) only and processed his application form for which the Trustees sanctioned a loan of Rs. 50,000 (Rupees fifty thousand only) and Shri Min Bahadur Thappa was paid the loan amount of Rs. 50,000 (Rupees fifty thousand only) vide Cheque No. 155466, dated the 10th July 2001. Shri Min Bahadur Thappa lodged a complaint, dated the 24th October 2001 alleging therein that he had paid you a sum of Rs. 11,817 (Rupees eleven thousand eight hundred seventeen only) in cash as suggested by you to enable him to receive the loan vide application, dated the 16th May 2001. On scrutiny of the papers it is found that you have not deposited the said amount of Rs. 11,817 (Rupees eleven thousand eight hundred seventeen only), although you have mentioned the said amount in blue ink with serial number and have struck it in red ink on the body of the Application Form. A copy of the complaint petition submitted by Shri Min Bahadur Thappa is enclosed herewith.
- (2) Shri Santaram Jena, PS No. 67866, P. F. Account No. 2402 had availed a refundable loan of Rs. 14,200 (Rupees fourteen thousand two hundred only) vide his application, dated the 13th October 1999, which he received vide Cheque No. 898498 dated the 21st October

1999. You did not feed the loan amount to the Computer for which the amount could not be recovered from Shri Santaram Jena. Shri Santaram Jena made another application on the 24th May 2000 for a loan of Rs. 15,000 (Rupees fifteen thousand only). While processing his application you reflected the refundable and non-refundable to be nil and basing on such wrong information the sanctioning authority sanctioned a sum of Rs. 15,000 (Rupees fifteen thousand only) and the amount was paid to him vide Cheque No. 152168, dated the 10th June 2000.
- (3) Shri Ayodhya Singh bearing PS No. 67703, P. F. Account No. 1881 applied for a loan of Rs. 18,000 (Rupees eighteen thousand only) on a religious ground vide his application, dated the 19th February 2001 and an amount of Rs. 15,700 (Rupees fifteen thousand seven hundred only) was paid to him vide Cheque No. 154558, dated the 20th February 2001. The application indicates that the purpose of the loan is religious since the applicant had sought for loan to meet the Shradha ceremony of his grand father. As the religious loan falls under refundable category, you fed the same in his account as refundable and the same was being recovered from his wages. The front page of the loan application indicates that Shri Singh was seeking loan to meet the expenses for treatment of his wife which has been struck but on the reverse page you have described the same as medical loan and simultaneously you mentioned the very same loan amount as medical loan (non-refundable loan) in the cash book as a result of which the same amount was again reduced/adjusted from his accumulated balance. Thus, the loan amount was reflected both as refundable and non-refundable and you created an artificial loan of Rs. 15,700 (Rupees fifteen thousand seven hundred only). This was detected while making final settlement of the accounts of Shri Ayodhya Singh in October, 2001.
- (4) Shri Jhon Ekka, PS No. 68204, P. F. Account No. 3613 had availed a refundable loan of Rs. 15,200 (Rupees fifteen thousand two hundred only) vide his loan application, dated the 20th November 2000 and the amount was paid to him vide Cheque No 153094, dated the 11th December 2000. The recovery of the said loan should have started from the month of January, 2001. Since you did not deliberately feed the loan in his account in January, 2001, the recovery was started only from September, 2001 when it was detected in the course of Audit.
- (5) Shri R. K. Sinha, PS No. 68047, P. F. Account No. 2397 availed a refundable loan of Rs. 10,000.00 (Rupees ten thousand only) vide his application, dated 28th April 1998 and received the amount vide Cheque No. 162859, dated the 10th May 1998. Shri Sinha resigned from service and applied for his final settlement from provident fund. While preparing the settlement of the provident fund dues, you did not reflect the outstanding loan amount of Rs. 6,640.00 (Rupees six thousand six hundred forty only) and you prepared the Cheque without deducting the said amount and caused a loss of Rs. 6,640.00 (Rupees six thousand six hundred forty only) to the P. F. Trust.
- (6) Shri P. K. Beura, PS No. 68146, P. F. Account No. 3107 had applied for a refundable loan of Rs. 15,000.00 (Rupees fifteen thousand only) vide his application, dated the 11th September 1998 and he was sanctioned a loan of Rs. 10,200 (Rupees ten thousand two hundred only) which was paid vide Cheque No. 163805, dated the 16th September 1998. Although you entered the amount in cash book you did not feed the same for recovery till the month of March, 1999 (for six months) and you started recovery only from April, 1999

thus causing a loss of interest on the loan amount for six months to the P. F. Trust.

