

# The Orissa Gazette

EXTRAORDINARY  
PUBLISHED BY AUTHORITY

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No. 2170 CUTTACK, WEDNESDAY, SEPTEMBER 21, 2011/BHADRA 30, 1933

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## LABOUR & EMPLOYMENT DEPARTMENT

### NOTIFICATION

The 7th September 2011

No. 8104—li/1(B)-30/2007-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 19th August 2011 in Industrial Dispute Case No. 9/2007 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of (1) M/s OSWAL Chemicals & Fertilizers Ltd., Paradeep (2) M/s IFFCO, Paradeep Unit, At Musadia, Paradeep, Jagatsinghpur and its workman Shri Madhusudan Lenka, Ex-Weigh Bridge Operator was referred to for adjudication is hereby published as in the Schedule below :

### SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 9 OF 2007

Dated the 19th August 2011

Present :

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

Between :

The Management of  
(1) M/s OSWAL Chemicals &  
Fertilisers Ltd., Paradeep.  
(2) M/s IFFCO, Paradeep Unit,  
At Musadia, Paradeep,  
Dist. Jagatsinghpur.

.. First -Party—Managements

And

Shri Madhusudan Lenka,  
S/o Jagabandhu Lenka,  
Vill. Talapada, P.O. Dosia,  
Via Alava, Dist. Kendrapada.

.. Second-Party—Workman

Appearances :

Shri B. C. Bastia,  
Advocate

.. For the First-Party—Managements

Shri Kamal Ray,  
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. 9606—li/1(B)-30/2007-LE., dated the 13th August 2007. The Schedule of reference runs as follows :

“Whether the action of the managements of M/s OSWAL Chemicals & Fertilisers Ltd., Paradeep Unit and M/s Indian Farmers Fertilisers Co-operative Ltd., Paradeep in terminating the service of/refusing employment to Shri Madhusudan Lenka, Ex-Weigh Bridge Operator with effect from 7-6-2005 is legal and/or justified ? If not, to what relief Shri Lenka is entitled ?”

2. The case of the second party-workman is that he was appointed by M/s OSWAL Chemicals & Fertilisers Ltd. (for short, 'OCFL') as a Weigh Bridge Operator and he joined in the said post on 1-4-1999. After completion of probationary period of six months he was confirmed in the post. While in the employment of the OCFL, the workman applied for one day's leave on 6-6-2005 on the ground of his illness but he could not recover from the illness for which he extended his leave from time to time till 15-11-2005. On 16-11-2005, when he reported for duty the management did not allow him to join saying that his name was struck off the Roll. It is claimed by the workman that prior to striking off his name the management had not taken any disciplinary action against him, nor was there compliance of the mandatory provisions of Section 25-F of the Act.

At this stage let it be mentioned that the Fertiliser Plant at Paradeep, where the workman was working, was owned by OCFL but with effect from 1-10-2005 the Plant has been taken over by M/s IFFCO Ltd. on the basis of a Sale Agreement. Thus, when the workman got appointment the Plant was under the erstwhile management but on the date the workman allegedly reported for duty but was denied employment the Plant had already been taken over by M/s IFFCO. Therefore, both of the managements have been arrayed as parties to the dispute.

3. The management of OCFL has filed written statement contending that the workman was employed as a Weigh Bridge Operator and was kept under probation for six months due to unsatisfactory service he was not allowed to cross the probationary period. It is further contended

that the workman used to remain absent frequently and he had not completed 240 days of work within a period of one year preceding the alleged date of his termination. It is further contended that the management had not terminated his services. It was the workman who absented from duty with effect from 7-6-2005 without prior permission or grant of leave. At the relevant time there was serious labour unrest in the Plant and transfer of the Plant by way of sale was under process. Finding that the workman was absent for a long period a notice was issued to him asking him to report for duty. As he did not turn up his name was struck off the Roll before the take over of the Plant. The new management has taken the assets and liabilities of the Plant along with the regular employees of the Plant. The workman was not a regular employee as on the date of the take over. As per the provisions contained in the Standing Orders of the Company/Model Standing Order the workman has lost his lien from the employment of the Company by remaining on unauthorised absence for a long period.

4. The management of IFFCO has filed written statement contending, *inter alia*, that the workman was never employed by or under IFFCO and no employer-employee relationship exists between the two parties. As per the terms of the Sale Agreement between OCFL and IFFCO the latter has taken the assets and liabilities of the Plant along with the regular employees of the Plant. At the time of transfer of the of undertaking OCFL had furnished a list of 1,292 employees who are the regular employees of the Plant and the IFFCO had agreed to take liabilities of those employees. Since the name of the second party is not included in the list, IFFCO has no liability in respect of the employment of the second party.

