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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 28th November 2011

No. 10689—Ii-1(B)-162/1998(Pt.)-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 31st May 2011 in Industrial Dispute Case No. 177 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of Odisha Mining Corporation Ltd., Bhubaneswar and their Workman Smt. Kanta Patra was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR
INDUSTRIAL DISPUTE CASE NO. 177 OF 2008
(Previously registered as I. D. Case No. 193 of 1998 in the file
of the Presiding Officer, Labour Court, Bhubaneswar)
Dated the 31st May 2011

Present :

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

Between :

The Managing Director, Odisha Mining Corporation Ltd., Bhubaneswar.	. .	First Party—Management
And		
Smt. Kanta Patra, W/o Debaraj Patra, At Jharana Sahi, Sisubhawan Chhak, Bhubaneswar.	. .	Second Party—Workman

Appearances :

For the First Party—Management	. .	Shri Banoj Kumar Pattanaik Advocate
For the Second Party—Workman	. .	Shri Subrata Kumar Mishra Advocate.

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. 13697—Ii-1(B)-162/1998-LE., dated the 1st December 1998 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—Ii-21-32/2007-LE., dated the 4th April 2008. The Schedule of reference runs as follows :—

> "Whether the action of the management of Odisha Mining Corporation Ltd., Bhubaneswar in terminating the services of Smt. Kanta Patra, Sweepress with effect from the 11th May 1994 is legal and/or justified ? If not, what relief she is entitled to ?"

2. The second party/workman has pleaded in her claim statement that on the 1st October 1992 she was appointed as a Sweepress by the first party/management. On the same day she was asked to work in the residence of the Managing Director of the first party/corporation. Since then she had been working sincerely and satisfactorily drawing monthly salary @ Rs. 950 but on the 10th May 1994 she was asked by the Managing Director that her services were no more required. Thus, she was terminated with effect from the 11th May 1994. Prior to termination of her service the management did not follow the statutory provisions to bring about a valid termination, nor was there any disciplinary proceeding taken against her. It is further pleaded that persons junior to her were allowed to continue when her services were terminated and that after the termination the management has appointed another person as a Sweepress.

3. The management has contended in the written statement that the second party was engaged on contract basis for a period of 44 days to perform conservancy work only in the residence of the then Chairman-*cum*-Managing Director (for short, 'C.M.D.') and the term of employment used to be extended from time to time on the request of the second party and as per the requirement of the C.M.D. The last contract was to expire on the 11th May 1994. After the expiry of the contract the workman did not turn up for the job and also did not make any prayer for extension. Thus, she left the job on her own volition. Subsequent to her abandonment of job the then C. M. D. left the Corporation on transfer. After his transfer there was no need of a workman to do conservancy work. Since the workman was engaged on contract basis for a specific period and specific purpose, non-renewal of the contract comes within the purview of Section 2(oo) (bb) of the Act. It is further pleaded that the first party being a Public Sector Undertaking under the Government of Odisha has its own Recruitment & Promotion Rules. The second party was not recruited in terms of the Rules. It is further contended that the second party has been in gainful employment after she abandoned her job under the first party. It is further contended that at present there is no scope of any engagement as the first party presently running with heavy loss is taking steps for reduction of manpower for its survival.

4. The following issues have been settled :—

ISSUES

(i) Whether the action of the management of Odisha Mining Corporation Ltd., Bhubaneswar in terminating the services of Smt. Kanta Patra, Sweepress with effect from the 11th may 1994 is legal and/or justified ?

(ii) If not, what relief she is entitled to ?

5. The workman has examined herself as W. W. No. 1. and has exhibited two documents. Similarly, the management has examined one witness but it has not exhibited any document.

FINDINGS

6. *Issue Nos. (i) and (ii)*—At the outset let it be examined as to whether the termination of service of the second party comes within the provisions contained in Section 2(oo) (bb) of the Act.

