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**LABOUR & E.S.I. DEPARTMENT**

NOTIFICATION

The 15th November 2012

No. 9322—IR(ID)-3/2010-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 7th August 2012 in I. D. Case No. 63/2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Ruchika Social Service Organisation, Sriram Nagar, Samantarapur, Bhubaneswar and its Workman Smt. Sanjukta Samantaray was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 63 OF 2010

Dated the 7th August 2012

*Present :*

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

*Between :*

The Management of . . . First Party—Management  
M/s Ruchika Social Service Organisation,  
3731-A, Sriram Nagar, Samantarapur,  
Old Town, Bhubaneswar.

And

Smt. Sanjukta Samantaray, . . . Second Party—Workman  
Plot No. 466, Nayapalli,  
Bhubaneswar.

*Appearances :*

Shri R. N. Rath, Authorised Representative	. .	For the First Party—Management
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Smt. Sanjukta Samantaray	. .	For the Second Party—Workman herself.

## AWARD

The Government of Odisha in their Labour & E.S.I. Department, exercising powers 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. 7231—ID-3/2010-LE., dated the 27th August 2010 :—

"Whether the action of the management of Ruchika Social Service Organisation, Bhubaneswar in terminating the services of Smt. Sanjukta Samantaray, Project Officer with effect from the 15th March 2009 is legal and/or justified ? If not, what relief Smt. Samantaray is entitled to ?"

2. M/s Ruchika Social Service Organisation which is the first-party management in this case is also hereinafter referred to as the 'Organisation'. Similarly, the second-party workman of this case is also hereinafter referred to as the 'disputant'.

3. The case of the second-party/disputant is that since 22-1-1990 she had been continuously working under the first-party till termination of her service with effect from the 15th March 2009. Initially, she used to get Rs. 205 per month which stood revised from time to time and her last drawn salary was Rs. 4,000 per month. Although she was designated as Project Officer, but she used to discharge clerical and manual work under the direct control and supervision of the Programme Manager. She had no supervising or managerial power. She had no subordinate staff under her to supervise their work.

On the circumstances that led to termination of her service, she has pleaded that when the employees of the first-party formed a Trade Union in 2008 and submitted a Charter of Demands on raising of the pay structure and better service conditions, the management coerced all the employees including the second-party to enter into contract with the management agreeing for contractual employment. But, it was with an evil intention to get rid of all the old employees on completion of the proposed contractual period. Since the employees in the past had rendered long continuous service without any stipulation of contractual employment, they did not agree to accept the proposed contractual appointment. So, the management became vindictive and terminated the services of all those employees who refused to accept the proposal. In this manner the second-party who was an Executive Body Member of the Employees' Association became a victim and suffered retrenchment which is in contravention of Sections 25-F and 25-G and 25-H of the Act.

4. The first-party in its written statement claims that neither it is an 'industry' nor the second-party is a 'workman' as defined under the Act. The organisation is a Voluntary Social Service Organisation providing free services to the destitutes. Being a Charitable Institution having no profit motive it cannot be said to be an 'industry'. The second-party and other persons, engaged by the organisation to implement the latter's objectives, are not its employees. They have employed themselves to render free service in lieu of small honorarium. So, there is no employer-workman relationship between the parties. That apart, the job of the second-party as "Project Officer" was mostly supervisory in nature.

Further stand of the first-party is that the disputant used to be engaged in different projects from time to time and each project being for a specific period, her engagement for the respective project was for a fixed period coterminous with the project. Lastly, she was engaged in 'Balwadi Project' which got closed on 31-12-2008. However, the disputant was continued till 15-3-2009. Then her engagement automatically came to an end. Subsequently, when the donor agency of the said project agreed to renew the project for another year the management called the disputant to work in the project by entering into agreement for one year of contractual service. But, she expressed her unwillingness to work in the project. Instead, she demanded for her absorption on permanent basis. The impugned retrenchment being covered under Section 2(oo)(bb) of the Act, there is no violation of Sections 25-F, 25-G and 25-H of the Act.

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

#### ISSUES

- (i) "Whether the first-party is an Industry as defined in the I. D. Act ?
- (ii) Whether the second-party is a workman as defined in the I. D. Act ?
- (iii) Whether the action of management of M/s Ruchika Social Service Organisation, Bhubaneswar, in terminating the services of Smt. Sanjukta Samantaray, Project Officer, with effect from the 15th March 2009 is legal and/or justified ?
- (iv) If not, what relief Smt. Sanjukta Samantaray is entitled to" ?

