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LABOUR & E. S. I. DEPARTMENT

NOTIFICATION

The 4th August 2012

No. 7001—IR(I D)- 18/2010-LESI—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 26th July 2012 in Industrial Dispute Case No. 40/2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of the Executive Engineer, Central Electrical Division, Balasore & Executive Engineer, Electrical Division, Soro, Balasore and their workmen represented through the General Secretary, O.S.E.B. Shramika Maha-Sangha was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No.40 OF 2010

Dated the 26th July 2012

Present :

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

Between :

- The Managements of— . . . First Party—Managements
1. Executive Engineer, Central Electrical Division, Balasore.
 2. Executive Engineer, Soro Electrical Division, Soro, Balasore.

And

Shri Ganesh Santra & 90 others . . . Second Party—Workmen
(as per Annexure-I attached to the conciliation failure report), represented through the General Secretary, O. S. E. B. Shramika Maha-Sangha, Bhubaneswar.

Appearances :

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| For the First Party—Management Nos. 1 & 2 | Shri D. N. Naik, A. M.(Legal) |
| For the Second Party—Workmen | R. C. Mohanty Gen. Secretary. O. S. E. B., Shramika Maha-Sangha. |

A W A R D

The Government of Odisha in their Labour & ESI Department, exercising power conferred upon them by Section 12(5) read with Section 10 (1) (d) of the Industrial Disputes Act, 1947 (for short, the Act), have referred the following dispute to this Tribunal for adjudication vide their Order No. 6332—ID/18/2010//LE., dated the 29th July 2010 :—

“Whether the termination of services of 91 N.M.R. workers(as per Annexure-I) by the Executive Engineer, Central Electrical Division, Balasore and Executive Engineer, Soro Electrical Division, Soro by way of refusal from employment w.e.f. the 24th October 1999 is legal and/or justified ? If not, to what relief these workers are entitled ?”

2. The second party Union has raised the dispute challenging the termination of services of 91 persons. According to the second party, the disputant-workmen numbering 91 were working under the first party as N. M. Rs.. Initially they were engaged in construction work of Central Electrical Division, Balasore and subsequently they were engaged in maintenance work of Soro Electrical Subdivision, Soro. It is claimed that each of them have completed 240 days of work before the alleged retrenchment took place. It is claimed that with effect from 24th October 1999 the Management refused employment to the workmen and thereby terminated their services without notice or notice pay and retrenchment compensation. After refusal of employment, it is claimed, the Management has given employment to some other workers to do the same work. Hence, their retrenchment is illegal and unjust. Thus, it is prayed that the workmen should be reinstated with full back wages.

3. According to the management, the second party has made false assertions in its claim statement that the disputant-workmen were engaged as N. M. Rs. to work under the first party and that they had completed 240 days of work before their services were terminated. It is further pleaded that the present management of M/s NESCO became operational on 26th November 1998. The claim of the second party relates to pre 26th November 1998 period when the management was with the O. S. E. B./GRIDCO. As such, there is no employer-employee relationship between the disputant-workmen and the present management. That apart, no such claim having been putforth

before the erstwhile management, the present reference is hopelessly time-barred and not maintainable as against the present management.

4. In terms of the reference the following issues have been settled :—

ISSUES

- (i) “Whether the termination of services of 91 N. M. R. workers as per Annexure-I by the Executive Engineer, Central Electrical Division, Balasore and Executive Engineer, Soro Electrical Division, Soro by way of refusal from employment w.e.f. 24th October 1999 is legal and/or justified ?
- (ii) If not, what relief these workers are entitled to ?”

5. To prove their respective stand the parties have examined two witnesses each. W. W. No.1 is one of the disputant-workman and W. W. No.2 is a retired Executive Engineer who was working as S. D. O., Soro Electrical Subdivision during the relevant period. Ext.1 to Ext. 4 series have been marked on behalf of the second party. M. W. No. 1 is the Executive Engineer, Central Electrical Division, Balasore and M. W. No.2 is the S. D. O. (Electrical), Soro Electrical Division, Soro. The first party has exhibited documents which are marked Exts. A to F series.

FINDINGS

6. *Issue No. (1)*—Since the Management does not admit that the disputant-workmen were ever engaged under the first party and the very existence of employer workmen relationship is denied, these points are to be examined carefully.

