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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 22nd February 2011

No. 1962—li/1(BH)-21/1999-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 6th November 2010 in I.D. Case No. 193 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of Executive Engineer, N. H. Division, Baripada and its Workman Shri Rama Soren was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 193 OF 2008

(Previously registered as I. D. Case No. 55 of 1999 in the file of the P.O., Labour Court, Bhubaneswar)

The 6th November 2010

Present :

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

Between :

The Management of
Executive Engineer,
N. H. Division, Baripada. .. First-party—Management

And

Its workman Shri Rama Soren,
S/o Late Durga Soren,
At Andhari, P. O. Baiganbadia,
P.S. Kuliana, Dist. Mayurbhanj. .. Second-party—Workman

Appearances :

Shri S. S. Kabi, Addl. Govt. Pleader	..	For the First-party—Management
Shri Subrat Misra, Advocate	..	For the Second-party—Workman

AWARD

This is a reference under Section 10 of the Industrial Disputes Act, 1947 (14 of 1947), (for short, the 'Act') made by the Government of Orissa in Labour & Employment Department vide their Order No. 8603–Ii/1(BH)-21/1999-L.E., Dt. 29-6-1999 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-L.E., Dt. 4-4-2008. The Schedule of reference runs as follows :

> "Whether the action of the Executive Engineer, National Highway Division, Baripada in retrenching Shri Rama Soren, N.M.R. workman with effect from Dt. 1-8-1986 is legal and/or justified ? If not, what relief he is entitled to ?"

2. The Claim statement case, in short, is that the second-party workman had been working with the first-party management as an N.M.R. since 1976 and was continued till Dt. 31-7-1986 without break. However, without any rhyme or reason his services were terminated with effect from Dt. 1-8-1986 without complying with the provisions contained in Section 25-F of the Act. Therefore, the workman be reinstated with full back wages.

3. In the written statement the first-party management has taken the stand that the workman was engaged during the period from Dt. 1-12-1980 to Dt. 31-7-1986 but intermittently as and when work was available and that he was never engaged for 240 days in any of the years during his entire period of engagement. The management had never terminated his employment. Rather, the workman had left the employment voluntarily. Since his job was purely temporary the question of his re-engagement does not arise. It is also contended that the National Highway Organisation being not an 'indusrty', the present reference could not have been made by the State Government. It is also contended that the workman has raised the dispute after eleven years of the alleged retrenchment.

4. The following issues have been framed :—

ISSUES

(*i*) "Whether the action of the Executive Engineer, National Highway Division, Baripada in retrenching Shri Rama Soren, N.M.R. workman with effect from Dt. 1-8-1986 is legal and/or justified ?

(*ii*) If not, to what relief is he entitled ?"

5. Evidence is adduced by both sides. The workman has examined himself as W.W. No. 1. He has not exhibited any document. On behalf of the management, the Executive Engineer of the first-party is examined as M. W. No. 1 and one Senior Clerk of the said Establishment is examined as M.W. No. 2. Copy of entries in the Muster Rolls for the period from December 1980 to July 1986 maintained in the office of the first-party has been marked as Ext. A.

FINDINGS

6. *Issue No. i* —There is no dispute that the workman had been engaged by the first-party as an N.M.R. during the period from Dt. 1-12-1980 to Dt. 31-7-1986. Though the workman claims that he had been working since 1976, there is no documentary evidence in support of his claim that he had been working during the period from 1976 to November 1980. Ext. A is the copy of the Muster Roll maintained by the first-party. It was produced by the management on the prayer of the second-party. Though the workman made a prayer to direct the first-party to produce the Muster Rolls for the period from 1976 till the date of the alleged retrenchment, the management did not produce Muster Rolls for the period from 1976 to November 1980 taking the plea that those were no more available. If the management had produced the Muster Rolls for the aforestated period, then this

Tribunal could have arrived at a conclusion as to whether the workman had been engaged during the disputed period. So, due to want of sufficient evidence, it is not possible to give a definite finding that the workman was under the employment of the first-party since 1976.

