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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 29th October 2011

No. 9729—li/1(B)-31/2001-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 28th May 2011 in Industrial Dispute Case No. 257 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of the Executive Engineer, Dam Safety (Medium Project) Division, Bhubaneswar and its workman Shri Gourang Charan Mallick was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR
INDUSTRIAL DISPUTE CASE No. 257 OF 2008 Previously registered as
I.D. Case No. 40 of 2011 in the file of the Presiding Officer,
Labour Court, Bhubaneswar
Dated the 28th May 2011

Present :

Shri Raghubir Dash, OSIS (Sr. Branch),
Presiding Officer,
Industrial Tribunal,
Bhubaneswar.

Between :

The Executive Engineer,
Dam Safety (Medium Project) Division,
Secha Sadan Campus,
Bhubaneswar.

. . First Party—Management

And

Shri Gourang Charan Mallick,
C/o Simachal Pradhan,
Office of the Chief Engineer,
Design & W.R. Deptt.,
Unit-V, Bhubaneswar.

. . Second Party—Workman

Appearances :

Shri Bichitrananda Bisoi . . . For First Party—Management
Government Pleader

Shri Subrata Kumar Mishra . . . For Second Party—Workman
Advocate

A W A R D

This is a reference under Section 10 of the Industrial Disputes Act, 1947 (for short the 'Act') made by the Government of Orissa in Labour & Employment Department, vide their Order No.14488 (5)—li/1(B)-31/2001-LE., dated the 9th October 2001 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., dated the 4th April 2008. The Schedule of reference runs as follows :—

“Whether the termination of services of Shri Gourang Charan Mallick, Computer Attendant, by the way of refusal of Employment with effect from the 5-8-1999 by the Executive Engineer Dam Safety (Medium Project), Bhubaneswar is legal and/or justified ? If not to what relief Shri Mallick is entitled ?”

2. In his claim statement the second party workman has taken the stand that on 1-2-1993 he was engaged by the first party to work as an Attendant/Night Watchman on daily wage basis, but, to circumvent the ban imposed by the Government on engagement of N.M.Rs./D.L.Rs., he was shown to be a contract labourer. He was deployed to work in the office of the Director, Dam Safety Division in connection with the maintenance and up-dating of the Computer and office equipments. Though he was shown to be a contract labourer but the nature of duties he used to perform and other conditions of his service were the same as that of the N.M.R. workers. Like the N.M.R. workers he used to get his wages directly from the establishment of the first party.

Subsequent to his engagement in the establishment of the first party, the authorities had made correspondence to get sanction for engagement of a watchman and an Attendant on N.M.R. basis for the running and maintenance of the Computer Section. The second party also made a representation on 26-11-1997 to treat him as an N.M.R. and regularise his service.

The second party used to receive his wages regularly but after March'1999 payment of his wages was stopped. When he approached the Executive Engineer (First Party) he was verbally asked on 1-8-1999 not to attend duties any more. Thus, his services have been terminated illegally in as much as Section 25-N of the Act was not complied with. His termination is also not justified because the work he used to perform was still available when he was refused employment.

4. In the written statement the first party has taken the stand that the Dam Safety Division came into existence in the year 1991. It had its required staff. The second party was never engaged in the Division as an Attendant/Night Watchman on daily wage basis, nor was he shown as a

contract labourer. He was not engaged in the establishment of the first party in any capacity. He might have been engaged under a contractor. So, the question of termination of his service by the first party does not arise.

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

ISSUES

(1) “Whether the termination of services of Shri Gourang Charan Mallick, Computer Attendant by way of refusal of employment with effect from 5-8-1999 by the Executive Engineer, Dam Safety (Medium Project) Division, Bhubaneswar is legal and/or justified ?

(2) If not, to what relief Shri mallick is entitled ?

5. The workman has examined himself as W.W. No.1. He has exhibited documents marked Exts. 1 to 11. The first party has examined one witness as M.W. No.1 and has exhibited one document marked Ext.A.

