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LABOUR & E.S.I. DEPARTMENT

NOTIFICATION

The 5th October 2012

No. 9083—IR-(ID)-111/2010-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 16th February 2012 and 1st August 2012 in Industrial Dispute Case No. 70 of 2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Hi-Tech Medical College and Hospital, Pandara, Rasulgarh, Bhubaneswar and its workmen Shri Sanjib Naik was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 70 OF 2010

Dated the16th February 2012

Dated the 1st August 2012

Present :

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

Between :

The Management of M/s Hi-Tech Medical College and Hospital, Pandara, Rasulgarh, Bhubaneswar. . . First Party —Management

And

Its Workman Shri Sanjib Naik, S/o Shri Nath Naik, At Pasania, P.O. Pathuripada, P.S. Banki, Dist. Cuttack. . . Second Party —Workman

Appearances :

Shri A. K. Sahoo,	. . For the Firsty Party —Management
Shri Susanta Dash, Advocate	. . For the Second Party —Workman

ORDER
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.8475—ID-111/2010-LE., dated the 4th October 2010. The Schedule of Reference runs as follows :

> "Whether the action of the management of M/s Hi-Tech Medical College and Hospital, Pandara, Rasulgarh in terminating the services of Shri Sanjib Naik with effect from the 14th July 2009 is legal and/or justified ? If not, what relief Shri Naik is entitled to ?"

2. Though the reference is on the alleged termination of service of the workman with effect from dated the 14th July 2009, the pleadings of the parties filed before this Tribunal reveal that it is a case of termination of service of the workman as a measure of punishment which was preceded by a domestic enqury on charges of misconduct.

3. The case of the workman is that he had been working as a Ward Attendant in Oncology Department of the first party hospital since 25-11-2008. On 14-7-2009 the management all on a sudden did not allow him to discharge duties. He was called upon to submit show-cause as to why he should not be punished for alleged negligence in duty. He submitted his explanation. Thereafter the management did not take any action. But, since he was not allowed to discharge his duties despite of his request in writing he raised a dispute before the local Labour Officer alleging refusal of employment. During conciliation proceeding the management took a false stand that he had been kept under suspension and an enquiry was being conducted. As a matter of fact the workman was not duly noticed about the enquiry. If at all any enquiry has been conducted it is behind his back. He was not given due opportunity to defend himself in the said enquiry.

The workman has further alleged that he is a victim of victimisation. He has demanded for better service conditions and for that he was earlier retrenched by the management in the year 2005. However, under a sttlement arrived at before the Lobour Authority he was reinstated on 25-11-2008. He continued to be an eyesore for the management who was in search of an opportunity to get rid of him and ultimately he has been removed from employment on alleged misconduct on which the management has not conducted a fair and proper enquiry.

4. Not disputing the employer-employee relationship the first party takes the stand that on 12-7-2009 morning the second party was absent from duty in oncology Ward. Because of that negligence one patient died in the Oncology Department. Therefore, on 14-7-2009 the workman was asked to explain his absence from duty at the relevant time and as to why disciplinary action

should not be initiated against him. The workman submitted his explanation in a casual manner without explaining his misconduct in details. Therefore, an enquiry on the alleged misconduct was initiated and he was noticed to appear before the enquiry committee on 16-07-2009 but he did not. He was again asked to appear on 23-7-2009 before the enquiry committee. This time also he didd not turnup. So, the management decided to conduct a disciplinary proceeding against the workman and the latter was noticed to attend the enquiry to be held on 24-11-2009. The workman failed to appear. So, another chance was given to him and he was noticed to appear on 6-1-2010 to take part in the disciplinary proceeding. Since the workman failed to appear on both the dates the enquiry was conducted *ex parte*. The Enquiry Officer (for short, the E.O.) submitted his report finding him guilty of the alleged misconduct. Therefore, on that basis his service was terminated with effect from Dt. 3-2-2010.

Further case of the management is that the workman, instead of taking part in thet enquiry as well as the disciplinary proceeding, cunningly approached the Labour Authority on false allegation of refusal of employment.

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

ISSUES

(i) Whether the domestic enquiry conducted against the workman is fair and proper ?

