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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 26th February 2011

No. 2110—li/1(B)-101/1993—(Pt.)-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 3rd January 2011 in Industrial Dispute Case No. 80/2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of Khurda Central Co-operative Bank Ltd., Khurda and its Workman Shri Melachha Pradhan was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR
INDUSTRIAL DISPUTE CASE No. 80 OF 2008 (Previously registered as
Industrial Dispute Case No. 280 of 1995 in the file
of the P.O., Labour Court, Bhubaneswar)
Dated the 3rd January 2011

Present :

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

Between :

The Management of Khurda Central
Co-operative Bank Ltd., Khurda.s

.. First Party—Management

And

Shri Melachha Pradhan,
At Podadiha,
P.O. Podadiha,
Dist. Puri.

.. Second Party—Workman

Appearances :

Shri B. C. Bastia, Advocate	.. For the First Party—Management
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Shri S. N. Dwibedi 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.11340–li (B)-1-101/1993-LE., dated 25-8-1995 which was originally referred to the Presiding Officer, Labour Cour, Bhubaneswar for adjudication but subsequently transferred to this Tribunal for adjudication vide Labour & Employment Departments Order No. 4138–li-21-32/2007-LE., dated 4-4-2008. The Schedule of reference runs as follows—

“Whether the termination of services of Shri Melachha Pradhan, Cadre Secretary by the Secretary, Khurda Central Co-operative Bank, Khurda with effect from Dt.14-2-1990 is legal and/or justified ? If not, what relief he is entitled to ?”

2. The pleadings of the second party in this claim statement are to the effect that he was a permanent Cadre Secretary under the first party since Dt. 8-2-1977. During his tenure he was transferred from one Branch of the first party to another at different periods. In 1987 he was working in Begunia Service Co-operative Society where he worked till Dt.18-8-1987 whereafter he was placed under suspension with effect from Dt. 14-8-1987. A departmental proceeding was drawn up against him on Dt.15-10-1987. He was not furnished with the relevant documents. However, he submitted his explanation on Dt. 29-9-1988 without going through the relevant documents. The Enquiry Officer appointed by the first party in the said departmental proceeding fixed the enquiry to be held at Kalika Prasad even though the headquarters of the workman was at Begunia. His request to hold the enquiry at Begunia was not heeded to. Subsistence allowance for the period from Dt.1-2-1990 to Dt.14-2-1990 was not paid to him. The first party passed order of dismissal on Dt. 2-3-1990 to take effect from Dt.14-2-1990 prior to that copy of the enquiry report was not furnished to him nor was he asked to submit second show-cause. The first party thus adopted unfair labour practice and dismissed him arbitrarily.

3. In the written statement the management has taken stand that the second party while working as Cadre Secretary in different branches misappropriated huge amount from the funds of the Service Co-operative Society (for short, 'S.C.S.') at Kalika Prasad, Podadhia and Bada Pokharia amounting to Rs. 99,375.48 paise which was found from the enquiry report of the Circle R.I. as well as audit report. Before initiation of the departmental proceeding the second party was asked to deposit the amount but he did not respond. So, the management was compelled to initiate disciplinary proceedings against him. The Enquiry Officer (for short, the 'E.O'.) appointed by the management conducted the enquiry in a fair manner. But, the workman did not appear to participate in the enquiry. On completion of the enquiry the E.O. submitted his report finding the workman guilty of all the charges and holding him liable for a sum of Rs. 90,636.37 paise only. The Chief Executive of the first party conducted personal hearing on the report of the E.O. The workman appeared and submitted

his reply in writing admitting some portion of the misappropriated amount. The matter was placed before the Cadre Sub-Committee on Dt. 27-10-1989. The Committee decided to ask the workman to deposit 25% of the misappropriated amount within fifteen days so that his continuance in service would be taken into consideration. The workman did not comply. So, the Cadre Committee resolved on Dt. 14-2-1990 to discharge the workman with immediate effect.

On non-payment of subsistence allowance, the management takes the stand that it was due to the workman's failure to submit non-engagement certificates.