The second party has not produced any documentary evidence except Experience Certificates issued by W. W. No. 2 to each of the 91 disputant-workmen. The genuineness of the Experience Certificates has been vehemently disputed by the first party. However, while cross-examining W. W. No. 1 the management has put suggestion that as and when required the S. D. O., Soro Electrical Section used to engage the disputant-workmen in different work and that they had never worked continuously from 18th April 1995 to 23rd October 1999. It is also suggested to the said witness that whenever fund was available, the disputant-workmen were called to work as daily wage labourers/casual workers and that their employment was not continuous. It is not understood as to how the Authorised Representative of the first party has put such suggestions to the witness even when it is completely denied by the first party that the disputant-workmen were ever engaged in the establishment of the first party. During argument it is clarified that the disputant-workmen might have worked as casual labourers but they were never engaged as N. M. Rs. It is submitted that if they had been engaged as N. M. Rs. during the relevant period their names would have found place in the N. M. R. Attendance/Bill Registers, which have been marked Exts. F, F/1 and F/2. It is true that these N. M. R. Attendance/Bill Registers, which relate to Soro Electrical Section Nos. I and II, do not contain names of any of the disputant-workmen though the Registers, cover a substantial part of the period the disputant-workmen were allegedly employed by the Management. Relying on

the testimony of W. W. No. 2 it is argued on behalf of the second party that since the disputant-workmen had all along been engaged in Khaira & Markona Sections of Soro Electrical Subdivision their names do not find place in Ext. F series which relate to Soro Section. It is not disputed that there are Khaira, Markona and Soro Electrical Sections under Soro Electrical Subdivision. It is simply suggested to W. W. No. 2 that no separate Attendance/Bill Registers for N. M. Rs. working in each section was being maintained. W. W. No. 1 denies that only one Attendance/Bill Register for the N. M. Rs. working in all Electrical Sections under Soro Subdivision was being maintained. The Management's plea that only one set of Register for all the Electrical Sections was being maintained is not believable inasmuch as Ext. F series themselves are proof of the fact that separate such register was being maintained for Electrical Section No. I, Soro and Electrical Section No. II, Soro. At the same time, the testimony of W. W. No. 1 that the disputant-workmen were engaged only in Khaira and Markona Electrical Section is not even supported by the pleadings contained in the claim statement and the oral evidence adduced by W. W. No. 1. Even in its petition seeking production of documents the second party did not specifically mention that the disputant-workmen were exclusively engaged in Khaira & Markona Electrical Sections. The reliability of W. W. No. 2 will be dealt with at a later stage while dealing with it Experience Certificates he has issued. Be that as it may, there is no documentary evidence showing that the disputant-workmen were ever engaged as N. M. Rs.

Relying on the suggestions put to W. W. No. 1 that the disputant-workmen were engaged as casual labourers as and when required but they had not completed one year of continuous service, it is argued on behalf of the second party that the burden shifts to the management to prove that they did not complete one year of continuous service. In this regard, reliance has been placed on a decision of the Hon'ble Supreme Court in the case of Director, Fisheries, Terminal Division Vrs. Bhikubhai Meghajibhai Chavda, reported in AIR 2010 (S. C.) 1236. In the reported case the management admitted that the workman was hired on daily wage basis but it took the stand that he did not work for 240 days. Opining that being a daily wagger he would have difficulty in having access to all the official documents, muster rolls, etc. in connection with his service, Hon'ble Supreme Court observed that since the workman had come forward and deposed that he had completed 240 days of work the burden of proof shifts to the employer to prove that he did not complete 240 days of service in the requisite period. In the reported case it was also found that the employer's contention that the workman's services were terminated in 1988 was contradicted by documentary evidence produced by the employer showing that the workman was working even during February, 1989. In the reported case the employer-employee relationship was not in dispute. The dispute was with regard to the number of days of service the workman had rendered to complete one year of continuous service. But, in the case at hand the Management does not admit the existence of employer-employee relationship.