6. To substantiate their respective case the parties have examined witnesses and exhibited documents. The disputant has examined herself as W.W. No. 1 and exhibited documents marked Exts. 1 to 13. The management has examined its Heads of Accounts as M.W. No. 1. Exts. A to BB have been marked on behalf of the management.

#### FINDINGS

7. *Issue No. (i)*—To support its claim that the activities of the organisation do not make it an 'industry', the first-party has pleaded that it is a Voluntary Organisation registered under the Societies Act, 1860 and is also qualified for deduction under Section 80-G of the Income Tax Act. It gets financial aid from the Central and the State Governments and non-Government Organisations as well and utilises the same in providing free services to the disabled and destitutes including imparting of free education to the destitute children. The organisation engages some stray servants on hire for manual and technical work, but its main activities are performed by volunteers who come forward to engage themselves free, or for small honoraria, to serve the destitutes without any remuneration.

The second-party does not dispute that the first-party is a Charitable Organisation. But, it is contended that all Charitable Institutions are not excluded from the definition of the word "industry" as explained by Hon'ble Supreme Court in Bangalore Water Supply & Sewerage Board Vrs. A. Rajappa, AIR 1978 (S.C.) 548. In the aforesaid case their Lordships have observed that in any profession, club, educational institution, co-operative, research institute, charitable projects and other kindred adventure where systematic activity organised by co-operation between the employer and employee for production and/or distribution of goods and/or services calculated to satisfy human wants and wishes is undertaken, it comes within the definition of the word "industry". In respect of Charitable Institutions it is further observed that if they fulfil the aforesaid tests they cannot be

exempted from the definition "industry". Hon'ble Supreme Court have further held that the following two categories of Charitable Institutions would fall within the definition of "industry" :—

- "(i) where the enterprise, like any other, yields profits but they are siphoned off for altruistic objects;
- (ii) where the institution makes no profit but hires the services of employees as in other like businesses but the goods and services, which are the output, are made available at low cost or no cost to the indigent needy who are priced out of the market."

The first-party of this case may come within category (ii) above of Charitable Institutions. Before coming to a final conclusion on this point it is necessary to examine the materials available on record.

Exts. 2 and 3 are the Organisation's Annual Reports for the year 2006-2007 and 2007-2008 wherefrom it can be gathered that the motto of the organisation is to advance opportunities to the under privileged children through education and other services. The Reports further reflect that annually 3,000 to 4000 children receive primary education and 900 children receive free School education through different projects undertaken by the first-party. Page 7 of Ext. 2 further reflects that the organisation's staff strength is 244 out of which 154 are part-timers. It also reflects the salary structure of the staff belonging to different categories. The Reports further reflect that the organisation has one S. N. Adalakra & Co. as its Auditor. The Annual Reports further reflect that in the year 2006-2007 the organisation had 19 projects and in the following year it had 16 projects to execute.

The materials available on record establish that the organisation gets donations from private persons/institutions, besides financial aid from the Governmental Agencies. Though it is claimed that most of its activities are done by persons who do not get salary or wages from the organisation, it is not proved that such persons render free services for the organisation. It is claimed that persons rendering free service for the organisation get small honoraria, but the Annual Reports reveal that the organisation has a good staff strength who get salary as either Part-timers or Full-timers. With the staff strength as shown in the Annual Reports the management's plea that it has engaged some stray servants on hire for manual and technical work cannot be accepted. The first-party claims that the organisation carries out different activities through a number of volunteers who get honoraria from the organisation. But, in the Annual Reports there is no mention about engagement of volunteers as well as the amount paid to them towards honorarium. M.W. No. 1 has stated during cross-examination that he gets honorarium.

While the second-party claims that each of the staff members gets salary from the first-party, M.W. No. 1 claims that the staff get honorarium. It is difficult to get materials to determine whether the staff get salary or honorarium. But, it is quite evident that each gets certain amount every month in lieu of the service/work he/she renders for the organisation. With the Annual Reports remaining silent on payment of honorarium, and, instead reflecting salary structure of staff belonging to different categories, it is to be held that the organisation pays salary to its staff, but consciously uses terms like 'volunteers' and 'honorarium', instead of 'employee' and 'salary', in an attempt to claim that there is no employer-employee relationship between the organisation on one hand and its staff on the other.