- (7) Shri D. Lenka, P. S. No. 66394, P. F. Account No. 2389 had applied for refundable loan of Rs. 6,000.00 (Six thousand only) vide his application, dated the 18th August 2000. At that time a sum of Rs. 9,990.00 (Rupees nine thousand nine hundred ninety) only was outstanding against him as a loan to his credit. While processing his application, you did not reflect the said amount and thereby misled the trustees to sanction the loan amount even though he was not entitled to the second loan without clearing the previous loan."

On the prayer of the workman he was allowed to inspect and take note of all available documents. Having inspected the same he submitted his explanation. His explanation being found not satisfactory, the management appointed an Advocate namely, Shri A. Acharya to enquire into the charges. The second-party, being supported by the Union, objected to the appointment of Shri Acharya on the ground that he was an outsider. The management so also the E. O. repeatedly persuaded/advised the workman to take part in the proceeding. But, the workman opted not to take part and therefore, the E. O. had no other option but to proceed with the enquiry *ex parte*. The management adduced evidence before the E. O. and on consideration of materials placed before him the E. O. found the second-party guilty of misconduct. The disciplinary authority being satisfied that natural justice was fully complied with and having been convinced with the findings of the E. O. called upon the workman to show-cause as to why he should not be dismissed. A copy of the report of the E. O. was also served on him and he submitted his show-cause which was found to be devoid of merit. So, the workman was dismissed vide order, dated the 3rd March 2003. Though another enquiry proceeding against the workman had concluded, the management did not consider the same while imposing punishment of dismissal on the workman. According to the management, it is its managerial prerogative to appoint an outsider as E. O. which is not specifically prohibited in the Certified Standing Orders of the Company and which is also permissible in law. For that the management was not required to accede to the unlawful demand of the Union. Since the workman refused to take part in the proceeding, the E. O. committed no illegality in proceeding with the matter in the absence of the workman. Principles of natural justice having been followed at each and every stage and there being no bias, discrimination or victimisation as alleged by the workman, the Tribunal should uphold the action of the management.

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

ISSUES

- (i) "Whether the reference is maintainable ?
- (ii) Whether the domestic enquiry conducted by the management was fair and proper ?
- (iii) Whether the action of the management in dismissing the workman from service with effect from the 4th March 2003 is proper and/or justified ?
- (iv) If not, to what relief the workman is entitled ?"

5. The parties did not adduce any oral evidence. However, several documents have been marked as exhibits on behalf of either side.

6. *Issue No. (ii)*—Which was taken up as a preliminary issue, has already been answered vide Order No. 63, dated the 18th November 2010 with the finding that the domestic enquiry conducted

by the management was fair and proper.

7. *Issue No. (iii)*—After this Tribunal recorded the findings on the fairness of the domestic enquiry in favour of the management, the parties were called upon to adduce evidence on the remaining issues. The workman exhibited two documents on admission of the management and thereafter neither side adduced further evidence. However, both sides have advanced arguments presenting their respective stand.

8. It is contended by the workman that none of the acts and omissions alleged against the workman as contained in the charge-sheet amounts to a misconduct as enumerated in the Certified Standing Orders (for short 'the C. S. O.') of the first-party. Consequently, it is further submitted that the workman cannot be dismissed for any act or omission which is not enumerated in the C. S. O. as a misconduct. In reply, it is argued on behalf of the management that the allegations made against the workmen squarely falls under Clause 17 (a) (9) of the C. S. O. It is further submitted that since all acts of an employee cannot be stated specifically in the C. S. O., the Tribunal is to examine whether the action of the employee is subversive of discipline and thereby constitutes a misconduct. The workman places reliance on *M/s. Glaxo Laboratories (I) Ltd. Vrs. Presiding Officer, Labour Court, Meerut and others*, reported in AIR 1984 (SC) 505 wherein it was submitted on behalf of the management that there can be some other misconduct not enumerated in the Standing Order and for that the employer may take appropriate action for such misconduct. Rejecting the contention their Lordships observed as follows :—

"The Act (Industrial Employment Standing Orders Act, 1946) makes it obligatory to frame standing orders and get them certified. Section 3 (2) requires the employers in an industrial establishment while preparing draft standing orders to make provision in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed, shall be, so far as is practicable in conformity with such model. Item 9 of the Schedule provides 'suspension or dismissal for misconduct, and acts or omissions which constitute misconduct'. It is therefore, obligatory upon the employer to draw up with precision those acts of omission and commission which in his industrial establishment would constitute misconduct. Penalty is imposed for misconduct. The workman must, therefore, know in advance which act of omission would constitute misconduct as to be visited with penalty. The statutory obligation is to prescribe with precision in the standing order all those acts of omission or, commission which would constitute misconduct."

