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LABOUR & E.S.I. DEPARTMENT

NOTIFICATION

The 21st July 2012

No. 5699—Ii-1(B)-45/2008(Pt.)-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 18th June 2012 in I. D. Case No. 19/2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of MESCO (Mid East Integrated Steel Ltd.), Khurunti, Danagadi, Jajpur and its Workman Shri Pradeep Kumar Chakra was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 19 OF 2010

Dated the 18th June 2012

Present :

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

Between :

The Managing Director, . . First-party—Management
MESCO, Mid East Integrated Steel Ltd.,
At Khurunti, P.O. Danagadi,
Dist. Jajpur.

And

Shri Pradeep Kumar Chakra, . . Second-party—Workman
At Sulei, P.O. Danagadi,
Dist. Jajpur.

Appearances :

Shri D. P. Nanda, Advocate	. .	For the First-party—Management
Shri B. N. Mohanty, Advocate	. .	For the Second-party—Workman

AWARD

The Government of Odisha in their Labour & Employment Department (Presently, the Labour & E.S.I. Department), in exercise of powers conferred upon them by sub-section (5) of Section 12, read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947), for short the Act, have referred the following dispute for adjudication vide their Order No. 3538—Ii-1(B)-45/2008-LE., dated the 29th April 2010.

"Whether the action of the management of MESCO, Jajpur is not permitting Shri Pradeep Kumar Chakra, Security I/c to continue in employment with effect from the 21st June 2000 is legal and/or justified ? If not, what relief the workman is entitled to ?"

2. In his claim statement the second-party workman has pleaded that from 1994 to 1997 he had been working in the Plant of the first-party as Security-in-charge through a Security Agency M/s. B.S.B.K., a Contractor providing Security Services to the first-party. In the year 1997 when the Security Agency was wound up the second-party was put under the direct employment of the first-party and as such he continued till 20-6-2000. During the period of direct employment he was also engaged at Delhi Office of the first-party. From Delhi Office he was transferred to work in the first party's Unit at Chennai. When he reported for duty at Chennai he was not allowed to join. Therefore, he made several representations to the first-party to allow him to work either in its Chennai Plant or at any other Units. When the first-party did not respond he raised the present dispute.

3. In the written statement the first-party has contended that the second-party was never an employee of the first-party and that he was not directly employed by the first-party to work in its Plant at Kalinganagar, Jajpur. As such, there is no employer-employee relationship between the parties. Admitting that the second-party was working as Security-in-charge under the Security Agency M/s B.S.B.K. which was wound up in 1996, it is further pleaded that after the Security Agency was wound up the second-party became jobless. When there was temporary requirement of a Security Staff in its Head Office at New Delhi and as the second-party was interested for that job he was asked to proceed to New Delhi for temporary engagement. He worked there on temporary basis. When his performance was found not satisfactory he was withdrawn from Delhi Office and was offered temporary engagement at Bokiyu Tanneries Ltd., Chennai. However, he never reported for duty at Chennai nor did he report to Delhi Office as to why he did not join at Chennai. So, he is deemed to have left the job on his own choice. Further contention of the first-party is that the dispute having been raised about ten years after the alleged cause of action the reference is liable to be rejected.

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

ISSUES

(*i*) "Whether the reference is maintainable ?

(*ii*) Whether there is work-employer relationship between the parties ?

(*iii*) Whether the second-party abandoned his job or he was denied employment with effect from the 21st June 2000 ?

(*iv*) Whether the termination of service is legal and justified ?

(*v*) What relief(s) the workman is entitled to ?"

5. The workman has examined himself as W.W. 1. Documents have been marked as Exts. 1 to 6 at the instance of the workman. The first-party has examined its Chief General Manager as M.W. No. 1 and on behalf of the management one document has been marked as Ext. A.