8. It is stated by M.W. No. 1 that the second-party has worked under the first-party as Teacher, Supervisor and Project Officer. It implies that the staff who have worked for a long period under the first-party have got promotions from lower rank to higher rank. This is another ground for a presumption that there is employer-employee relationship between the organisation and its staff. For the purpose of the Act, whether the employees get honorarium or salary makes no difference. Because, all that the Act requires is that a workman is employed for hire or reward.

M.W. No. 1 says that the projects undertaken by the first-party are executed with the co-operation of the Project Officer, Supervisor, Cluster Educators and Teachers working with the organisation.

Apart from all these, the second-party has also relied on Ext. 4 which is the Human Resource Policy formulated by the organisation. It appears to be just like the Certified Standing Orders of an industrial establishment. It embodies, *inter alia*, the definition of employee, method of recruitment of employees, policy on the salary structure of the employees, provisions on the conduct of employees and procedure as to how charges on employees' misconduct ought to be dealt with. No doubt, it is stated in Ext. 3 that the Policy shall be effective from 1st January, 2009. But, there is no explanation as to how all the matters specified in Ext. 3 used to be dealt with by the management before the Policy was formulated. From Clause 1 of the Policy it is to be construed that the organisation had a verbal Human Resource Policy prior to formulation of Ext. 4. This gives rise to further inference that the organisation was having its employees prior to 1-1-2009 who used to be governed by unwritten Rules. Thus, there are ample materials to record a finding that the organisation functions by engaging employees and not volunteers.

The management fails to establish that its Charitable activities are performed by persons who work not because they are paid wages but because they share the passion for the cause and derive job satisfaction from their contribution. In Bangalore Water Supply & Sewerage Board's case (*supra*) the Hon'ble Supreme Court have observed that Institutions which are called to be philanthropic entities are industries if they involve co-operation between employers and employees to produce and/or supply goods and/or services. In the case at hand, the first-party is found to have been undertaking its social service activities with co-operation of its employees who get salary from the management. In *Thilagavathi S. Vrs. P. O.*, Labour Court, Madurai, 2010 (I) LLJ 101 the Hon'ble High Court of Madras have observed that Madurai Children Aid Society is an 'industry'. In that case the society was being used as an Observation Home for the children and the Government was providing aid to the society which also used to receive donations from other sources. The society was giving educational training to the children for self-help jobs and the like. The society used to get the allocated works carried out as per its Rules and Regulations and in accordance with the duty hours. Its accounts were being audited every year. With such factual aspects their Lordships held that there were systematic activities in the society carried out for human necessities with the joint efforts by the employer and employees. The materials which have already been taken into consideration make it clear that the first-party of this case stands in the same footing as Madurai Children Aid Society. The first-party has placed reliance on another decision of the Hon'ble Madras High Court, reported in 1996 (III) LLJ (Supp.) 482 in which a Single Judge of the Hon'ble Madras High Court have held that Madurai Children Aid Society is not an 'industry'. In this case his

Lordship have observed, *inter alia*, that the said society was discharging sovereign functions as an Agent of the State Government. This reported case is not applicable to the first-party inasmuch as it has not shown to be discharging sovereign functions.

In the result, it is held that the organisation though not a profit earning institution, it hires the services of employees and its services are made available at no cost to the indigent needy who are priced out of the market. Therefore, it is an 'industry'.

9. *Issue No. (ii)*—According to the disputant, her nature of work was to collect survey data and children's data from the centres functioning under the organisation on making personal visit to the centres from time to time; attend community meetings, distribute nutrition, learning materials, books and stationeries to the centres; attend Community Awareness Meetings at slum areas; consolidate reports of different activities of the organisation and submit half-yearly and annual report to the Secretary as well as the Programme Manager of the organisation. She takes the plea that though she was designated as 'Project Officer' but all along she used to discharge clerical and manual work under the direct control and supervision of the Programme Manager without having any supervisory and/or managerial power. In reply to the disputant's aforestated plea, the management has stated in Para. 11 of its written statement that the aforestated powers and functions shouldered by the disputant is sufficient to show that she was discharging supervisory/managerial duty and it cannot be said that the dominant nature of her duty was clerical and/or manual. The management has not made any other elaboration as to what other duties the disputant used to perform while working as Project Officer. Thus, basing on the pleadings of the parties it is to be concluded that the parties have no dispute as to what was the work that the disputant used to perform as a Project Officer. But, while the disputant claims that it was manual and/or clerical in nature, the management claims that it is supervisory in nature.