4. Initially, the following issues were settled :—

ISSUES

- (i) "Whether the termination of services of Shri Melachha Pradhan, Cadre Secretary by the Secretary, Khurda Central Co-operative Bank, Khurda with effect from Dt. 14-2-1990 is legal and/or justified ?
- (ii) If not, what relief he is entitled to ?"

5. The parties adduced evidence. The second party examined himself as W.W. No. 1 and one of the erstwhile President of Kalika Prasad S.C.S. as W.W.2. Exts. 1 to 4 have been marked on behalf of the workman. The management examined only one witness. He is the Junior Administrative Inspector of the first party. On behalf of the management several exhibits have been marked.

6. After recording of evidence this Tribunal passed an Award on Dt. 13-3-2009 which, being challenged in W.P. (C) No. 7342 of 2009, has been set aside by the Hon'ble High Court vide Order No. 5, dated the 18th March 2010 and the matter has been remitted back to this Tribunal for re-adjudication after giving opportunity of hearing to both the parties. The Hon'ble Court gave opportunity to both the sides to lead to further evidence, if any. Accordingly, after remand, this Tribunal asked both the sides to adduce further evidence but they declined to adduce further evidence.

Since it is a case of dismissal preceded by a domestic enquiry, this Tribunal passed orders to recast the issues as follows—

ISSUES

- (1) Whether the domestic enquiry has been conducted fairly following the principles of natural justice ?
- (2) Whether the order of dismissal of the workman is legal and/or justified ?
- (3) What relief the workman is entitled to ?

After recast of the issues the management was given an opportunity to clarify whether it would adduce further evidence on the charges levelled against the second party in the event the finding on the issue related to the fairness of the domestic enquiry would be answered against it. The Learned

Counsel for the first party has submitted a written memo to the effect the management will not adduce further evidence on the charges/merit of the case. Therefore, this Tribunal now proceeds to record its findings on all the issues.

FINDINGS

7. *Issue No. (1)*—Since the management opts not to adduce further evidence even in the event this issue is answered against it, the fate of the case depends on findings on this issue.

Though it is pleaded by the workman that subsistence allowance for certain period was not paid to him and that copy of the enquiry report was not furnished to him, it is not shown as to how prejudice has been caused to him. The alleged non-payment of subsistence allowance is for the period from Dt.1-2-1990 to Dt.14-2-1990. According to the management, it was not paid due to non-submission of non-engagement certificate by the workman. The enquiry report (Ext.S) was submitted on the 14th September 1989. The workman was discharged with effect from Dt.14-2-1990. Thus, it is found that till the enquiry was over the workman was receiving subsistence allowance. Therefore, it cannot be said that on the ground of non-payment of subsistence allowance the workman could not face the proceeding effectively. That apart, Hon'ble Supreme Court have held in *U.P. State Textile Corporation Ltd. Vrs. P.C. Chaturvedi & others*, 2006 (109) FLR 411 (S.C.) that unless prejudice is shown and established, mere non-payment of subsistence allowance cannot *ipso facto* be a ground to vitiate the proceedings in every case. It is further observed that it has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-payment of subsistence allowance.

On the alleged non-supply of copy of enquiry report, it is to be considered as to whether prejudice has been caused to the workman due to non-supply of a copy of the enquiry report. Save and except the pleading in the claim statement there is no other material on this aspect. In *serve U.P. Gramin Bank Vrs. Monoj Kumar Sinha*, AIR 2010 (S.C.) 2491, it is observed that the enquiry will not vitiate because of mere non-supply of copy of enquiry report, if no prejudice has been caused. In the case at hand, there is no material to say that the workman was prejudiced for non-supply of copy of the enquiry report.

The workman has taken the plea that relevant documents were not furnished to him for which he had to submit his explanation to the charges without referring to the relevant documents. But, it is not proved by the workman that at any point of time he had made request for either supply or verification of the relevant documents but the management did not allow him to get access to those documents.

It is further contained that though the workman's headquarters was fixed at Begunia, the E.O. fixed the place of enquiry at Kalika Prasad and the workman's prayer to fix it at Begunia was not heeded to. It may be a fact that the workman's headquarters during the period of suspension was fixed at Begunia but that does not mean that the E.O. should have conducted the enquiry proceeding

at the workman's headquarters. It appears, the workman was duly noticed about the enquiry proceeding to take place at Kalikaprasad. Yet, he did not appear before the E.O. to participate in the enquiry. The E.O. cannot be said to have acted unfairly by not conceding to the workman's demand to hold the enquiry at Begunia.