IFFCO admits that after the take over the second party had come report for duty but he was not allowed to join duty as his name was not there in the said list of employees.

5. The workman has filed rejoinder contending *inter alia* that IFFCO having taken over the entire liabilities and assets of the previous management, it is wrong to say that relationship of employer-employee between the Second party and IFFCO does not exist.

6. Basing on the pleadings of the parties, the following issues have been settled :—

#### ISSUES

- (i) "Whether the action of the management of M/s OSWAL Chemicals & Fertilisers Ltd., Paradeep Unit and M/s Indian Farmers Fertilisers Co-operative Ltd., Paradeep in terminating the service of/refusing employment to Shri Madhusudan Lenka, Ex-Weigh Bridge Operator with effect from 7-6-2005 is legal and/or justified ? If not, what relief Shri Lenka is entitled to ?"
- (ii) Whether the Second party was a regular employee of M/s OSWAL ?
- (iii) Whether the second party unauthorisedly remained absent from duties with effect from 7-6-2005, whether such absence is to be treated as voluntary abandonment of service, and whether striking of the name of the second party from the Roll of M/s OSWAL on the ground of such absence is legal/justified ?
- (iv) Whether M/s IFFCO under the terms of the Sale Agreement is liable to take the liabilities that may arise out of this industrial dispute ?

7. The workman has examined himself as W.W. No.1 Exts. 1 to 13 have been marked on behalf of the workman. The management of OCFL has examined one witness as M.W. No.1 and three documents have been marked as exhibits on its behalf.

#### FINDINGS

8. *Issue Nos. (ii) & (iii) and issue No. (I)*—There is no dispute that the workman was appointed to the post of Weigh Bridge Operator. But, it is claimed by the OCFL that as on the date of the alleged termination of service the workman was still continuing as a Probationer. Ext. 1 is the order of appointment and it contains the terms and conditions of employment. Regarding the probation period it is mentioned in Ext.1 that the probation is for a period of six months which is liable to be extended by the management at its sole discretion. It is further mentioned that unless a written order confirming the workman's service is issued the workman will not be deemed to have been made permanent. Taking advantage of this condition in Ext.1 the management takes the plea that since no order in writing confirming the workman's service was issued by the management, it is to be presumed that he was still continuing as a Probationer till 7-6-2005. The workman has asserted that after expiry of six months of probation period he was confirmed in the post and became a permanent employee. But, no written order of confirmation has been exhibited. He joined in the post on 1-4-1999 and his employment got terminated on 7-6-2005. Thus, it is found that the workman was in service for a period of little more than six years. From Ext.5 series (pay slips) it can be found that the workman was allowed to get periodical increments. Though it is asserted by the management that the probationary period of the workman was not satisfactory for which he was not allowed to cross the probationary period, it is not proved by the management that any warning or show-cause notice was served on the workman or any written order was passed extending the period of probation from time to time on the ground that his service was not satisfactory. The management seems to have taken the stand only to bring the termination under clause (bb) of Section 2 (00) of the Act. But, in *Deputy Director of Health Services, Nasik Vrs. Sau. Lata Bai*, 1996 Lab. I.C. 428 (Bombay High Court), it is observed that the sweep of clause (bb) cannot be extended to such cases where the job continues and the employee's work is also satisfactory, and yet periodical renewals are made to avoid regular status to the employee, where the circumstances indicate that the letter of appointment is a camouflage to circumvent the provisions of the Industrial Disputes Act or the benefit of permanency on workers who have worked continuously for a period of more than 240 days.

The workman proves one entry pass marked Ext.2 on which it is mentioned that it was valid up to the period of probation. It is not disputed that the pass was issued to the workman. The workman has proved another entry marked Ext.3 wherein there is no mention that the workman was a Probationer. The workman has deposed that after expiry of the period of the probation the management issued Ext.3. This is not challenged by the management even by way a suggestion.

In the absence of materials to the contrary it is to be presumed in the facts and circumstances of this case that the workman's performance was satisfactory and he was allowed to continue in the job for six years without issuing any written order extending the period of probation for any valid reason. Since the workman was appointed against a permanent post, it is to be presumed that

after expiry of six months of the probationary period he was regarded as a regular employee of OCFL.

