

The Orissa Gazette

**EXTRAORDINARY
PUBLISHED BY AUTHORITY**

No. 2585 CUTTACK, TUESDAY, NOVEMBER 29, 2011/MARGASIRA 8, 1933

LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 11th November 2011

No. 10115—li/1(B)-15/2002-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 4th August 2011 in I. D. Case No. 285/2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s East Coast Breweries & Distilleries Ltd., Paradeep and its Workman Sauquat Tullah was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 285 OF 2008

(Previously registered as I. D. Case No. 40 of 2002 in the file of the Presiding Officer, Labour Court, Bhubaneswar)

Dated the 4th August 2011

Present :

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

Between :

The Management of
M/s East Coast Breweries &
Distilleries Ltd., Paradeep,
Dist. Jagatsinghpur. . . First-party—Management

And

Sauquat Tullah,
At Bato, P.O. Barithongala,
Via Dhanmandal,
Dist. Jajpur. . . Second-party—Workman

Appearances :

Shri N. K. Mishra, 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 Odisha in the Labour & Employment Department vide their Order No. 3693—li-1 (B)-15/2002-LE., dated the 15th March 2002 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 action of the management of M/s East Coast Breweries & Distilleries Ltd., Paradeep by terminating the services of Sauquat Tullah with effect from the 28th June 1996 is legal and/or justified ? If not, what relief he is entitled to ?"

2. It is admitted by both the parties that the second-party workman was appointed as a Helper-*cum*-Mazdoor with effect from the 25th January 1988 and he was confirmed in the service with effect from the 25th January 1989. On an earlier occasion, his services were terminated on the ground of unauthorised absence with effect from the 1st October 1995 but on the prayer of the workman, he was again taken back to employment with effect from the 27th October 1995.

3. The case of the second-party is that after his reinduction on Dt. 19-6-1996, he got information that his son was ill. The next day was his 'off' day. So, he applied to the management to permit him to perform 'B' shift duty instead of General shift so that he could go to his village without taking any leave. As his son's condition was serious, he could not come back to join on Dt. 21-6-1996, in the morning. So, he sent an application applying for leave up to Dt. 27-6-1996. On Dt. 28-6-1996, he reported for duty but the management did not allow him to join. Thereafter, everyday he used to go to the factory gate but the management did not allow him entry. In this manner, he waited till December 1996. In December 1996 due to financial difficulties, he went to his village on Dt. 26-12-1996. As his mother expired, he sent a telegram to the first-party on Dt. 30-12-1996 applying for leave. After the funeral ceremony of his mother, he came back to Paradeep and requested the management to allow him to join. At last on Dt. 24-11-2000 when he met the Personnel Officer of the first-party, he was told that his services had already been terminated with effect from the 28th June 1996. It is contended that the termination of his service is illegal and unjustified in the absence of statutory notice or notice pay and payment of compensation. There was no enquiry before removing him from service.

4. The first-party management takes the stand that the workman was in the habit of remaining absent frequently and unauthorisedly. When it became intolerable, the management had to conduct an enquiry and the workman being found guilty of the misconduct was removed from service with effect from the 1st October 1995 but on the representation of the workman and on compassionate ground, the management took him back as a new entrant in terms of a bipartite settlement between the parties. The workman was put on probation initially for a period of six months which was likely to be extended for another period depending on the performance of the workman. In terms of the settlement, the workman joined as a Probationer on Dt. 27-10-1995 but he continued with his past habit of frequently remaining absent unauthorisedly. For that, he was served with a charge-sheet

on Dt. 8-5-1996 to which he did not reply. So, the charges were treated as proved against him. Therefore, his probation period of six months was further extended till Dt. 27-7-1996. Yet, the workman repeated to remain absent unauthorisedly.