It is true that the second party had prayed for production of certain documents vide its application dated 27th January 2011 and when the first party despite of several adjournments failed to file objection to the petition the Tribunal directed the latter to produce the documents. Subsequently, the first party submitted in writing that the documents called for were not available with the present

management. The first party contends that the documents called for by the second party relate to the period of erstwhile management of O. S. E. B./GRIDCO which were not handed over to the present management at the time of take-over of the management. The erstwhile management is not arrayed as a party. The petition to call for certain documents is omnibus in nature. No where the second party has made it specific as to exactly in which Electrical Sections the disputant-workmen were working. It is only during the cross-examination of W. W. No. 2 he has stated that they were working in Khaira and Markona Electrical Sections. The second party did never make a prayer to cause production of the relevant documents maintained in Markona and Khaira Electrical Sections. Executive Engineer, Central Electrical Division, Balasore and Executive Engineer, Soro Electrical Division, Soro have been arrayed as first parties. Under the two Electrical Divisions there must be many Electrical Subdivisions, and under each Subdivision, several Sections. That apart, the plea that the documents called for are not in the custody of the present Management cannot be brushed aside. Under such circumstances, it cannot be said that the documents though available are intentionally suppressed by the first party. As the result, no adverse inference can be drawn against the Management.

7. Relying on Ext. 4 series, the xerox copy of Experience Certificates issued in favour of the disputant-workmen, it is submitted by the second party that the second party has adduced sufficient evidence to *prima facie* show that the disputant-workmen were engaged in Electrical Subdivision, Soro since 1995 till 23rd October 1999 without any break. The first party submits that the Experience Certificates are not genuine and that those have been obtained from W. W. No. 2 after he was dismissed from service vide Order dated the 4th June 2002.

All the Experience Certificates are found to have been issued on 23rd October 1999. W. W. No. 2 claims that he has issued these Certificates after verifying the Nominal Muster Rolls and wage records. He has issued the Certificates in the capacity of S. D. O., Electrical Subdivision, Soro. But, as on 23rd October 1999 he was not the S. D. O. of Soro Electrical Subdivision. Because in his affidavit evidence he has stated that he was the S. D. O. of Soro Electrical Subdivision from 19th September 1995 to 5th May 1997. In his cross-examination he has stated that as on the date of issue of the Certificate he was posted as S. D. O., Dhamnagar Electrical Subdivision under Bhadrak Electrical Division. He has also admitted that Soro Electrical Subdivision was never under Bhadrak Electrical Division. To give an explanation that he was competent to issue the Certificates he has taken a queer plea that at the time he was relieved as S. D. O., Soro Electrical Subdivision he was directed to look after the balance construction work of Soro Subdivision till the work got completed. In cross-examination he says that the Superintending Engineer, Electrical Circle, Balasore had issued "verbal instruction" to look after the incomplete work even after he was relieved from the post of S. D. O., Soro Electrical Subdivision. This does not inspire any credibility. According to the Second party, the disputants were retrenched w.e.f. 24th October 1999. In the Certificates it is mentioned that the disputants had been working as N. M. Rs. from 1995 to 23rd October 1999. The Certificates are purportedly issued on the last date of their engagement. It is not claimed by W. W. No. 2 that as on 23rd October 1999 no other person was holding the post of S. D. O., Soro Electrical Subdivision. W. W. No. 2 admits that he had faced a departmental enquiry and was dismissed from service w.e.f. 4th June 2002. Though the date of retrenchment is alleged to be 24th October 1999

the dispute was raised only in February, 2009 as it reveals from the conciliation failure report. It appears, the Experience Certificates have been obtained from W. W. No. 2 much after 23rd October 1999, possibly after W. W. No. 2 was dismissed from service. W. W. No. 2 claims that he issued the Certificates after verifying Norminal Muster Rolls and wages Records. In cross-examination he has stated that before issuing the Certificates he had verified the records by making a visit to the Office of the Central Electrical Division, Balasore. At that time he was not working in the Balasore Electrical Division. He admits to have not issued any requisition and/or obtained permission from the appropriate authority to verify the records in the Office of the Central Electrical Division. Therefore, his claim that before issuing the Certificates he had verified the relevant records is also not convincing.