(ii) Whether the action of the management of M/s Hi-Tech Medical College and Hospital, Pandara, Rasulgarh in terminating the services of Shri Sanjib Naik with effect from the 14th July 2009 is legal and/or justified ?

(iii) If not, what relief Shri Naik is entitled to ?

6. Since the management in its written statement has reserved its right to adduce evidence on merits in the event the enquiry is found to be unfair and improper, the Tribunal decided to takeup issue No.i in the fairness of the domestic enquiry as a preliminary issue. The parties have adduced their evidence on the preliminary issue. The workman has examined himself as W.W. No.1. he has exhibited documents which are marked Exts.1 to 8. On behalf of the management two witnesses have been examined. M.W. No.1 is the Enquiry Officer who is also the Deputy Medical Superintendent of the first party Hospital. M.W. No.2 is the Medical Superintendent of the Hospital. Documents have been marked Exts.A to K from the side of the first party.

FINDINGS

6. *Issue No. (i)*—From the evidence adduced by the management it is found that before initiation of the disciplinary proceeding the management decided to initiate a fact finding enquiry on the incident Dt. 12-7-2009. Exts. B and D are the copies of the notices Dt.14-7-2009 and Dt.17-7-2009, respectively, addressed to the workman calling uopn him to appear before an Enquiry Committee on 16-7-2009 and 23-7-2009 respectively. Admittedly, the workman did not appear before the Enquiry Committee on the dates mentioned in the two notices. The workman denies to have

been served with either of the notices. The management has not adduced evidence showing service of notices on the second party. However, it appears, no fact-finding enquiry did ever take place. It is pleaded in the written statement and also stated by M.W. No.2 that when the workman did not appear before the Enquiry Committee on both the dates the management decided to initiate a disciplinary proceeding against the workman and placed him under suspension vide Letter No.1721, Dt. 27-7-2009 which is marked Ext. E.

The workman claims that the order of suspension was not served on him. The management has not adduced evidence to show that the order of suspension was actually served on the workman. According to the workman, the management did not allow him to attend duty with effect from 14-7-2009 and it was only after he raised a dispute before the local Labour Officer by filing a complaint on 9-9-2009 the management, on being noticed by the Labour Officer, created papers to show as if a disciplinary proceeding had already been started against him. In this regard it is to be mentioned that on 14-7-2009 the management served a notice (Ext.6) on the workman to explain on his alleged absence from duty on 12-7-2009 morning and in reply thereto the workman submitted his explanation (Ext.A) on the same date. After submission of the explanation the management claim to have served notices on the workman which are marked Ext.B, D and E. But it is not proved that these notices were actually served on the workman. Here it is pertinent to mention that the workman alleges refusal of employment with effect from Dt. 14-7-2009. He approached the Labour Authority on 9-9-2009. In between these two dates the letters marked Exts.B, D and E are said to have been served on the workman. But there is no documentary evidence of due service of the notices. Ext.2 reflects that on 8-10-2009 the Assistant Labour Officer, Bhubaneswar sent to the management a notice along with a copy of the workman's complaint. Ext.3 reflects that on 10-10-2009 the management sent to the workman the charge sheet framed against him instructing him to appear before the E.O. on 24-11-2009 to take part in the enquiry. It is true that in Ext.3, the letter Dt.10-10-2009, there is mention about issuance of notices vide Exts.B, D and E. But Ext.3 was issued after the management got intimation that the workman had raised a dispute before the Labour Authority. Notices like Exts.B, D and E should have been either personally served on the workman or sent to him by registered post. Under such facts and circumstances, the workman's plea that till he lodged a complaint before the Labour Authority the management had not initiated any disciplinary action against him and he was not allowed to discharge duty with effect from 14-7-2009 cannot be brushed aside. This presumption finds further support from the fact that no fact-finding enquiry was conducted by the management. There was nothing to prevent the management to conduct a fact- finding enquiry even in the absence of the workman. Presumption that no action was initiated against the workman till he raised a dispute before the Labour Authority gets further support from the fact that the management has not shown to have served on the workman the order of suspension even though it is claimed that the workman was placed under suspension with effect from the 27-7-2009. Also no order was passed by the management permitting the workman to get subsistence allowance while under suspension. The management has not produced its Certified Standing Order. Therefore, it is to be presumed that the management has no Certified Standing Order of its own and the provisions contained in the Model Standing Order

(Schedule-I of the Odisha Industrial Employment (Standing Order) Rules, 1946) apply to its workman. In the Model Standing Order there are provisions as to how a workman under suspension on disciplinary ground is to be paid subsistence allowance. The workman is said to have bee placed under suspension from 27-7-2009 till the order of dismissal was passed against him on 3-2-2010. All these cost doubt over the fairness of the management.