9. The management of OCFL further contends that the workman frequently absented from duties and had not worked for 240 days within a period of one year preceding the date of the alleged retrenchment. It is not in dispute that the workman was in the employment of OCFL during the period from 1-4-1999 to 6-6-2005. It is shown by the workman that periodical increment was allowed to him from time to time. On the prayer of the workman the Tribunal had asked the management to produce the Attendance Register but the management replied that it is not available. There is no evidence showing the management to have taken any action against the workman for his alleged frequent unauthorised absence. Under such facts and circumstances, it is to be presumed that the workman had worked continuously during the entire of the aforesaid period. He is presumed to have completed one year of continuous service immediately preceding the alleged retrenchment.

10. Now it is to be considered as to whether the workman can be said to have abandoned his job voluntarily. When it is claimed by the workman that he suddenly fell ill on 6-6-2005 for which he had submitted a leave application and it was granted by his authority, the OCFL contends that the workman absented from duty with effect from 7-6-2005 without prior permission of the authority or grant of leave. According to the workman, Ext.6 is the copy of his leave application dated 6-6-2005. He further says that in that application there is endorsement that his application was allowed by the authority. It is suggested to the workman that there is no such endorsement in Ext. 6 with further suggestion that his leave application dated 6-6-2005 was not sanctioned by the management. Thus, in course of cross-examination the management has not denied that the workman had submitted the application (Ext.6) before his authority. M.W. No.1 in his cross-examination has expressed his inability to say as to whether any employee from the Weigh Bridge Department had made the endorsement "may be allowed" on Ext.6. However, he admits that Ext.6 is in the prescribed printed form of OCFL. Thus, it is found that the workman had made an application on 6-6-2005 to grant him one day leave of absence for the same day on the ground of his medical treatment. It also found that some one has made an endorsement thereon that the application might be allowed. But, the management had failed to prove that the authority had rejected the application and the fact of rejection was intimated to the workman.

The workman says that as he did not get cured he sent application after application extending his leave from time to time till 15-11-2005. To support his contention he has exhibited documents marked Exts. 7 to 13. Exts.7 and 9 are two applications for extension of leave addressed to the Manager, Personnel sent by FAX. The management has not adduced evidence showing that the FAX number to which the applications are purportedly sent was not that of the management. Ext.10 is another application dated 8-9-2005 for extension of leave which is shown to have been sent Under Certificate of Posting on 10-9-2005. It is not suggested to W.W. No.1 that the Postal Certificate was wrongfully procured or it is a forged document. It is not shown by the workman that some other representations exhibited in this case were sent to the management either by FAX or under Certificate of Posting or by Registered Post. But, it is sufficiently proved by the workman that first he had applied for leave and subsequently sent representations to the management praying for extension of leave. On the other hand, the management on its part has failed to prove that the authority had considered the applications and passed any order either granting or rejecting them. It

is also not shown that the management had served any notice on the workman inviting explanation on his unauthorised absence or asking him to resume duties forthwith. Under such circumstances, it cannot be said to be a case of voluntary abandonment of job.

11. Admittedly, the management of OCFL had no Certified Standing Orders of its own. It is submitted by learned Advocates of both the parties that the Model Standing Orders which is in Schedule-I of the Orissa Industrial Employment (Standing Orders) Rules, 1946 apply to the workman. As per Order No. 14 of the Model Standing Orders, habitual absence without leave or absence without leave for more than ten days is an act of misconduct. According to the management, the workman had not applied for leave nor was he granted leave of absence. Admittedly, the workman remained absent from duty for more than ten days. Therefore, this is a case of absence without leave for more than ten days which amounts to an act of misconduct. But, the management has not initiated a disciplinary proceeding against the workman.

According to the management, the name of the workman was deleted from the Roll on the ground that he had remained absent unauthorisedly for a long period. Order 9(3) of the Model Standing Orders contemplates that if a workman remains absent beyond the period of leave originally granted or subsequently extended he shall lose his lien on his appointment, unless he returns within eight days of the expiry of the leave and explains to the satisfaction of the employer his inability to return before the expiry of his leave. It is further contemplated that in case the workman loses his lien on his appointment he shall be entitled to be kept in the "Badli list". To make this order applicable the management has not proved that initially leave was granted but the workman over-stayed the period of leave. Therefore, this order is not applicable to the case in hand. The workman has proved that he had applied for leave but the management has not shown that his leave application was dealt within the manner as laid down in Order 9(2) of the Model Standing Orders. Therefore, it is not a case of the workman's losing his lien on his appointment.