Admitting that the workman had applied for shift change on Dt. 21-6-1996, it is contended by the management that the workman did not resume duties on Dt. 21-6-1996. Later on his leave application was received. He had applied for leave up to Dt. 27-6-1996 but the leave application was received on Dt. 29-6-1996. The workman did not report for duty on Dt. 28-6-1996 and even thereafter. On Dt. 24-7-1996, the management sent a letter to him detailing the above facts which the workman received on Dt. 25-7-1996 but there was no response. When the extended term of probation expired on Dt. 27-7-1996, the management did not extend the probation period any more on the ground that the workman could not complete the probation period satisfactorily. Thus, it is a case of non-renewal of contract of employment of a probationer within the provisions of Section 2 (oo)(bb) of the Act. The management also did not consider it necessary to make further communication to the workman. The workman also never showed any intention to join duties. Therefore, it is a clear case of abandonment of job. According to the management, there was no termination of service of the workman with effect from the 28th June 1996.

5. The following issues have been settled :—

ISSUES

- (1) Whether the action of the management of M/s East Coast Breweries & Distilleries Ltd., Paradeep by terminating the services of Sauquat Tullah with effect from the 28th June 1996 is legal and/or justified ?
- (2) Whether the action of the management in causing non-renewal of contract/probationary employment of he workman amounts to termination ?
- (3) If not, to what relief he is entitled ?

6. The workman has examined himself as W.W. No. 1. On behalf of the workman, documents have been marked as Exts. 1 to 12. The management has examined one witness as M.W. No. 1 who is an Executive in the establishment of the first-party. The management has exhibited documents which are marked as Exts. A to K.

FINDINGS

7. *Issue Nos. 1 and 2*—Both the issues being inter-related are taken up together.

According to the workman, he was refused employment with effect from the 28th June 1996. But according to the management, it is a termination of service as a result of non-renewal of the contract of employment. It is not in dispute that the workman had left for his village on Dt. 19-6-1996 applying for change of his shift duty on Dt. 21-6-1996 but he did not resume duties on Dt. 21-6-1996. It is also admitted by the management that the workman had sent an application for leave up to Dt. 27-6-1996 but it is contended that it was received by the management on Dt. 29-6-1996. The workman claims that on Dt. 28-6-1996, he reported for duty but the management did not allow him to attend. This is denied by the management. According to the management, the workman had never reported for duty till expiry of the extended period of probation. On that ground, the management has also taken the stand that the workman is presumed to have abandoned his job.

8. First, it may be thrashed out as to whether the workman's plea is convincing and acceptable. According to the workman, on and from Dt. 28-6-1996 he was going to the factory gate everyday and requesting the management to allow him to work and in that manner he waited up to December 1996. He has not pleaded in his claim statement that during this period he made any written communication with the management but while adducing evidence he has exhibited some representations. Ext. 3 purports to be a copy of his representation, Dt.28-6-1996. But, there is no evidence that this letter was actually delivered to the management. The letter is self-serving in nature and it can be created at any time. Ext. 2 purports to be a representation, Dt. 27-7-1996 in which it is mentioned that from 28-6-1996 onwards he was not permitted to perform his duties. It is also stated therein that the workman might be permitted to perform his duties. This representation also stands in the same footing as Ext. 3. Therefore, both the documents are not reliable. Ext. 10 is a copy of the workman's representation, Dt. 17-12-1998 addressed to the Assistant Labour Officer of the first-party wherein it is mentioned as to how the workman was refused his employment and that he should be allowed to join in his duties. There is no evidence that this letter was actually delivered to the Officer concerned. Ext. 11 is another representation, Dt. 16-4-1999 addressed to the Chief Executive of the first-party with a request to allow him to resume his duties. It is claimed that this letter was sent by Registered Post. The registration receipt is marked Ext. 11/1. Basing on the registration receipt it may be presumed that the representation vide Ext. 11 was sent to the management through Registered Post and the management received it. But there cannot be such a presumption with regard to the other exhibited documents referred to herein before. The date of alleged retrenchment is Dt. 28-6-1996. There is neither any pleading nor any acceptable evidence to show that at least till sending of Ext. 11 by Registered Post the workman had made any communication with the management expressing his intention to resume duties. It is pleaded that on Dt. 30-12-1996 he had sent a telegram to the first-party but there is no evidence to that effect. The claim statement is silent as to what action the workman had taken in between Dt. 30-12-1996 and Dt. 24-11-2000 except the plea that after the funeral ceremony of his mother he approached the management to allow him to join in his duty. The plea that on Dt. 24-11-2000 when he met the Personnel Officer of the first-party he was told for the first time that his service was terminated with effect from the 28th June 1996 is neither convincing nor acceptable. On the basis of materials available on record it is to be held that after his application for leave from Dt. 21-6-1996 to Dt. 27-6-1996, the workman had not made any communication with the management till Dt. 16-6-1999. This long silence is a circumstance in favour of a presumption that he had remained absent unauthorisedly for a long period.