However, with the materials available on record there cannot be a definite conclusion that termination of service of the workman was effected from 14-7-2009. During conciliation proceeding the management had taken the stand that in a disciplinary proceeding the workman being found guilty of misconduct his service was terminated with effect from Dt. 3-2-2010. It is not understood as to how, despite of such clear stand, the reference is on alleges termination of service effctive from 14-7-2009 and nor on the alleged dismissal with effect from the 3rd February 2010.

8. Now, coming to the enquiry proceeding, it is to be stated that the workman had received the charge sheet vide Ext.3 and on the body of the charge sheet itself it is mentioned that he was required to appear before the E.O., Dr. S. K. Acharya, Deputy Medical Superintendent in his Office Chamber on 24-11-2009 at 9.A.M. When the management contends that the workman did not appear before the E.O. on the scheduled date, time and place, the workman takes the plea that he tried to appear but he was prevented by the staff of the first party.In absence of any other evidence the plea taken by the workman is found to be unreiable. Therefore, it is to be presumed that despite of notice he failed to appear before the E.O. on 24-11-2009. The evidence on record proves that on 24-11-2009 the E.O. conducted the disciplinary proceeding and on the same date he submitted his report which is marked Ext.G. From the evidence of M.W.1 it transpires that the disciplinary authority, instead of accepting that enquiry report, adviced the E.O. to give another opportunity to the workmamn to participate in the enquiry proceeding and, accordingly, the E.O. issued notice to the workman calling upon him to appear before him on 6-1-2010. Ext.4 is that noftice which is, admittedly, received by the workman. But the workman did not appear before the E.O. His plea that he was prevented from entering into the chamber of the E.O. without other convincing materials, is found to be unreliable. Thus, it is found that on both the occasions the workman failed to appear before the E.O. It is a case in which the workman was given opportunity to defend himself but he willingly did not cooperate in the disciplinary proceeding by keeping himself away from the proceeding without sufficient reason.

9. Now, let it be examined as to how the E.O. has conducted the enquiry in the absence of the workman. Ext.G is a copy of the enquiry report Dt. 24-11-2009. As already stated, the enquiry was fixed to 24-11-2009 and on the same date the E.O. submitted his report. The management has not produced other enquiry papers including the statement of witnesses recorded by the E.O. The E.O. in his cross-examination has stated that he had prepared a rough note of the statements of the witnesses who were presented before him during the enquiry but he further stated that the rough note is no more available. It at all he had prepared any rough note containing the statements

of witnesses, then he ought to have submitted the same along with his enquiry report. The explanation that the rough note is no more available makes his assertion murky. Rather an adverse inference has to be drawn to the effect that no statement of witnesses was recorded by the E.O. The disciplinary proceeding was initiated against the workman on an alleged incident of 12-7-2009. According to the management, a patient in Oncology Ward died at about 8.15 A.M. on 12-7-2009 during the workman's duty time but the workman having remained absent in the ward at the crucial moment no information could be sent to the treating Doctors and support staff as reasult of which the patient died. The charge sheet, Ext.3 further reflects that basing on two paper cuttings Dt. 31-5-2009 the workman was also charged of creating disturbance in the hospital campus.

10. A careful perusal of the enquiry report Dt. 24-11-2009 reflects that no witness has made any statement on the alleged temporary absence of the workman from duty on 12-7-2009 for which he is made responsible for the death of a patient. It further reflects that no evidence was adduce before the E.O. on the other charge, i.e. making intentional disturbance in the hospital campus. The E.O. seems to have acted upon the newspaper cuttings.