8. There is no pleading but argument has been advanced on behalf of the workman that the Enquiry Officer has not conducted an enquiry in its real sense and instead he himself having verified some records of different S.C.Ss. has submitted the enquiry report. Ext.S is the copy of the enquiry report. Before going to deal with the enquiry report it is pertinent to re-produce the charges levelled against the workman. Ext.A is the copy of the charge sheet. It contains the following chargers :—

"It is reported that Shri Pradhan being the Secretary of Kalikaprasad S.C.S. has misappropriated the funds of the Society from time to time. The summary of the amounts are given below :—

Kalikaprasad S.C.S.

1. Shortage of control commodities	..	Rs. 6,631.50
2. Sitting fees to Directors	..	Rs. 1,299.00
3. Other unauthorised expenditure	..	Rs. 8,610.18
4. Fertilizer subsidy	..	Rs. 1,430.00
5. Dugwell subsidy	..	Rs. 5,299.00
6. Cash Book error	..	Rs. 1,300.71
	Total ..	<u>Rs. 24,570.39</u>
7. Retention of Cash balance	..	Rs. 3,928.33
8. Illegal & unauthorised Exp.	..	Rs. 986.00
	Total ..	<u>Rs. 29,484.72</u>

Besides the above, Shri Pradhan has misappropriated funds of the Societies where he was posted as Secretary previously are as follows :—

1. Podadiha S.C.S.	..	Rs. 6,462.41
2. Badapokharia	..	Rs. 6,236.01
	Grand Total ..	<u>Rs. 12,698.42</u>

Further an amount of Rs. 57,192.34 has been shown recoverable from him in the Audit Report of Kalikaprasad S.C.S. for the year 1985-86 for which he was given notice for deposit of the said amount but he has not yet deposited the same.

It is presumed that, Shri Pradhan is in habit of misappropriation of Society funds.

He has not got himself relieved of his duties at Kalikaprasad S.C.S . but joined at Begunia Branch on transfer.

Thus, the following charges are framed against Shri Melachha Pradhan, ex-Secretary of Kalikaprasad S.C.S. :—

1. Misappropriation of Society funds
2. Retention of heavy cash balance
3. Taking of unauthorised advance
4. Misappropriation of consumer commodities
5. Disobedience of orders.

According to the charges, the workman had allegedly misappropriated Rs. 29,484.72 from Kalikaprasad S.C.S. and Rs. 12,698.42 from the S.C.Ss. of Podadiha and Badapokharia. Furthermore, despite of direction the workman had not deposited a sum of Rs. 57,192.34 which was shown in the Audit Report as recoverable from the workman in respect of Kalikaprasad S.C.S. for the year 1985-86.

A perusal of the enquiry report reveals that the E.O. himself has verified the relevant records of different S.C.Ss. and found almost all the charges established against the workman. The E.O. is not examined as a witness before this Tribunal and the workman could not avail an opportunity to cross-examine him in order to findout the procedure he had adopted during the enquiry proceedings. But, from the report itself it transpires that the E.O. did not record any evidence and he did not call upon the management to adduce evidence on the charges. He himself examined the records and recorded his satisfaction on different charges. from all these one can say that the E.O. conducted just another audit in order to findout irregularities committed by the workman. Without any evidence to establish the charges of misappropriation of money the E.O. could not have arrived at the conclusion that workman had misappropriated the Society's fund. The findings recorded in the report do not appear to be confined to the charges contained in the charge sheet. In the charge sheet the workman has been charged to have misappropriated Rs. 29,484.72 +(plus) Rs. 12,698.42. Thus, the total sum of alleged misappropriation comes to Rs. 42,183.14, but the E.O. has mentioned in Page-5 of his report that the workman misappropriated a sum of Rs. 51,613.08.

Even though the workman did not take part in the enquiry pdroceeding, the E.O. ought to have conducted the enquiry asking the management to adduce evidence to prove the charges. The E.O. should not have played the role of an Investigator. For that reason the enquiry cannot be said to have been conducted fairly and properly.