In *Rasiklal Vaghajibhai Patel Vrs. Ahmedabad Municipal Corporation & Another*, reported in AIR 1985 (SC) 504, also relied on by the workman, it has been held that unless either in the Certified Standing Orders or in the Service Regulations an act or omission is prescribed as misconduct it is not open to the employer to fish out some conduct as misconduct and punish the workman even though the alleged misconduct would not be comprehended in any of the enumerated misconduct.

The management, on the other hand, cites the decision in *W. M. Agnani Vrs. Badri Das*, 1963 (I) LLJ 684 (S. C.) wherein it has been laid down that in the absence of Standing Orders it would be open to the employer to consider reasonably what conduct can be properly treated as misconduct and the question will have to be dealtwith reasonably and in accordance with common sense.

management and not of the Trust. Therefore, he is guilty of habitual negligence which is a misconduct enumerated in Clause 17 (a) of the C. S. O.

10. Now, I shall come to Charge No. 1 in which it is alleged, *inter alia*, that the workman had received Rs. 11,817 in cash from Min Bahadur Thappa, an employee of the management, to deposit the said amount in the Provident Fund Account of the said employee but the workman failed to deposit the same. It is found that said Min Bahadur Thappa had made a written complaint to that effect and he was examined as a witness before the E. O. and on the basis of his evidence the E. O. has found the allegations made by Shri Thappa to have been proved. It is also found from the complaint made by Shri Thappa as well as his deposition before the enquiry officer (Ext. 35) that he did not get back the said amount from the workman. Therefore, this amounts to criminal breach of trust. Under this circumstance, it is considered pertinent to refer to the following observations made by the Hon'ble Karnatak High Court in *Jyoti Home Industries Vrs. Presiding Officer, Additional Labour Court, Bangalore, 1996 Lab. I. C. 1211* :—

"There will be several acts of the employee which will expose him to penal consequence. These acts would no doubt be a misconduct in industrial parlour. In such cases the employer is free to decide reasonably what action should be taken in that matter. On an analysis of the decision of this aspect, it can be safely concluded that any act of an employee which would constitute an offence with penal consequence under the Indian Penal Code or such other analogous legislations is a misconduct. Broadly stated, all offences with penal consequences are misconduct but not all misconducts an offence. We may state that the Supreme Court in AIR 1984 SC 1361 : (1984 Lab. I. C. 961), was considering the later class of cases. In such cases, where the facts leading to the misconduct attributed to the worker do not constitute an offence it is obligatory on the employer to specify and to define it with precision what would amount a misconduct. But the conduct which will attract penal consequence and will expose the employee to be proceeded against either under the Indian Penal Code or such other analogous penal legislation are misconduct even if the employee has not been told in advance that these acts according to the employer would amount to 'misconduct'."

It is true that in the Charge No. 1 there is no specific mention that the workman committed breach of trust. But, the contents of the charge contains everything to make out a case of breach of trust, besides allegation that the workman had manipulated records. Since, Charge No. 1 is with respect to an offence punishable under the Indian Penal Code, it is a misconduct even if it is not enumerated in the C. S. O. So, the workman cannot escape his liability for having been found guilty of the said charge.

It is argued for the workman that the management having not mentioned in the charge-sheet about the relevant clause of the misconduct as enumerated in the C. S. O., the charge itself is defective and the management cannot inflict any punishment. This submission is not supported by any authority. In my considered view the relevant clause of the C. S. O. need not be mentioned in the charge-sheet and it would suffice if the facts constituting the misconduct find place in the charge-sheet.