While adducing evidence the parties have tried to bring additional materials on record without supported by documentary evidence. Since those are beyond their pleadings, and that too not supported by documentary evidence, it is very difficult on the part of this Tribunal to rely on them. In Para. 3 of her deposition the disputant has stated that she even used to discharge the duty of a Sales Personnel in the Food Stall of the management at Exhibition Ground, Unit-I, Bhubaneswar during Adivasi Mela held each year on the 26th day of January and at different stalls organised by the management at Saheednagar, 35, Forest Park, Bhubaneswar to sale bed-sheets, sarees, shawls, sweaters, etc. These facts are not stated in the claim statement. So, these are supposed to be after thought. That apart, the claim that the disputant was discharging the duty of a Sales Personnel very occasionally cannot be said to be a part of her main duty. Therefore, these facts should be ignored while determining the dominant nature of her duty.

Similarly, M.W. No. 1 in Para. 7 of his affidavit has stated so many facts which do not find place in the written statement. He has stated that the disputant used to guide the Platform Cluster Educators and Platform School Teachers as to how they should impart teaching to the students; that she used to check the daily work of the Teachers and submit report to the management as to how the project work should run effectively; that she used to sanction leave applied by the Teachers and Supervisors if the leave applied for was up to three days and sanction of leave applications exceeding three days depended on the recommendation of the disputant; that she used to prepare

honarium list of the Teachers and give recommendation for payment and disbursement of honorarium; that as a member of the Approval Committee she was taking decision in respect of procurement of materials for the projects; that she used to attend various meetings organised by the Funding Agencies and also used to take independent decision for and on behalf of the society; and that she had the full discretion in the matter of admission of students in the School under her jurisdiction and to decide which activities are necessary to be undertaken for smooth functioning of the project. All these statements made by M.W. No. 1 could have been corroborated by documentary evidence. But, the management has not taken any pain to adduce documentary evidence except one leave application marked Ext. BB which reflects that one Puspanjali Sasmal, a Balwadi Teacher, had addressed her leave application to the Project Officer. Below the application, the disputant's dated signature finds place. The disputant has not made any endorsement either refusing/rejecting or granting the application. She has simply put her signature with date but since the application is addressed to the Project Officer and the disputant has put her signature thereon, it is to be presumed that the application was addressed to the disputant as Project Officer of Balwadi Project to obtain permission to avail leave. Basing on this document it may be said that the disputant had the power to grant leave to the Teachers.

Exts. A and N are the information sheets which are signed by the disputant as Project Officer. It appears from the form (used to prepare the information sheets) that the name of the Information Collector should be mentioned at the foot of the form but no such name appears. It appears, the disputant herself has filled up the information sheets. Nothing is there in the information sheets showing that the disputant has signed the same as a Supervising Authority. It is quite possible that she had prepared the information sheets while discharging clerical functions. The management has exhibited several documents signed by the disputant in which she has described herself as Project Officer (Exts. K, L, T and U). But non of these documents speak of the nature of work she used to perform. Thus, so far the documentary evidence is concerned the management could exhibit only one leave application to support M.W. No. 1's claim that the disputant had the power to grant leave to the Teachers up to three days. On the basis of this single document, it is difficult to jump to a conclusion that the disputant, as Project Officer, had the power to grant leave to the Teachers working under her, more so when it is not pleaded in the written statement that she had the power to grant leave to the Teachers. It is also not shown that a number of Teachers used to work under her supervision. Therefore, by adducing such evidence the management has taken the disputant by surprise. It is quite possible that under some special circumstances the Teacher had addressed her leave application to the Project Officer.

The parties are in agreement to the extent that the disputant as Project Officer used to collect survey data and children's data from different centres on her personal visit thereto; attend community meetings; distribute nutrition, learning materials, books and stationeries to the centres; attend Community Awareness Meetings at slum areas; and submit half-yearly and annual reports by consolidating the reports of different activities of the organisation. Evidently, this is the main work the disputant used to perform as Project Officer.