The Certificates seem to have been issued in a mechanical manner. The date of commencement of employment of the disputant-workmen is not mentioned in any of the Certificates. It is simply stated that the employment of the second party workmen commenced in 1995. The Certificates have not been issued following the official procedure. W. W. No. 2 says that the disputants did not make any application for issuance of such Certificates and that no issue number has been assigned to the Certificates. Ext. D contains instructions of the O. S. E. B. prohibiting officials other than the Executive Engineer from issuing service certificates and Character Certificate in favour of the N. M. Rs. W. W. No. 2 says that the instructions do not relate to issuance of "Experience Certificate." But, such a plea cannot be readily accepted. Since the Experience Certificates contain the period of engagement and the nature of work in which the concerned workmen were engaged it is to be treated as service certificates. W. W. No. 2 being not an Executive Engineer was incompetent to issue such certificates. W. W. No. 2 having been dismissed from service is a highly interested person and the Certificates having been issued by such a person under suspicious circumstances cannot be relied upon.

Once the Experience Certificates are discarded and adverse inference for non-production of documents is not raised the second party cannot be said to have established employer-employee relationship between parties.

8. It appears, the genesis of the dispute has been suppressed. The conciliation failure report reflects that in their complaint dated the 10th February 2009 made to the Conciliation Officer-*cum* Asst. Labour Officer, Balasore a different story was narrated. During conciliation the disputants' claim was that in the year 1999 basing on the instructions issued by GRIDCO the disputants were instructed by the Management to work under some contractors, and, accordingly, they worked under one Pradip Grahacharya and other contractors without any objection. After working for four months under the contractors they were refused employment by the contractors because the contracts were abolished. Thus, it is found that during the period of the erstwhile Management, i.e. M/s. GRIDCO, the disputants were disengaged. They did not raise any dispute challenging such disengagement. They seem to have remained silent till 10th February 2009. The second party has exhibited three representations (Ext. 3 series) to show that soon after the retrenchment they had made representations to the Management. But, it is not shown that those representations were actually delivered or sent to the Management. In the absence of such evidence these documents being self-serving in nature cannot be taken into consideration. During conciliation the disputants

did not reveal their date of alleged retrenchment. They simply stated that they were in service from 1995 to 1999 and that in the year 1999 they were instructed by the GRIDCO to work under contractors. Thus, it is very clear the retrenchment took place when GRIDCO was in the Management. It is not disputed that NESCO obtained licence for the distribution of Electricity from the Odisha Electricity Regulatory Commission w.e.f. 1st April 1999. If the retrenchment was brought about by the erstwhile Management of GRIDCO the second party's plea that the disputants' services were terminated w.e.f. 24th October 1999 by the present Management is an after-thought. If the second party had taken the same stand that it had taken before the Conciliation Officer, then the date of retrenchment, i.e. the cause of action would have been different and the Tribunal could have arrayed the erstwhile management as a party to this case. Be that as it may, the second party has failed to prove that there was employer-employee relationship between the parties and that the disputants were retrenched w.e.f. 24th October 1999. It is also not proved that the disputants had completed one year of continuous service under the first party. Therefore, the alleged retrenchment w.e.f. 24th October 1999 can not be said to be illegal or not justified.

9. *Issue No. (II)*— In view of findings on issue No. I the disputants are not entitled to any relief. However, in the event raising of adverse inference for non-production of documents is permissible and/or the Experience Certificates are held to be reliable and it is held that the disputants having completed one year of continuous service their retrenchment was illegal and/or unjustified, then in my considered view, they would not be entitled to either reinstatement or back wages. In *Jagbir Singh Vrs. Haryana State Agriculture Marketing Board & Another*, AIR 2009 (SC) 3004, award of reinstatement with full back wages, particularly, in respect of daily-wagers is held to be improper and instead compensation is to be awarded. In *Ashok Kumar Sharma Vrs. Oberoi Flight Services*, AIR 2010 (SC) 502, it is observed by the Hon'ble Supreme Court 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 in contravention to the prescribed procedure. In the case at hand, the disputants claim that they were working as N. M. Rs. They claim that they were engaged for a period of four years. Though they claim that they were retrenched on 24th October 1999, they did not raise any dispute till 10th February 2009. Under such circumstances, they would be entitled to compensation only. Considering the length of employment a reasonable compensation for each of the workmen should be Rs. 20,000 (Rupees twenty thousand) only.

However, in view of the observation on Issue No. I, the disputants are not entitled to any relief.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
26-7-2012
Presiding Officer
Industrial Tribunal, Bhubaneswar

RAGHUBIR DASH
26-7-2012
Presiding Officer
Industrial Tribunal, Bhubaneswar

By order of the Governor
M. R. CHOUDHURY
Under-Secretary to Government