Neither side has proved any appointment order containing the terms and conditions of appointment of the second party. However, it is admitted by the management that initially the second party was given engagement for a period of 44 days and subsequently the term of her engagement was extended from time to time. According to the management, the second party was engaged as a daily rated Mazdoor to discharge the conservancy work at the residence of the then C.M.D. Thus it is not disputed that it was the Corporation and not the C.M.D. of the Corporation who had given employment to the second party. It is not proved by the management that the engagement was given to the second party for a specific period and for specific purpose. The plea that the workman was engaged to perform conservancy work only at the residence of the C. M. D. should have been proved by the management by way of documentary evidence. In course of argument learned counsel for the management has relied on several decisions of the Hon'ble Supreme Court including the decisions in M/s Haryana State FCCW Store Ltd. *Vrs.* Ram Niwas, AIR 2002 (S.C.) 2495 and Punjab State Electricity Board *Vrs.* Darbara Singh, AIR 2006 (S.C.) 386. In all the cited decisions the engagement of the workman concerned was for specific period and purpose. Therefore the cited decisions cannot be made applicable to the case at hand.

In Chairman-*cum*-Managing Director, Orissa Road Transport Company Ltd. *Vrs.* Ramesh Chandra Gouda, 78(1994) C. L. T. 136 the workman was a daily wage worker who was engaged from the 14th February 1986 to the 14th January 1987. It was argued on behalf of the management that since the workman was a daily wager he had a contract of employment with the management from day to day and if the contract is not renewed after any day it is a case of termination of service as a result of non-renewal of the contract of employment and hence it is not 'retrenchment' as provided under Section 2 (oo) (bb) of the Act. Their Lordships did not accept this submission with the following observations—

> "Non-renewal of the contract of employment" would presuppose an existing contract of employment which is not renewed. It is of course true that even in respect of a daily wager a contract of employment may exist such contract being from day to day. The position is different when such a contract is in reality a comouflage for a

> more sustaining nature of arrangement, but the mode of daily wager is adopted so as to avoid the rigors of the Act. To us it appears that sub-clause (bb) of Clause (oo) of Section 2 does not contemplate to cover a contract such as of a daily wager and is rather intended to be more general class of contracts where a regular contract of employment is entered into and the termination of service comes about because of non-renewal of that contract."

In the facts and circumstances of the case in hand the abovequoted observations of the Hon'ble High Court are quite applicable and the submission made by the management claiming exclusion under Section 2(oo)(bb) of the Act.

Also, the following observations of the Hon'ble Supreme Court in S. M. Nilajkar & others *Vrs.* Telecom District Manager, Karnatak 2003 (97) FLR 608 are squarely applicable to the case in hand :—

> "The engagement of a workman as a daily wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or up to to the occurrence of some event and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complain that by the act of employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of sub-clause (bb) abovesaid. In the case at hand, the respondent-employer has failed in alleging and proving the ingredients of sub-clause (bb), as stated herein above. All that has been proved is that the appellants were engaged as casual workers or daily wagers in a project. For want of proof attracting applicability of sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment."

Since it is not proved by the management that the workman was put on notice that she was being engaged for a specific period and purpose, the termination of her services cannot be excluded as claimed by the first party.

7. It is not in dispute that the second party was continuously engaged during the period from the 1st October 1992 to the 11th May 1994. Therefore, she has undoubtedly completed more than one and a half years of continuous service under the first party. If it is found to be a case of refusal of employment, with effect from the 11th May 1994 then compliance of the provisions contained is Section 25-F of the Act is mandatory.

It is necessary to examine the plea taken by the management that after the 11th May 1994 the second party left the job on her own accord. The burden is on the management to establish that the workman voluntarily abandoned her employment. In support of this contention it is argued that the delay of more than three years in raising the dispute before the Labour Machinery itself is a strong

circumstance for an inference that the workman had abandoned her job. The workman appears to have raised the dispute for the first time by making a representation on the 28th October 1997. This delay has not been explained by her. But merely on the ground of such delay there cannot be a presumption that she had abandoned the job. The management has not shown to have issued any notice to the workman calling upon her to report for duty. It is further submitted that the term of employment used to be extended from time to time on the paryer of the workman but after the 11th May 1994 the workman did not make any prayer for extension of the period of employment. Therefore, it is submitted, the Tribunal should presume that the workman had no intention to further continue in her job after the 11th May 1994. The workman is an illiterate lady. Though she admits that on her prayer the term of her engagement used to be extended, it is not proved by the management that as per the terms and conditions of employment it was made compulsory for the workman to make prayer for extension. There being no other facts and circumstances to support the plea of abandonment it is to be held that the workman had not abandoned her job. Consequently it is to be held that her services were terminated by the management.