9. Now I shall proceed to consider the stand taken by the management.

It is not denied by the workman that after his removal from service with effect from the 1st October 1995 the workman made a representation to reconsider his case and in terms of a Memorandum of Settlement (Ext. G) signed by both the parties the workman was given fresh appointment like a new entrant on a condition that he would be on probation for a period of six months which might be curtailed or extended by another six months depending upon his performance. The workman did not raise any dispute with regard to the terms and conditions of the bipartite settlement. Therefore, when he joined on Dt. 27-10-1995 in terms of the settlement, he joined as a Probationer. Ext. H reflects that after his joining as a Probationer the workman had remained unauthorisedly absent from Dt. 2-5-1996 to Dt. 8-5-1996 for which he was directed to show-cause. Ext. H/1 reflects that this show-cause notice was sent to the workman by Registered Post but it could not be delivered to the workman on the ground of his reported absence. Ext. J is a copy of an

office order passed by the Chief Executive on Dt. 28-5-1996 which reflects that the period of probation of the workman was further extended for another three months and the workman was cautioned to be regular in his duties in future. It is not proved by the management that this office order was actually served on or tendered to the workman. Thus, there is no satisfactory evidence that the workman was served with the show-cause notice as well as the office order regarding extension of the probation period. But, even though the management has pleaded all these facts in its written statement the workman did not file rejoinder denying the same. Even in his affidavit evidence in chief he did not deny these assertions. It is only during cross-examination when the management put suggestions to the workman he denied these assertions. This being the position of pleadings of the parties and the evidence on record it is to be considered as to whether the termination of the workman's service does not amount to retrenchment as claimed by the management. As observed earlier, the workman was on probation initially for a period of six months. Ext. H reflects that during the probation period the management had served a show-cause notice on the workman alleging unauthorised absence. Ext. J reflects that on the ground of that unauthorised absence the management extended the period of probation for a further period of three months. It is true that the management has failed to prove that the originals of Exts. H and J were actually served on the workman but Ext. H/1 reflects that the notice marked Ext. H was sent to the workman in his home address but it was returned unserved. Since there is no denial in the pleading of the second-party and since it is not the plea of the workman that the office order marked Ext. J is created for the purpose of this case, reliance can be placed on Ext. J and it is to be held that the management had extended the period of probation. During the extended period of probation the workman did not turn up. The management did not pass any further order regarding termination of his service on the expiry of the extended period of probation.

10. The management contends that it is a case of non-renewal of contract of employment of a Probationer and therefore, covered under Section 2(oo)(bb) of the Act. In my considered view, the Memorandum of Settlement (Ext. G) is not a contract stipulating a specific period of employment. If the workman had shown good conduct and proper performance he would have been regularised in the post after expiry of the probation period. On the ground of frequent unauthorised absence the management denied him employment by not regularising him in service. Therefore, his termination of service amounts to retrenchment which is not covered under Section 2(oo)(bb) of the Act.