11. On behalf of the workman it is submitted that the findings of the E.O. are perverse and that no material was there before the E.O. to hold the workman guilty of any major misconducts. In Para. 4 of the enquiry report (Ext.G) the E.O. observes that it is a confirmed case of negligence in duty on the part of the workman. But, as already stated, this finding is not based on any evidence adduced before the E.O. A perusal of Para. 4 of the enquiry report would make it clear that the E.O., who is also an officer of the first party hospital , has acted upon his personal knowledge about the death of patient taking place in the Oncology Ward of the hospital on 12-7-2009. It is not understood as to how the E.O. could come to a conclusion that the patient died in the absence of the workman and even if it is presumed that he was absent at the relevant time it is not stated in the report as to on what basis the E.O. has held the workman to be negligent in his duty on 12-7-2009 which resulted in the death of the petient. The E.O. seems to have based his finding on the explanation submitted by the workman on 14-7-2009 and 10-9-2009. The explanation Dt. 14-7-2009 is marked Ext.. C. The other explanation is not brought on record. In Ext.C the workman has stated that while be was performing morning duty on 12-7-2009 he had gone to attend the lavatory at about 8.20 A.M and during that temporary absence the patient died. This type of reply cannot be said to be an admission/confession of negligence in duty. Without the help of other materials it cannot be said that the workman was guilty of negligence in duty merely because a patient died during the temporary absence of the workman who was, admittedly, a Ward Attendant. The other charge which is related to the alleged intentional distrubance caused by the workman in the hospital campus the E.O. has simply based his findings on the facts stated in the news-item in two Odia Newspapers. Though it is mentioned in the enquiry report that statement of one Madhusudan Mishra, House-Keeping Supervisor of the hospital revealed criminal behaviour of the workman the E.O. has not recorded the statement of Shri Mishra. Therefore, it is not possible to ascertain as to whether what Shri Mishra had stated before the E.O. did constitute a major misconduct.

In view of the discussions made above, this Tribunal is of the considered view that the findings of the E.O. being not supported by any evidence are perverse.

12. Clause 14(4) (c) of the Model Standing Order lays down that if on the conclusion of the enquiry the workman has been found guilty of the charges framed against him and it is considered, after giving the workman concerned a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal or suspension or fine or stoppage of annual increment or deduction in rank would meet the ends of justice, the employer shall pass an order accordingly. Thus, the afore-stated clause contemplates that before passing the order of punishment the employer must give the workman concerned an opportunity of making representation on the penalty proposed. But, in the case at hand the management has not given that opportunity to the workman.

13. In this case the E.O. is different from the disciplinary authority. Therefore, the workman should have been furnished with a copy of the enquiry report to permit him to make a representation to the disciplinary authority against the findings recorded in the enquiry report. This is one of the requirements to make the enquiry fair and proper as laid down in G.R. Venkateswar Reddy *Vrs.* Karnataka State Road Transport Corporation, 1995 Lab.L.R.338.

14. On behalf of the workman it is argued that the E.O. has shown his biased attitude by making specific suggestion in his enquiry report as to what punishment should be imposed on the workman. In this regard, reliance has been placed on State of Uttaranchal and others *Vrs*. Kharak Singh (2998) 8SCC,236. It is true that the E.O. in his report has recommended that major punishment should be awarded to the workman as his services should no more be in the interest of the Institution. The Hon'ble Supreme Court in the afore-stated cited case have observed that though there is no specific bar in offering views by the E.O. on the punishment to be imposed, the E.O. in the facts and circumstances of the reported case exceeded his limit by saying that the delinquent had no right to continue in the Government service and he had to be dismissed from service with immediate effect. Since there is no specific bar in offering views on the punishment to be imposed on a delinquent-workman, this Tribunal, in the facts and circumstances of the case in hand, is of the considered view that the recommendation made by the E.O. in his enquiry report itself does not have the effect of nullifying the disciplinary proceeding. However, the E.O. himself being the Deputy Medical Superintendent of the first party hospital seems to have shown his biased attitude by making observation that the services of the second party in future shall not be in the interest of the Institution and he should be terminated from service.