FINDINGS

6. *Issue No. (ii)*—The first-party's consistent stand is that the second-party was not its workman at any point of time and therefore, he cannot raise the dispute against it. It is not in dispute that initially the second-party was working in the establishment of the first-party as Security-in-charge being engaged through a Contractor. It is also not disputed that the second-party was working as such till the Contractor's establishment got wound up. While the second-party claims that the Security Agency was wound up in 1997, the first-party claims that it was wound up in 1996. It is not very much important as to when the Security Agency was wound up. But, what happened immediately thereafter is very much important. The second-party claims that soon after the winding up he was directly employed under the first- party. But, the first-party claims that the second-party was never directly employed in its establishment. The second-party has not exhibited any document in support of his claim that he was directly employed by the first-party. However, in his cross-examination he has stated that Ext. 2 is his appointment letter. Ext. 2 is a letter, dated the 7th March 1998 signed by the General Manager (P&A) of the first-party addressed to the P.S. to the M.D., MESCO Tower, New Delhi (Head Office). The letter reflects that on being asked by the Head Office, the General Manager (P&A) of the first-party sent two Guards to be deployed at the Head Office. In Ext. 2 it is not specifically mentioned that the second-party was an employee of the first-party. The second-party has failed to produce any other document to prove that after winding up of the Security Agency and till the letter marked Ext. 2 was addressed to the Head Office he had ever received salary/wages from the establishment of the first-party. So, there is no evidence to support the workman's stand that soon after the Security Agency was wound up he was directly employed in the establishment of the first-party.

7. Ext. 5 is a representation made by the second-party's wife addressed to the Chairman, Mahila Commission, Bhubaneswar. The letter does not bear any date, but it is found to have been written after the alleged refusal of employment which is the subject matter of the reference. Ext. 6 is a Lawyer's notice, dated the 26th October 2005 addressed to the Managing Director of the first-party. Both the documents are relied on by the second-party. Though in each of the documents there is detail description about the employment of the second-party after his retirement from Military Service till the alleged refusal of employment by the first-party, but in neither of the documents there is mention that when M/s B.S.B.K. was wound up the second-party was directly employed under the first-party and worked there till he was transferred to the Head Office. In Ext. 5 it is stated that the Managing Director of MESCO appointed the second-party and posted him in the Head Office at Delhi on 7-3-1998 vide appointment letter No. 012060, dated the 7th March 1998. Also in Ext. 6 it is stated that after the second-party had left his service under M/s. B.S.B.K., he was appointed directly under MESCO vide Letter No. 012060, dated the 7th March 1998. Ext. 2 is the said order of appointment. Even the second-party in his evidence has claimed Ext. 2 to be his appointment

order. The conciliation failure report does not reflect that after the employment of the second-party under M/s B.S.B.K. had come to an end and before the letter marked Ext. 2 was issued on 7-3-1998 the workman being directly employed by the first-party had been working in the first-party's Plant. Therefore, the plea that he was directly employed by the first-party to work in its Plant at Jajpur till he was transferred to the Head Office is an after thought.

8. Now, it is to be considered as to whether Ext. 2 is an appointment order. The first-party does not dispute that it had written the letter (marked Ext. 2) to the Head Office and that on the strength of this letter the second-party proceeded to the Head Office and worked there till he was asked to join in Bokiyu Tanneries Ltd. at Chennai. According to the first-party, since there was some temporary requirement at Delhi Office and the second-party, being jobless, was interested to accept the job at New Delhi he was asked to proceed there for temporary engagement. If that was the case then the first-party would not have addressed a letter like Ext. 2. In the letter it is mentioned that on being asked by the Managing Director to send two more Guards to be deployed at the Head Office, the General Manager (P&A) of the first-party sent two personnel with their bio-data clearly stating it that they would report at the Head Office on 10-3-1998. Even the pay package of the two personnel was specified in the said letter. Thus, it is found that the General Manager (P&A) of the first-party sent two "personnel" to be deployed at the Head Office. The second-party is one of the two personnel. Basing on the contents of the letter marked Ext. 2 it can be construed that the second-party was a personnel of the first-party but he was sent to the Head Office to be deployed there as a Guard. The bio-data of the personnel further reflect that one Madhusundan Sethi who was sent to the Head Office along with the second-party was already a Group-IV Security Guard having served for two and a half-years at the first-party's Plant whereas in the case of the second-party it is stated that he had worked as Security-in-Charge with M/s B.S.B.K. from 1992 to 1996. The second-party's plea that he was an employee of the first-party during1997-1998 is found unacceptable. It is also not stated in Ext. 2 that by the time Ext. 2 was issued the second-party was working in the Plant in any capacity. But the second-party's claim that Ext. 2 is an appointment order issued by the General Manager (P&A) of the first-party cannot be brushed aside. It can be construed from the terms of Ext. 2 that the General Manager (P&A) of the first-party having appointed the second-party as a Guard in the first-party's establishment deputed him to the Head Office to be "deployed" there. In the body of the letter marked Ext. 2 the second-party is described as a "personnel" and his pay package is also defined in details. If it were a simple case of suggesting the name of the second-party to the Head Office for being temporarily engaged in the Head Office, such a letter describing the second-party as a "personnel" and mentioning his pay package should not have been written. Thus, according to my considered view the second-party was given first appointment in the establishment of the first-party vide Ext. 2 and thereafter he was asked to report at the Head Office on 10-3-1998 to be deployed there as a Guard.