11. The materials on record establish that the workman was on probation and his service was terminated on the expiry of the extended period of probation on the ground of unsatisfactory performance mostly due to his frequently remaining absent from duty unauthorisedly. It is also found that no enquiry was conducted as the management did not want to take any punitive action against him. In *L.I.C. of India Vrs. Raghavendra Seshagiri Rao Kulkarni*, 1998 Lab. I.C. 411 (S.C.), their Lordships have observed as follows :—

"The period of probation is a period of test during which the work and conduct of an employee is under scrutiny. If on an assessment of his work and conduct during this period it is found that he was not suitable for the post it would be open to the employer to terminate his services. His services cannot be equated with that of a permanent employee who, on account of his status is entitled to be retained in service and his services cannot be terminated abruptly without any notice or plausible cause. This is based on the principle that a substantive appointment to a permanent post in a public service confers substantive right to the post

and the person appointed on that post becomes entitled to hold a lien on the post. He gets the right to continue in the post till he attains the age of superannuation or is dismissed or removed from service for misconduct etc. after disciplinary proceedings in accordance with the Rules at which he is given a fair and reasonable opportunity of being heard. He may also come to lose the post on compulsory retirement."

In the reported case the Respondent was a Probationer. It was contemplated in the letter of appointment issued to the Respondent that the probation period should initially be for twelve months but the Corporation might in its sole discretion extend the probationary period subject to a maximum limit of twenty-four months. It was further contemplated that during the period of probation the Respondent should be liable to discharge from service of the Corporation without any notice and without any cause being assigned. In Para. 12 of the reported case their Lordships have further observed as under :—

"The requirement to hold a regular Departmental Enquiry before dispensing with the services of a Probationer cannot be invoked in the case of a Probationer especially when his services are terminated by an innocuous order which does not cast any stigma on him. But it cannot be laid down as a general rule that in no case can an enquiry be held. If the termination is punitive in nature and is brought about on the ground of misconduct, Article 311 (2) would be attracted and in that situation it would be incumbent upon the employer, in the case of Government service to hold a regular Departmental Enquiry. In any other case also, specially those relating to statutory Corporations or Government instrumentalities, a termination which is punitive in nature cannot be brought about unless an opportunity of hearing is given to the person whose services, even during the period of probation or extended period are sought to be terminated. [See : Parshotam Lal Dhingra V. Union of India, 1958 S.C.R. 828 : (A.I.R. 1958 S.C. 36)], in which it was held that appointment to a permanent post on probation means that the servant is taken on trial. Such an appointment comes to an end if during or at the end of the probation, the person so appointed is found to be unsuitable and his services are terminated by notice. An appointment on probation or on an officiating basis is of a transitory character with an implied condition that such an appointment is terminable at any time."

In view of the aforementioned observations of the Hon'ble Supreme Court, the termination of service which is under consideration cannot be challenged on the ground that no Departmental Enquiry was conducted against the workman.

12. Now the workman's contention that the management has to serve notice or pay and notice pay besides payment of retrenchment compensation is to be considered. If the management's plea that the workman voluntarily abandoned the job falls to the ground the workman's plea on the non-compliance of the Statutory requirements for a valid retrenchment could be upheld. It is found from the materials on record that the workman had applied for leave from Dt. 21-6-1996 to Dt. 27-6-1996 and thereafter he had not made any communication with the management at least till Dt. 16-4-1999 on which date he had sent the representation marked Ext. 11 to the management by Registered Post. Though he has claimed that he was denied employment with effect from the 28th July 1996 he has not shown to have raised a dispute till Dt. 11-12-2000 on which date he sent a copy of Ext. 12 to the District Labour Officer, Jagatsinghpur. The District Labour Officer appears to have taken up conciliation proceeding on the basis of the copy of Ext. 12. Such a long silence on the part of the workman gives rise to a strong presumption that he had abandoned the job. Since

the workman was on probation and during the continuance of the probation period he remained absent unauthorisedly for a long period and did not raise any dispute for about four years the only presumption is that he had voluntarily abandoned his job.

13. *Issue No. 3*—In view of the discussions made on issue Nos. 1 and 2, this Tribunal is of the considered view that it is not a case of termination of service by way of denial of employment to the workman but a case of voluntary abandonment of service. Therefore, the workman is not entitled to any relief.

Dictated and corrected by me.

RAGHUBIR DASH
4-8-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
4-8-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

By order of the Governor

T. K. PANDA

Under-Secretary to Government