Another case law reported in 1995(71) FLR-911 (Ajai Pal Singh *Vrs.* The District Panchayatiraj) is relied on by the second party to support the argument that the person who holds the preliminary enquiry cannot hold the regular enquiry as it would be violation of natural justic. But, this Judgement is not applicable to the case in hand in as much as no preliminary enquiry or fact finding enquiry was ever conducted by the E.O. though for that purpose notice was served on the workman. It is discusse in Para. 7 of this order that when the workman did not appear to take part in the fact finding enquiry the management decided to initiate a disciplinary proceeding.

15. The management, on the other hand, relies on the decision of the Hon'ble Supreme Court in State Bank of India *Vrs.* Hemanta Kumar, reported in (2011) 11-SCC 355 to support its contention that since the workman despite of due service of notice did not participate in the enquiry and the enquiry was conducted *ex parte* the workman cannot be permitted to take the plea of violation of the principles of natural justice. In the case at hand the Tribunal has not placed any importance on the enquiry having takenup in the absence of the workman. On many other grounds as discussed in the foregoing paragraphs this Tribunal has held the domestic enquiry to be unfair and improper. Therefore, the cited Judgement is of no help to the management.

For the aforesaid reasons this Tribunal comes to a conclusion that the management has not conducted a fair and proper enquiry. Therefore, Issue No. (i) is answered against the management.

Dictated and corrected by me.

RAGHUBIR DASH
16-2-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
16-2-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

INDUSTRIAL DISPUTE CASE No. 70 of 2010
Dated Bhubaneswar, the 1st August 2012

Findings on remaining Issues

16. *Issue No. (ii)*— Having held that the domestic enquiry conducted against the second party is not fair and proper, this Tribunal has called upon the parties to adduce evidence on the charges on which the domestic enquiry was held by the Management. Consequently, the Management has adduced further evidence of M. W. No. 2 who is the Medical Superintendent of the first party hospital and has examined another witness (M. W. No. 3), a hospital staff who was allegedly assaulted by the second party, which is also a subject matter of charges levelled against him. The workmen, on the other hand, examined himself to adduce further evidence in support of his innocence.

17. Ext. 3 contains the charges. On perusal of Ext. 3 it is found that the charges relate to two distinct incidents. One incident relates to the death of an indoor patient taking place on the 12th July 2009 and the other relates to an incident dated the 31st May 2009 in which the workman allegedly created disturbance in the campus of the Hospital by giving assault to one Madhusudan Mishra (M. W. No. 3).

18. On the first incident, it is the case of the first party that during the duty hours of the workman in Oncology Ward of the hospital a patient in the ward died at about the 8.15 A. M. on the 12th July 2009 and the treating Doctors and the support staff could not be informed in time bacause of the absence of the workman in the ward at the crucial moment. The second limb of the charge is that after the said incident the workman did not report for duty from 13th July 2009 onwards.

Now the materials on record are to be thrashed out to find out whether the Management has substantiated this charge.