The Issue is therefore, answered in the negative.

9. *Issue No 2*—In view of the findings on Issue No.1, it is found to be a case of dismissal without any enquiry. The management has opted not to prove the charges by adducing evidence before this Tribunal. Consequently, it is to be held that the charges are not established and the order of dismissal/discharge is neither legal nor justified.

On behalf of the management several decisions have been cited on certain settled principles such as (1) if a workman is found guilty of breach of trust removal from service is justified, and (2) once a domestic Tribunal, based on evidence, comes to a particular conclusion, it is not open to the Tribunal/Court to substitute its subjective opinion in place of the opinion arrived at by the domestic Tribunal. In view of the findings that the report of the E.O. is not based on any evidence and that the enquiry has not been conducted fairly and properly, these cited decisions are not necessary to be dealt with in details.

10. *Issue No 3*— Since the order of dismissal/discharge is held to be illegal, the workman is entitled to the relief of reinstatement in service. This Tribunal while making the Award on Dt.13-2-2009, which has been set aside by the Hon'ble High Court, has held that the workman is entitled to reinstatement in service but he is not entitled to any back wages from the date of discharge till the date of the Award with further clarification that on reinstatement of the workman the management would be at liberty to recover the admitted amount of Rs. 30,000 from the workman from his monthly salary in instalments. However, this Tribunal deems it just and proper to give relief differently. But, before going to do so certain observations in the Judgement of the Hon'ble Supreme Court in *Biecco Lawrie Ltd. & Another Vrs. State of West Bengal & Another* reported in AIR 2010 (S.C.) 142 taken may be note of (This judgement is relied on by the learned counsel for the workman to support his argument that the Tribunal cannot reverse its earlier decision vide the Award dated Dt.13-2-2009.) In the reported case an Award of the 5th Industrial tribunal, West Bengal affirming the order of dismissal passed against the Respondent was set aside by the Hon'ble High Court of Calcutta and the matter was remitted back to the Tribunal for re-consideration on the basis of existing evidence. After remand the Tribunal heard the matter on the basis of the same evidence on record and held that the Respondent was illegally terminated and the dismissal order was not justified. When the matter went up to the Hon'ble Supreme Court, their Lordships have observed as follows :—

“The Tribunal also erred in reversing its own decision on the same evidence for which we fail to see as to how the same Forum can appreciate the same evidence differently.”

It is true that in the case at hand our Hon'ble High Court after setting aside the Award have remanded the matter for fresh disposal but giving opportunity to the parties to adduce further evidence. The factual aspect in the reported case is some-what different from that of the case at hand. In the reported case Hon'ble Calcutta High Court had remanded the case to the Tribunal for re-consideration on the basis of existing evidence but in this case our Hon'ble High Court remanded the case giving the parties opportunity to adduce further evidence. That apart, in the earlier Award so also in the present Award this Tribunal has found the order of dismissal to be illegal and unjustified. So, in my humble opinion the observations in *Biecco Lawrie's case (supra)* would not be a bargain allowing relief to the workman which would be somewhat different from what is awarded in the earlier Award.

On 25-8-2005 the workman deposed in this case and at that time he mentioned his age to be 52. Now he must be aged about 57. The order of dismissal, without a fair domestic enquiry, has been held to be illegal. So, in the eye of law it is deemed that there was no dismissal order against the second party and he is deemed to be in service. Therefore, he is entitled to get back wages besides the relief of reinstatement. It may so happen that the workman would reach the age of superannuation before he gets opportunity to enforce the Award. Therefore, denial of back wages would be highly prejudicial to the second party. The management may recover any amount legally recoverable from the workman and it cannot be limited to a sum of Rs. 30,000 (thirty thousand) as observed in the earlier Award. The second party while adducing evidence has stated on oath that he was unemployed but he was doing cultivation. The management has not claimed that the second party was in gainful employment during the relevant period. For that reason also the second party is entitled to back wages.

In the result, it is held that the second party shall be entitled to reinstatement with full back wages alongwith other service benefits.

The reference is answered accordingly.

Dictated & corrected by me.

RAGHUBIR DASH
3-1-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
3-1-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

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