Consequently, it is held that there was employer-employee relationship between the parties. Issue No. (ii) is answered accordingly.

9. *Issue No. (iii)*—It is not in dispute that on being sent by the first-party the second-party reported in the Head Office at New Delhi on 10-3-1998 where he worked till 20-6-2000. It is also not disputed that on 20-6-2000 the second-party was asked to report for duty in Bokiyu Tanneries Ltd.,

at Chennai. In this regard Ext. 3 has been exhibited without objection. It reflects that as per the direction of one Mrs. Singh the workman was sent to Chennai for doing Security work at Bokiyu Tanneries Ltd.'s Plant. The workman's case is that consequent upon his transfer to Chennai he had reported for duty but he was not allowed to join. But, according to the first-party, the workman did neither report at Bokiyu Tanneries nor did he inform the Head Office the reason of his failure to join at Chennai. Further case of the management is that since his job was temporary in nature no charge sheet was served on him and no disciplinary proceeding was initiated. The second-party claims that when he was not allowed to join at Chennai he approached his principal employer, i.e., the first-party, but the latter did not take any step either to see that he was allowed to join at Chennai or to be posted in any other Unit.

Thus, according to the first-party, it is a case of abandonment of employment. It is well settled that burden lies on the employer to establish and prove that the employee had abandoned service. That apart, in M.G. Patel *Vrs.* Mastanbaug Consumers Co-operative (W&R) Stores Ltd., 1997 Lab. I.C. 2537 Hon'ble Bombay High Court have observed that even in a case of abandonment of service the employer has to give notice to the employee calling upon him to resume his duty and if the employee does not turn up despite such notice, the employer should hold enquiry on that ground and then pass appropriate order for termination. If the management's plea is accepted then it is a case of wilful disobedience of the order of a superior under which the workman was transferred from New Delhi to Chennai, Therefore, as per the Model Standing Order Clause No. 14(3)(a), prescribed under the Industrial Employment (Standing Orders) Act, 1946, it is a misconduct for which a disciplinary proceeding is mandatory. In this case the first-party has not given any indication that it has got its own Certified Standing Orders. Therefore, the Model Standing Orders framed under the Industrial Employment (Standing Orders) Rules, 1946 is to be made applicable to the parties. Had there been a disciplinary proceeding the management could have ascertained whether it was a case of abandonment of job. In the absence of other materials it cannot be presumed to be a case of abandonment of job.

10. It is contended by the first-party that the inordinate delay in raising the dispute is itself sufficient to raise such a presumption. The case of action arose soon after 20-6-2000. Ext. 6, the legal notice which is exhibited without objection, was sent to the first-party on 26-10-2005. The conciliation failure report reflects that the second-party raised the dispute before the Labour Authority by making an application on 29-12-2005. The workman claims that in between 20-6-2000 and 29-12-2005 he had made several approaches to the first-party to get employment but the management did not respond. It is true that the workman has not produced any documentary evidence showing that he had made repeated request to the management. However, the management has relied on Ext. A which is a representation made by the second-party in which the latter has requested for his reinstatement. Ext. A does not bear any date but the management also does not clarify as to on which date Ext. A was received. Ext. A is sufficient to dispel the management's plea of abandonment of job.

Some other circumstances also run against the presumption of abandonment of employment. The management in clear terms pleads that because of unsatisfactory performance the workman was withdrawn from the Head Office and asked to work in its Chennai Plant. Thus, it is found that the management was trying to get rid of him. So, as a measure of punishment he was transferred to a far off place. Ext. 5 and Ext. A reflect that the workman was not happy with his posting at Chennai for which he did not report to join there in time. Under such circumstances, it cannot be said that with an intention to quit the job the workman did not join at Chennai.

Considering all these facts and circumstances it is held to be a case of refusal of employment. There is no sufficient evidence showing that the workman had reported for duty at Chennai. It appears, he was not interested to join there and therefore, he approached the first-party to give him employment elsewhere which was not acceded to. Therefore, it is a case of refusal of employment on the part of the first-party.