M. W. No. 2 is the sole witness adducing evidence on this charge. He has stated that on the 12th July 2009 the second party a Ward Attendant, was allotted morning shift duty in Oncology Ward from the 8 A. M. to 2 P. M. and that on the same date the witness received a complaint from the medical staff that one patient died in the said Ward due to absence and negligence in duty of the second party. He has further stated that on the 12th July 2009 the second party remained absent from duty without any intimation to his Supervisor any other staff which is a gross misconduct on his part. He has further stated that the second party did not take care of the patient properly nor did he intimate the medical staff in time or shift the patient for treatment when the patient became serious. It is not in dispute that on the 12th July 2009 the second party, as a Ward Attendant, was allotted duty in Oncology Ward in the morning shift. Ext. N, P and Q, all related to marking of attendance of the second party, establish the fact that on the 12th July 2009 the second party had marked his attendance.Ext. C is an explanation submitted by the second party with regard to the incident of the 12th July 2009. In this explanation he has stated that at about 8.20 A. M. when he had gone to the lavatory the death of the patient took place. It is not very much clear from Ext. C if he had gone to the lavatory either to attend the call of nature or, as part of his duty, to clean the toilets. Ext. 7 is another written explanation submitted by the workman on the 23rd July 2009. In Ext. 7 he has stated that on the 12th July 2009 he was late in attending the morning shift duty. Thus, it is very much clear that at the time the patient died the second party was not present near the patient. The second party was working as a Ward Attendant. According to the charge sheet the patient died at about 8.15 A. M. but according to the Bed-head ticket of the deceased patient (Ext. R), on the 12th July 2009 at about 9.10 A. M. the patient was declared clinically dead. Before the patient was declared dead, she was last attended to on the 11th July 2009 and the condition of the patient was stated to be stable, but the patient's family members were 'explained about the risk'. From this it is evident that the patient's condition was critical. There is no material to support the fact stated in the charge sheet that the patient died at about 8.15 A. M. But, the charge itself makes it very clear that when the condition of the patient became serious none of the Hospital staff, including the treating Doctors, were present in the Ward. Yet, it is stated by M. W. No. 2 that the medical staff made a complaint against the workman putting all the blames on him. In Para. 22 of his deposition he has stated that he had received one complaint from the medical staff that one patient died in the Oncology Ward due to the absence of the workman in the Ward as well as his negligence in duty. It appears, the hospital staff who were absent from the Ward at the relevant time, in order to save their skin, made the workman a scapegoat. It is not shown by the first party that any other staff who were supposed to be on duty in the Ward at the relevant time were taken to task in the manner the workman has been dealt with. It is admitted by M. W. No. 2 that the deceased patient's relatives who used to attend her did not make any complaint against the workman. Therefore, it implies that the patient's relatives had nothing to say against the workman. M. W. No. 2 further says that he cannot say whether other supporting staff were present in the Ward at the relevant time. It implies that the Management did never care to find out whether any other hospital staff was responsible for the death of the patient. M. W. No. 2 further says that about the death of the patient he got information over telephone in between 8.00 and 8.10 A. M. If that is true, then it is to be presumed that the patient died before 8 A. M., i. e. before commencement of the workman's morning shift.

It is argued that since the workman was not present in the Ward when the condition of the patient became serious no timely intimation could be sent to the treating Doctors and other support staff. It is admitted by M. W. No. 2 that in each shift only one Ward Attendant is kept on duty in the Oncology Ward. Thus, the second party was the only Ward Attendant in the said Ward. It is admitted

by M. W. No. 2 that the principal duty of a Ward Attendant is to clean the toilets, wash-basings and floors of the Ward; to lift garbages and waste materials from the Ward; to take samples collected from the patients for pathological test; and to call Doctors on the instruction of the Sisters/Nurses as and when required. If the Ward Attendant remains busy in cleaning toilets etc., carrying garbages/ waste materials from the Ward and taking samples for pathological test, then he is expected to remain away from the indoor-patients most of the time. Therefore, the temporary absence of the workman at the relevant time, in the absence of other materials, cannot be said to be the cause of the patient's death, as a result of negligence in duty or disobedience of orders. Therefore, it cannot be said that due to the temporary absence of the workman the patient died and that had he remained present at the relevant time the life of the patient could have been saved. It is stated by M. W. No. 2 that the workman, because of his absence from the Ward, did not take care of the patient properly. A Ward Attendant is not expected to take medical care of the patients. That apart, no evidence is adduced to support the allegation that the workman, as an Attendant, had failed to take care of the patient. The supporting medical staff are expected to remain present in the Ward round the clock, particularly when condition of any patient in the Ward is already known to be quite critical. It is also stated by M. W. No. 2 that because of the workman's absence the patient could not be shifted for treatment when his condition became serious. When none other hospital staff was present in the Ward it is imaginable that the workman alone could not have shifted the patient from the Ward to any other place for better treatment. This claim of M. W. No. 2 is also not supported by direct evidence. It is the mere opinion of M. W. No. 2. In the absence of any other material it can not be said that due to the absence of the workman the patient could not be shifted for treatment.

It is alleged that the workman absented from duty without any intimation to his Supervisor or any other staff. Admittedly, the workman had attended his duty on the 12th July 2009 and signed the Attendance Register at 8 A. M. The Supervisor who is incharge of the workman is not examined as a witness. He could have adduced direct evidence as to the workman's temporary absence from the Ward. It is not shown by the Management that either the Supervisor or any other staff was available at the relevant time to whom the workman could have intimated about his temporary absence from the Ward.