It is further argued that the provisions contained in Clause 17 (e) (iii) of the C. S. O. having not been complied with the punishment of dismissal is not justified. The aforesaid clause enumerates

that if during the enquiry it is found that the workman is guilty of misconduct other than that is stated in the order of suspension, the workman shall nonetheless be liable to punishment for misconduct enumerated in the C. S. O., but before any punishment is awarded to him he shall be afforded a reasonable opportunity of explaining and defending his action in respect of such act of misconduct. This case does not fall in the category of Clause 17 (e) (iii) of the C. S. O. as there is no allegation that the workman has been found guilty of the misconduct other than that is stated in the order of suspension.

11. *Issue No. (iv)*—Now the propriety of the punishment inflicted on the workman is to be considered. According to the workman, the allegations made against him, in a nutshell, are wrongful processing of Provident Fund application forms of the employees which caused loss to the Provident Fund Trust and for that no motive can be attached. It is further submitted that while imposing the penalty the management has not taken into consideration the gravity of the misconduct, the previous records, if any, of the workman and any other extenuating and aggravating circumstances including the past unblemished services rendered by the workman for about 25 years. It is there in Clause 17 (e) (v) of C. S. O. that while awarding the punishment, the management shall take into account the gravity of the misconduct, the previous record, if any, of the workman and any other extenuating and aggravating circumstances that may exist. In the order of dismissal marked Ext. 46 it is stated that the charges levelled and established against the workman being serious in nature, the authority cannot repose confidence in the workman and accordingly, he is dismissed from service. Thus, according to the authority the charges are serious in nature, so serious that the management lost confidence in the workman. However, the order does not disclose that the management has taken into account the previous record of the workman and any other extenuating and aggravating circumstances. According to the workman, his unblemished conduct during the past 25 years of service should have been taken into account. It is not shown by the management that prior to the commission of the misconduct contained in the charge-sheet, the workman had committed any other misconduct. It is shown by the workman that he was given promotion in the year, 1997. Attendance Award was given to him in 2001 and a Certificate of Appreciation was issued to him on his completing 20 years of service in 1998. The management does not dispute these facts but it is argued that those are not sufficient for awarding a lesser punishment in view of the management having lost confidence in the workman. Therefore, let it be considered as to whether the proved misconducts are commensurate with the severest form of punishment.

The workman was posted in the Accounts Section. He was a Clerk entrusted to deal with the Provident Fund matters. It is not on record as to whether he was dealing with any other matters. Not only he was a Clerk dealing with the Provident Fund matters of the employees of the management but he was one of the Trustees of the L & T (Kansbahal) Staff & Workmen Provident Fund. Not only that he was also the Secretary of the Kansbahal Mazdoor Union. Therefore, he was required to perform his duties as a Clerk of the management with utmost sincerity. The charges levelled against him show that because of his negligence the employees concerned have been unduly benefitted. It is highly doubtful that the mistakes committed by the workman were *bona fide*. It cannot be said that there is no gravity of the misconduct for which the punishment of dismissal is highly disproportionate. The authority has rightly taken the view that because of such misconduct it has lost confidence in the workman. Therefore, the punishment is found to be proper. However, considering that the workman had a good service career before he was charge-sheeted, a milder punishment though in the nature of removal from service would be justified. Following the observations in *Shiva Anand Vrs. Indian Airlines Ltd.*, and others, 2008 LLR 93 (S. C.) and *Gurdeep Singh Vrs. Dhadogal Co-operative Agricultural Service Society Ltd.*, Dhadogal & another, 2009 LLR 1324 (Punjab

& Haryana High Court), the punishment be modified from dismissal to termination of service with effect from the 4th March 2003.

It is further argued for the workman that the action taken by the management is discriminatory in nature, particularly when the workman was not alone responsible for the act of negligence in as much as the Checking Officer under whom he was working was also equally responsible for having not found out the fault in the processing of Provident Fund applications. It is not a case where the management initially proceeded against the workman and his Superior Officers but subsequently no action was taken against the latter even though incriminating materials were available. There is no allegation that two or more persons conjointly did the act. The workman has been proceeded against with respect to the misconduct which is exclusively attributable to him. Therefore, the question of discrimination does not arise.

12. *Issue No. (i)*—Though an issue is framed on the maintainability of the reference, the management has not pointed out as to why it is not maintainable. That apart, this issue is not pressed at the time of argument.

13. The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
9-2-2011
Presiding Officer
Industrial Tribunal, Bhubaneswar

RAGHUBIR DASH
9-2-2011
Presiding Officer
Industrial Tribunal, Bhubaneswar

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