12. It is not a case of abandonment of job. On the pleadings of the management it is to be presumed that the workman's name was struck off the Rolls and he was removed from employment on an alleged act of misconduct for which no disciplinary proceeding was initiated. Therefore, striking out the workman's name amounts to termination of service. According to the workman, he was refused employment on 16-11-2005 when he reported for duty. The management is not specific as to with effect from which date the workman's name was struck off the Rolls. But, from the pleadings it is clear that his name was struck off before a list of 1,292 regular employees was furnished to IFFCO on the eve of taking over of the Plant. It is not shown that the workman was paid wages from 7-6-2005. No notice was served on the workman after 7-6-2005 inviting him to join his duties. Therefore, in the facts and circumstances of the case it is to be presumed that his service was terminated with effect from 7-6-2005. Since it is not claimed that the provisions of Section 25-F or 25-N of the Act were complied with to bring about a valid retrenchment and since the management did not take any disciplinary proceeding against the workman on the alleged misconduct of unauthorised absence, the retrenchment is held to be illegal as well as unjustified. Since the second party is held to be a regular employee of OCFL, he is entitled to be reinstated in service.

Accordingly, the issues are answered in favour of the second party

13. *Issue No. (iv)*— The management of OCFL was not justified in striking out the workman's name from its Roll. The retrenchment in dispute is held to be illegal and/or unjustified. Because of such illegal retrenchment the workman's name did not find place in the list of the regular employees of OCFL who were to be taken back into employment by the management of IFFCO in terms of the Sale Agreement. Since his name did not find place in the list IFFCO refused to allow the workman to resume duties when he reported for duty on 16-11-2005. IFFCO takes the plea that in terms of the Sale Agreement it is not liable to absorb the workman. If it will be found that IFFCO is liable to absorb the workman, then the refusal of employment of the workman with effect from 16-11-2005 will be held illegal and it will have to take the liability that may arise out of this Award.

Ext.C is a copy of the Sale Agreement between the OCFL and IFFCO. It is marked with objection on the ground that the whole of the Agreement is not produced by the first party. Learned Counsel for the first party submits that the relevant portion of the Sale Agreement showing the *inter-se* liability of OCFL and IFFCO with regard to the employees of the undertaking has been exhibited. On a perusal of Ext.C it is found that clause-11 of the Sale Agreement lays down the terms and conditions relating to the Purchaser's liability in respect of the employees of the Seller. Under Clause-11.2, IFFCO as Purchaser has undertaken to absorb without interruption in service all employees of the undertaking covered by the Industrial Disputes Act, 1947. Clause-11.1 of the Agreement refers to the list of 1,292 employees of OCFL. It is argued on behalf of IFFCO that since the name of the second party was not there in the list. IFFCO is not under an obligation to absorb him even if his retrenchment is found to be illegal. The name of the second party was not included in the list because of an illegal act on the part of OCFL. Had there been no such illegal act the name of the workman must have found place in the list and IFFCO would be under obligation in terms of the Sale Agreement to absorb him along with all the employees of the undertaking. Since his service has been illegally terminated by OCFL it is to be deemed that in the eye of law he was not retrenched as on 30-9-2005 and that he was a workman of OCFL as on the said date and his name was there in the list. Therefore, IFFCO is liable to absorb the workman without interruption in his service. As per Clause-11.6 of the Sale Agreement OCFL is to indemnify IFFCO against each and every cost, claim, liability, expence or demand which relates to or arises out of any Act or omission by OSWAL prior to 1-10-2005 which IFFCO may incur in relation to any contract of employment, etc. Such a condition is incorporated in the Sale Agreement to meet situations arising out of pending industrial disputes between the workman and the erstwhile management, besides other contingencies. Clause-11.6 readwith Clause 11.1 and 11.2 make it amply clear that IFFCO is liable towards the claim of the workman as made in his claim statement and the workman is entitled to get all the reliefs from IFFCO.

*Issue No. (iv)* is answered accordingly.

14. Coming to the relief that the second party is entitled to, it is to be remembered that he was holding a regular post. His services have been illegally terminated. Though it seems to be a case of removal from employment on account of an act of misconduct of the second party, no enquiry has

been conducted. In the circumstances, the workman is entitled to get the relief of reinstatement with full back wages and all other service benefits. However, it is left open to the management of IFFCO to take disciplinary action against the workman for the alleged misconduct of absence without grant of leave.

The reference is answered accordingly

The management of IFFCO is to implement the Award within a period of two months of the date of its publication in the *Official Gazette*.

Dictated and corrected by me.

RAGHUBIR DASH  
19-8-2010  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

RAGHUBIR DASH  
19-8-2010  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

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