Here, it is pertinent to mention that in the charge-sheet there is no specific accusation that due to the temporary absence of the workman or due to his negligence of any kind the patient in the Ward died. Yet, M. W. No. 2 in his evidence has expressed his opinion that due to the misconduct on the part of the workman an innocent patient died in the Oncology Ward. His evidence on the workman's misconduct is in the nature of opinion. There is neither any charge nor any evidence to the effect that due to the negligence of the workman the patient had died.

However, from the explanations submitted by the workman which are marked Exts. 7 and 8 Ext. C, it is found that on the 12th July 2009 the workman was either late in reporting for duty or he was temporarily absent for sometime from his work place. In those explanations the workman has purportedly taken an excuse for such late coming/temporary absence taking the plea that on the 11th July 2009 night he was asked by the Management to perform night duty. But, while adducing evidence before this Tribunal in his defence he has not taken such a stand. Therefore, his temporary absence and/or late attendance remains unexplained. The first limb of the first charge is found proved to the extent that on the 12th July 2009 at about 8.15 A. M. the workman was absent from his duty.

19. The second limb of the first charge is that from the 13th July 2009 onwards the workman abstained from attending duty. With respect to this part of the charge M.W. No. 2 has not stated anything except proving the Attendance Register (Ext. Q) for the month of July 2009 to show that from the 13th July 2009 onwards the workman had remained absent. It is the case of the workman that he attended duty on the 13th July 2009 and after that he was not allowed by the Management to discharge his duties. In its written statement the Management has not denied that on the 13th July 2009 the workman had attended duty. Even the daily Attendance Register marked Ext. N reflects that on the 13th July 2009 the workman had reported for duty at 8 A.M. but his signature is found scored through. Ext. Q is an Attendance Register in which the employees do not put their signatures. The Attendance Register is marked putting 'P' for present and 'A' for absent. But, Ext. N is a register in which the employees are required to put their signatures. Since the workman's signature appears on Ext. N it is to be held in favour of the workman that he had reported for duty on the 13th July 2009.

20. Now, it is to be found-out whether the workman remained absent or he was refused employment from the 14th July 2009 onwards. Ext. 1 is the workman's representation dated the 9th September 2009 It is addressed to the District Labour Officer, Khurda. In this representation he has alleged that he was refused employment with effect from the 14th July 2009. Ext.2 is a letter from the office of the District Labour Officer, Khurda addressed to the first-party management. It reflects that a copy of the workman's complaint (Ext. 1) was sent to the Management. Ext. 2 purports to have been issued on the 8th October 2009. It is not shown by the Management that till the copy of the workman's complaint was communicated to the first party any notice was served on the workman to show cause on his unauthorised absence since the 13th July 2009. For the first time it is mentioned in the charge sheet (Ext. 3) that from the 13th July 2009 the workman was not attending duty. This charge sheet is signed by the Authority on the 10th October 2009, supposedly after the workman's complaint (Ext. 1) was communicated to the Management from the District Labour Officer's Office. It is quite interesting to note that on the 14th July 2009 the same authority, who has signed the charge sheet, sent a letter to the workman inviting explanation on the workman's absence from duty on the 12th July 2009 morning, but there is no mention in the letter that the workman was also not reporting for duty from the 13th July 2009. Taking all these materials into consideration it is to be held that till the workman made a complaint before the labour machinery alleging refusal of employment the Management did not take any action against the workman for his alleged unauthorised absence from the 13th July 2009. Therefore, it is to be presumed that it was the Management who did not allow the workman to perform his duties from the 13th July 2009 and not the other way round. Thus, the second limb of the first charge is found not proved.