7. Ext. A being bulky, this Tribunal had called upon the Learned Counsels of both the parties to prepare a Chart showing the number of days the workman was actually engaged during the period from December 1980 to July 1986. As per the Chart submitted by the first-party, it is found that the workman had worked for 146 days during the period from Dt. 21-12-1980 to Dt. 31-12-1981, 207 days during 1982, 294 days during 1983, 296 days in 1984, 353 days in 1985 and 185 days in 1986 till the date of the alleged retrenchment. The advocate for the second-party has filed a Chart showing the number of days the workman had worked during the twelve calendar months preceding the date of the alleged retrenchment. According to that Chart, the workman had worked for 352 days during the period from August 1985 to July 1986. On the other hand, according to the Chart submitted by the first-party the workman is shown to have worked for 333 days during the period from August 1985 to July 1986. Though there is a difference of 19 days between the figures shown in the Charts furnished by both the sides in respect of this number of days the workman had worked during the twelve calendar months preceding the date of the alleged retrenchment, it seems to be immaterial in as much as, both the Charts show that the workman had worked for more than 240 days during that period. So, the workman is deemed to have completed one year of continuous service immediately before the alleged retrenchment. Therefore, if it is held to be a case of termination of service then compliance of the provisions contained in Section 25-F of the Act would be mandatory in order to bring a valid and legal retrenchment.

8. The workman claims that he was denied employment with effect from Dt. 1-8-1986. In his cross-examination the workman has stated that he was retrenched as because there was no work. According to the management, the workman voluntarily abandoned the job. M.W. No. 1 says that after Dt. 31-7-1986 the workman did not turn-up for further engagement. But he is not competent to give such oral evidence as he was not in the N. H. Division, Baripada at the relevant time and had no direct knowledge about the engagement/disengagement of the second-party. For the same reason M.W. No. 2 also is incapable of making a statement that the workman left employment after July 1986. There is no contemporary correspondence on the discontinuance of the workman's services in August 1986 wherefrom it can be said that the workman had either left the job or he was disengaged by the management. On behalf of the first-party it is argued that since the workman remained silent for a long period of eleven years to raise the dispute, it is to be presumed that he had voluntarily abandoned the job. It is true that there has been a long delay in raising the present dispute. The disengagement commenced on Dt. 1-8-1986 and the workman, as revealed from the Conciliation Failure Report, made the complaint in June 1997. No doubt there is a long delay and ordinarily, a presumption in favour of voluntary abandonment may be raised. But some other facts and circumstances may be taken into consideration before raising such a presumption. The workman has cited the xerox copy of *Orissa Gazette* (Extraordinary No. 1497), Dt. 6-11-1992 in which the Award passed by this Tribunal in I. D. Case No. 20 of 1991 has been published. It reflects that the present first-party management was the first-party in the said I. D. Case and in that reference the legality of termination of services of as many as 38 workmen (N.M.Rs./D.L.Rs.) with effect from Dt. 27-9-1989 was the subject matter of dispute. It further reflects that this Tribunal held that the termination of services of those workman was not legal and justified and for that they were entitled to be reinstated in service with full back wages. To get confirmed, I have verified the Register of Industrial Dispute Cases (R-1) maintained by this Tribunal and found that in I. D. Case No. 20 of 1991 also the present first-party was the first-party and in the said I.D. Case Award was made for the restoration of the workman in services with full back wages. The very purpose of making a reference to I. D. Case No. 20 of 1991 is to point out that on Dt. 27-9-1989 the first-party had

retrenched 38 workmen (N.M.Rs./D.L.Rs.) who had been in employment since 1976. In 1986 the service of the present second-party was brought to an end. He is a poor labourer said to be belonging to a Scheduled Tribe in the district of Mayurbhanj. It might be that he did not get proper advice to raise objection against the termination of his service for which he remained silent for a long period. Therefore, merely on the ground of delay there cannot be a presumption that the workman had voluntarily abandoned his job. The workman had been under the employment of the first-party for about five to six years and if he absented from work without having been retrenched, the management ought to have made some correspondence in that regard. In the absence of any such materials, this Tribunal raises a presumption against the management and holds that he was denied employment with effect from Dt. 1-8-1986. Admittedly, the provisions of Section 25-F of the Act have not been complied with. As a result, the termination of services of the workman by way of refusal of employment is found to be illegal.