It is not claimed that the Statutory provisions were complied in order to effect a valid termination. Rather, from the pleadings of the first party it is made quite clear that the management did not consider it necessary to comply with those provisions. Therefore, it is held that the retrenchment under consideration was effected without compliance of the Statutory provisions. Therefore it is illegal. It is also not justified inasmuch as the workman's services were terminated while the C. M. D. in whose residence she used to work was still continuing. It is clearly pleaded by the first party that sometime after the termination of the workman's service the C. M. D. was transferred from the organisation of the first party.

8. Now the issue on the grant of relief should be taken-up

The second party claims that she should be reinstated in her job with full back wages. To support the claim, reliance has been placed on S. M. Nilajkar's case (*supra*). In this case the workman was a daily wager/casual worker and termination of his services being found illegal he was directed to be reinstated which was upheld by the Hon'ble Supreme Court.

The first party, on the other hand, submits that reinstatement with full back wages is not automatic and that in the facts and circumstances of this case the workman is not entitled to reinstatement with back wages. In this regard the first party relies on the observations of the Hon'ble Supreme Court in Jagbir Singh *Vrs.* Haryana State Agriculture Marketing Board & another, reported in AIR 2009 (S. C.) 3004. In Jagbir Singh's case (*supra*), their Lordships have observed that the earlier view of the Hon'ble Supreme Court reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in the recent past, it is observed there has been a shift in the legal position and in a long line of cases Hon'ble Supreme Court have consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is found to be in contravention to the prescribed procedure. The Hon'ble Court have further observed that the award of reinstatement with full back wages, particularly in the case of daily wagers is not proper and in lieu thereof compensation is to be awarded. In the same judgment the Hon'ble Court have distinguished between a daily wager who does not hold a post and a permanent employee.

In Jagbir Singh's case (*supra*) it is further observed that nature of employment, method and manner of appointment, length of service and availability of job are relevant factors to be taken into consideration while deciding as to what relief should be awarded.

Though the second party claims that she was appointed as a Sweepress, no appointment order is brought on record. On the other hand, the first party claims that the second party was given engagement as a daily rated Mazdoor initially for a period of 44 days and subsequently the term being extended from time to time. It is not proved by the second party that she was holding a regular post and was appointed to the post being recruited as per the Rules of the first party. The workman has admitted in her cross-examination that she was engaged to work in the residence of the C. M. D. and her appointment was on the recommendation of the C. M. D. himself. She has also admitted that initially she was engaged for a period of 44 days and on her prayer the term was being extended from time to time. She has further stated that she did not face any interview or recruitment test to get the employment.

It is claimed by the workman that after her retrenchment the management has engaged another lady as a Sweepress but this plea could not be proved by her. There is no proof that after the transfer of the then C. M. D. the management engaged some other person to work in the residence of the successor of the then C. M. D.

In view of the above, reinstatement with back wages cannot be awarded to the workman merely basing on the S. M. Nilajkar's case (*supra*). The observation in the latter judgment of the Hon'ble Supreme Court in Jagbir Singh's case (*supra*) are binding precedent and the relief is to be granted in accodance with those observations.

Taking all these factors into consideration it is held that the second party is not entitled to reinstatement with back wages. In lieu of reinstatement and back wages she should get compensation of Rs. 50,000 (rupees fifty thousand) only. The management is to pay the compensation of Rs. 50,000 (rupees fifty thousand) only to the second party within a period of two months of the date of publication of the award in the Official Gazette.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
31-05-2011
Presiding Officer
Industrial Tribunal, Bhubaneswar

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31-05-2011
Presiding Officer
Industrial Tribunal, Bhubaneswar

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

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