21. The second charge is on alleged assault on an employee of the first party inside the hospital campus. In the charge itself there is no mention about the alleged assault, but in the charge there is reference to some Newspaper cuttings. Mark-X and X/1 are said to be the Newspaper cuttings which reflect that on or about the 30th May 2007 one Sanjib Kumar Naik assaulted one Madhusudan Mishra, a Supervisor, within the first-party's medical campus. M.W. No.3 is said Madhusudan Mishra. He has stated that on the 29th May 2007 he was assaulted by the workman challenging as to why the witness had marked the workman's brother 'absent' in the Attendance Register. It is not in dispute that the workman's brother, Benudhar Naik, is an employee of the first party. It is also proved that on the alleged assault FIR No. 121 dated the 29th May 2007 was lodged in Mancheswar Police Station. It is simply suggested to the witness that his allegations against the workman are false.

However, it is not disputed that as on the date of the alleged assault the workman was not an employee of the first party. Because, long back in July 2005 he was out of employment of the first party for which an industrial dispute was pending with the District Labour Officer, Khurda and upon conciliation he was reinstated in service with effect from the 25th November 2008. Thus, the second-party was not in the employment of the first party from July 2005 to the 24th November 2008. During this period the workman has allegedly assaulted M. W. No. 3 for which a Police Case appears to be pending. Ext. L is a copy of the FIR. drawn by the I. I. C. Mancheswar P. S. It is not on record as to whether that case has been finally disposed of.

When it is not shown that the workman was an employee of the first party as on the alleged incident dated the 29th May 2007, the Management could not have drawn a departmental proceeding on the charge of criminal assault on Shri Madhusudan Mishra, even though the incident occurred inside the medical campus. In my considered view the second party cannot be subjected to a disciplinary proceeding on the charge of assault on Madhusudan Mishra.

22. To sum-up, the charge that the workman was absent from his duty at about 8.15 A.M. on the 12th July 2009 is found established, but the remaining charges are found not established. The Management does not claim to have got its own Certified Standing Orders. Therefore, the conditions of employment with respect to the second party is governed by the Model Standing Orders for workman as enumerated in Schedule I of the Odisha Industrial Employment (Standing Orders) Rules, 1946. Model Standing Order (for short, M. S. O.) No. 14 (3) (h), prescribes that riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline is one of the misconducts. The temporary absence of the workman from his work place during working hours is an act of disorderly behaviour and therefore, a misconduct as per the M. S. O. This act/omission on the part of the workman does not come under any other category of misconducts.

M. S. O. No. 14 (2) prescribes that a workman may be suspended for a period not exceeding four days at a time, or dismissed without notice or any compensation in lieu of notice, if he is found to be guilty of any misconduct prescribed under the M. S. O.

The Management has removed the workman from employment on the ground of proved misconduct, but in view of the fact that some of the charges are found not proved and keeping in view that for a short period the workman was absent from duty, the punishment of dismissal from service appears to be shockingly disproportionate to the proved misconduct. It is submitted that the previous conduct of the workman is not satisfactory. It is pointed out that earlier in 2005 he was removed from employment because of his indisciplined activities. But, it is not in dispute that subsequently, with the intervention of the labour machinery, the workman was reinstated in service. It is also not shown that before terminating his services in the year 2005 the Management had conducted any disciplinary proceeding and the workman was found guilty of any misconduct. Therefore, the previous termination of service of the workman is not an aggravating condition. It is also pointed out as to how the workman had assaulted an employee of the first party inside the medical campus. That incident is the subject matter of investigation and trial arising out of the FIR lodged against the workman. For that criminal proceeding the Management is at liberty to take action against the workman as per the provisions contained in the M. S. O. vide order No. 14 (4). But, while considering the quantum of punishment the allegation of assault on another employee is not to be taken into consideration. Thus, in the considered view of this Tribunal the punishment of suspension for a period of four days would be just and proper.

In the result, the punishment of dismissal from service imposed on the workman is found to be unjustified.

23. *Issue No. (iii)*— In view of the discussions made above, the order of removal from service passed by the Management vide Ext. 5 needs to be set aside and the punishment of suspension for a period of four days in lieu thereof be imposed on the workman. Consequently, the workman is entitled to be reinstated in service with full back wages except for the period of suspension.

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

Dictated & corrected by me.

RAGHUBIR DASH

1-8-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH

1-8-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

By order of the Governor

J. DALANAYAK

Under-Secretary to Government

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