9. It is vehemently argued that the first-party is not an 'industry' as defined in the Act. In support of the contention learned Advocate for the first-party has submitted a xerox typed copy of extracts from a Judgement of our Hon'ble High Court in O.J.C. Nos. 686 of 1984, 2748 of 1984, 2756 of 1984, 2759 of 1984, 2760 of 1984 and 3049 of 1986. A certified copy or an authenticated copy of the Judgement has not been furnished. The typed xerox copy reflects that the Writ Applications were made to quash the order of the Regional Provident Fund Commissioner under the Provident Fund & Miscellaneous Provisions Act, 1952 wherein it is held that the Works Department of the Government cannot be termed as an 'industry'. Since the full reported case (Judgement) is not before this Tribunal it is not possible to findout in what context and under what facts and circumstances the Hon'ble Court have held the Works Department of the Government not to be an 'industry'. On the other hand, learned Advocate for the second-party has referred to the Award in I. D. Case No. 20 of 1991 (*supra*) and has further submitted that against the Award the first-party therein had moved the Hon'ble High Court so also the Hon'ble Supreme Court, but did not succeed. He has furnished the xerox copy of the Certified Copy of the Judgement of the Hon'ble Court in O.J.C. No. 656 of 1993 wherein their Lordships have observed that the National Highway, Baripada Division is an 'industry'. Since no authentic copy of the Judgement of the Hon'ble High Court is placed before this Tribunal, it is not wise to rely on the xerox copy. But, since the first-party herein was a party in I. D. Case No. 20 of 1991 and it is found that the Award in that I. D. Case was answered against the first party, the burden lies on the first-party to show that the finding of this Tribunal that the first-party is an 'industry' has been set aside. No evidence has been adduced by the first-party as to what is the nature of its activities. In Bangalore Water Supply & Sewerage Board *Vrs*. A. Rajappa, AIR 1978 (S.C.) 548, it has been narrated as to what activities would constitute an 'industry'. In that case it has been laid down by the Hon'ble Supreme Court that the regal functions described as primary and inalienable functions of State would not come within the concept of industry. But such regal function shall be confined to legislative power, administration of law and judicial power. It has further been observed that even in the Department discharging several functions, if there are units which are industries and they are severable, then it can be construed to come within the definition of 'industry'. Since it is not shown by the first-party that it was discharging only regal functions and since it can be presumed that the works like construction of roads and bridges can be left to private enterprise the first-party, assuming that its main function is construction work, is to be taken to be an 'industry' as defined in the Act.

10. *Issue No. ii*—Since the retrenchment is held to be illegal, the second-party is to get adequate relief. He was working as an N.M.R. He had worked for five to six years with the first-party. He is now more than 60 years old (on Dt. 18-7-2003 the workman in his deposition has mentioned his

age to be 55 years). Now the relief of reinstatement cannot be given to the workman. Even otherwise also in view of the recent decisions of the Hon'ble Supreme Court the relief of reinstatement with back wages are not to be extended to N.M.Rs./D.L.Rs. Since he did not agitate the dispute for eleven years, he is not entitled to back wages for that period. He raised the dispute in the year 1997 and attained the age of 60 years in the year 2008. Had he not been terminated, he would have been in the employment for about eleven years. But, he has not rendered any service to the first-party during that period. Therefore, relying on the decisions of the Hon'ble Supreme Court in Ashok Kumar Sharma *Vrs*. Oberoi Flight Services, AIR 2010 (S.C.), 502 and General Manager, Haryana Roadways *Vrs.* Rudhan Singh, 2005 SCC (L & S) 716, this Tribunal is of the considered view that the workman be suitably compensated. While determining the amount of compensation the long legal battle fought by the workman challenging the illegal termination is also to be taken into account. In the facts and circumstances, the first-party should pay a sum of Rs. 1,00,000 (rupees one lakh) only as compensation to the second-party. The first-party to make payment of the compensation amount within a period of three 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
6-11-2010
Presiding Officer
Industrial Tribunal
Bhubaneswar

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6-11-2010
Presiding Officer
Industrial Tribunal
Bhubaneswar

By order of the Governor

P. K. PANDA
Under-Secretary to Government

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