FINDINGS

6. *Issue No. (1) & (2)* : The affidavit evidence containing the examination-in-chief of W.W. No.1 is almost an exact reproduction of the contents of the claim statement. Though it is claimed that the workman was directly engaged by the first party but shown to be a contract labourer ; that he used to receive wages directly from the establishment of the first party and that the nature of duties and conditions of services of the second party were the same as that of the N.M.Rs. directly employed under the first party, no evidence has been adduced to substantiate the same. On the other hand, the workman has exhibited his own representation which has been marked as Ext.5, wherein he has admitted that he had been working as a Computer Watchman on contract basis. Ext.7 is another document relied on by the workman wherein the workman has been described as “contractor labourer”. Ext.9 is another representation of the workman wherein he has stated that he was working as contract labourer. Thus, the workman before raising this industrial dispute has admitted that he was contract labourer. So, his plea taken before this Tribunal that he was falsely shown to be a contract labourer is not acceptable. In this regard, the following observation in *Steel Authority of India Ltd. vrs. Union of India and others, 2006 (III) LLJ-1037 (S.C.)* is applicable to this case :—

“The workman whether before the Labour Court or in writ proceedings were represented by the same Union. A trade union registered under the Trade Unions Act is entitled to espouse the cause of the workman. A definite stand was taken by the employees that they had been working under the contractors. It would, thus, in our opinion, not lie in their mouth to take a contradictory and inconsistent plea that they were also the workman of the principal employer. To raise such a mutually destructive plea is impermissible in law. Such mutually destructive plea, in our opinion,

should not be allowed to be raised even in an industrial adjudication. Common law principles of estoppel, waiver and acquiescence are applicable in an industrial adjudication.”

7. There is no specific plea either during the conciliation proceeding or before this Tribunal that the contract system under which the second party was engaged through a contractor was camouflage. There is also no evidence to that effect. So, the mere held statement that the nature of duties the second party used to perform and all other conditions of service he was subjected to were similar to that of the other workmen who were engaged by the first party on N.M.R. basis is not acceptable. There is also no evidence that the workman used to get his wages directly from the establishment of the first party. The plea on the mode of payment of wages could have been proved by the workman by adducing documentary evidence. He has not made any attempt to prove the time. He has not made any prayer before this Tribunal to direct the first party to cause production of the Registers/Records wherefrom it could have been ascertained that the management used to pay his wages directly and not through any contractor. Since there is no prayer from the side of the workman to compel the first party to produce such Records/Registers, no adverse inference can be taken against the first party, because the initial burden lies on the second party to prove that he was an employee of the first engaged on N.M.R. basis and not a contract labourer. Thus, in the absence of any other materials the second party should be treated as a contract labourer.

8. Since the management has denied that the second party was ever engaged in its establishment in any capacity it is to be considered as to whether the second party was ever engaged even as a contract labourer.

Ext.7 is a document which is marked without objection. It is a charge report dated 7-6-1999. It relates to banding over and taking over of charge of the Assistant Director, Dam Safety (Medium Project) Division, Bhubaneswar. It consists of three pages. In the second page there is mention about the staff of the computer room. The name of the second party appears there and he is shown to be a contract labourer working as an Attendant. Therefore, basing on Ext.7 it can safely be held that the second party was working in the computer room as an Attendant as on 7-6-1999. Even in the written statement the first party has taken the plea that he might have been engaged in the computer room as contract labourer. But, the period of employment even as a contract labourer is not satisfactorily established by the second party. Ext.5 is a copy of his representation which has been marked as exhibit with objection. It is argued that this letter being not addressed to or channelled through the first party no reliance can be placed on the facts stated in the representation. This submission appears to be quite tenable. It appears, the second party addressed this representation directly to the Engineer-in-Chief, WaterResources, Orissa, Bhubaneswar wherein he has mentioned that he had been working on contract basis since 1-2-1993. It appears, on receipt of the representation marked Ext.5 the office of the Engineer-in-Chief made correspondence with the Chief Engineer, Designs & Research, Orissa, Bhubaneswar vide Ext.6 asking the letter to furnish a detailed report on the engagement of the second party and another person under the first party. The authority concerned must have furnished a detailed report in response to Ext.6, but the second party has failed to bring the same on record. No attempt has been made by the second party to compel the first party to cause production of the relevant documents/records/registers to prove the actual

period of his engagement under the first party. With the materials available on record it is not possible to ascertain the exact period of engagement of the second party.

Even if it is presumed that the second party had been continuously engaged in the establishment of the first party from the 1-2-1993 till the alleged date of retrenchment i.e. 5-8-1999, the second party cannot be said to have been denied employment by the first party in as much as he is found to be a contract labourer.

8. In view of the discussions made above, the second party is not entitled to any relief in the present proceeding.

Dictated and corrected by me.

RAGHUBIR DASH
28-5-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

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28-5-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

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