11. *Issue No. (iv)*—It is argued on behalf of the management that the second-party instead of approaching the first-party should have approached either the Head Office at New Delhi or the management of the Chennai Unit. Such an argument has been advanced on a supposition that there is no employer-employee relationship between the parties. But, it is already held that the first-party is the employer of the second-party and he was simply deployed in the Head Office and was never transferred from Odisha to New Delhi. As per the provisions of the Model Standing Orders the management could not have transferred him from Odisha to New Delhi. Schedule-IB of the Orissa Industrial Employment (Standing Orders) Rules, 1946 containing additional items of the Model Standing Orders stipulates that a workman may be transferred according to exigency of work from one station to another or from one establishment to another under the same employer but where the transfer involves moving from one State to another such transfer shall take place either with the consent of the workman or if there is a specific provision to that effect in the letter of appointment. In the case at hand, the management has not proved any such order of appointment containing the provisions for such transfer and it is also not contended that the workman had given his consent for his transfer either to Delhi or to Chennai. That apart, the first-party being the employer of the second-party, it is not shown that the establishments in Delhi and Chennai are the establishments under the same employer. Perhaps, being conscious about the provisions contained in the Model Standing Orders the management has not transferred the second-party from Odisha to New Delhi and has used the word "deployment" while issuing the letter Ext. 2.

12. Ext. 3 is admitted to be an order asking the second-party to report at Chennai but this letter does not appear to have been issued either by the first-party or any Authority of the Head Office. The order appears to have been issued by some authority of Bokiyu Tanneries Ltd. The management has not proved any order passed by the Head Office asking the second-party to report at Chennai. All these circumstances show that the second-party's transfer to Chennai is *mala fide* and thus invalid. The first-party being the employer of the second-party ought to have considered favourably by permitting the workman to resume duties in its Plant. Its inaction amounts to refusal of employment leading to termination of his service which is not in accordance with the provisions contained in the Act. Under such circumstances, the termination of service of the second-party is neither legal nor justified.

13. *Issue No. (i)*—Though not specifically pleaded in the written statement, it is stated in the affidavit evidence of M.W. No. 1 that the dispute should have been raised in either Delhi or Chennai as the cause of action arose there. It is already held that the workman was first employed by the first-party and thereafter he was deployed at the Head Office in New Delhi. It is not shown that any authority other than the first-party is the employer of the second-party. Since the employer is in the State of Odisha and it is not shown that the second-party was legally transferred from the management of the first-party to the management of any other establishment located at either Delhi or Chennai, the workman has to raise the dispute before the authorities within whose local jurisdiction the first-party comes. Therefore, on this ground the reference cannot be said to be not maintainable.

The issue on maintainability of the reference has been framed solely on the contention that there is no employer-employee relationship between the parties. This issue having already been answered against the first-party, the present issue is answered in the affirmative.

14. *Issue No. (v)*—Ordinarily, a workman under such a situation should be reinstated with full back wages. But, in this case there are some special facts and circumstances which must be taken into consideration. As per the Model Standing Orders, the age of retirement shall be either as may be agreed upon between the employer and the workmen under an agreement, or as specified in a settlement or Award binding on both sides and in absence of all these the age of superannuation shall be on completion of 58 years of age by the workman. On 12-9-2011 the workman, while adducing evidence, has stated on oath that his age is 56. In Exts. 2 and 6 it is stated that the workman having served for $10^{1}/_{2}$/11 years of Military Service took voluntary retirement in 1981. Presuming that he entered into the Military Service at the age of 18, the year of birth of the second-party can be said to be either 1951 or 1952. If the age of superannuation is 58, then in the meanwhile the workman has completed 58 years of age. Therefore, he is not entitled to be reinstated. Regarding back wages, it is to be remembered that the workman must be getting pension consequent upon his taking voluntary retirement from Military Service. That apart, he raised the present dispute at a belated stage. It is also neither pleaded nor proved that the workman was out of gainful employment ever since his retrenchment. Had he not been refused employment from 21-6-2000 he would have served under the first-party for another period of 8 to 9 years. It appears, he used to get a monthly salary of Rs. 2,500 at the relevant time. Considering all these facts and circumstances, it is found to be just and appropriate to award a compensation of Rs. 1,50,000 (Rupees one lakh fifty thousand) only which is little more than 50% of the back wages he would have received for having remained out of employment for about nine years.

15. In the result, the termination of service of the workman is held to be neither legal nor justified and the workman is held entitled to get compensation of Rs. 1,50,000 (Rupees one lakh fifty thousand) only in lieu of back wages.

The reference is answered accordingly. The first-party to implement the Award within a period of two months of its publication in the Official Gazette.

Dictated and corrected by me.

RAGHUBIR DASH
18-6-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
18-6-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

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By order of the Governor

M. R. CHOUDHURY

Under-Secretary to Government

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