The management has cited a decision of Hon'ble Gujarat High Court, reported in 2012 LLR 123 (S. Kalyanakrishnan Vrs. Blue Star Limited). In the Judgment their Lordships have extracted

the following observations of the Hon'ble Supreme Court made in *National Engineering Industries Ltd. Vrs. Shri Kishan Bhageria & others*, AIR 1988 (S.C.) 329 :—

"In *P. Maheswari V. Delhi Administration & Others*, (1983) 3 SCR 949 the question whether a person was performing supervisory or managerial work was the question of fact to be decided bearing in mind the correct principle. The principle therefore is, one must look into the main work and that must be found out from the main duties. A supervisor was one who could bind the company to take some kind of decision on behalf of the company. One who was reporting merely as to the affairs of the company and making assessment for the purpose of reporting was not a supervisor."

In addition to that the following observations made in *Anand Regional Co-op. Oil-seeds Growers' Union Ltd. Vrs. Shaileshkumar Harshadbhai Shah*, 2006 (6) SCC 548 have also been quoted :—

"Supervision contemplates direction and control. While determining the nature of the work performed by an employee, the essence of the matter should call for consideration. An undue importance need not be given for the designation of an employee, or the name assigned to, the class to which he belongs. What is needed to be asked is as to what are the primary duties he performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work is required to be supervised. Being incharge of the section alone and that too it being a small one and relating to quality control would not answer the test."

In the case at hand the management has not placed sufficient materials for a definite conclusion that the disputant had the power to give direction and exercise control over any of her subordinates. There is neither pleading nor any material to show that some persons were working under the disputant whose work she was required to supervise. Though claimed by M.W. No. 1, it is not proved by documentary evidence that the disputant was guiding the Teachers, checking the daily work of the Teachers, making recommendation for sanction of leave in favour of Teachers or making recommendation for disbursement of honorarium/salary to the Teachers and taking independent decisions for and on behalf of the organisation either while dealing with the Funding Agencies or in the matter of activities to be undertaken for smooth functioning of the project. The disputant's work as stated in the first part of Para. 4 of the claim statement which is not disputed by the management does not appear to be either managerial or supervisory in nature. Rather, it seems to be clerical in nature. Though in the case at hand the disputant was admittedly working as a Project Officer, the management has failed to bring materials to support its claim that the dominant nature of work of the Project Officer was either managerial or supervisory. Therefore, the management's plea cannot be accepted.

Accordingly, it is concluded that the second-party was a 'workman' as defined under the Act.

10. *Issue No. (iii)*—Admittedly, the services of the second-party got terminated with effect from the 15th March 2009. Ext. 9 is the management's letter putting an end to the second-party's service with effect from the 15th March 2009. The reason of termination is said to be closure of the project in which she was working. It is claimed by the management that when the disputant's engagement came to an end she was working as a Project Officer in the Balwadi Project. Thus, an

attempt has been made to bring the termination under Section 2(o) (bb) of the Act. Admittedly, no appointment order containing terms of employment was issued to the second-party. It is also not in dispute that the second-party had been working with the organisation since 22-1-1990 in different capacities. It is not shown by the management that the second-party was employed in any particular project for a specific period and that after closure of the project her employment terminated and thereafter she was engaged in some other project. As it appears from the Annual Reports the first-party takes up several projects at a time and executes them with the help of its staff. Even though it is claimed that at the relevant time the second-party was engaged in the Balwadi Project, it is not shown that the second-party was employed on a contract containing the condition, *inter alia*, that her employment would come to an end on the expiry of the project. No material is placed showing that the second-party was made aware of the terms of employment from the very commencement of her employment under the said project. In *S. M. Nilajkar and others Vrs. Telecom District Manager, Karnataka, 2003 (97) FLR 608 (S.C.)* the Hon'ble Supreme Court have laid down certain criteria which are to be considered to ascertain whether a workman is engaged in a scheme or project and whether the termination of services of such a workman would fall within Clause (bb) of Section 2 (oo) of the Act. In this regard, the Hon'ble Supreme Court have observed as follows :—

"The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied :—

- (i) that the workman was employed in a project or scheme of temporary duration;
- (ii) the employment was on a contract, and not as a daily-wager simpliciter, which provided *inter alia* that the employment shall come to an end on the expiry of the scheme or project;
- (iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract; and
- (iv) the workman ought to have been appraised or made aware of the abovesaid terms by the employer at the commencement of employment."

All these criteria are not found satisfied so far this case is concerned. The second-party, on the other hand, has established that some time prior to the impugned retrenchment she and some other staff of the organisation had formed an Employees' Association and taken up trade union activities to secure better service conditions. It appears, being dissatisfied with such trade union activities the management terminated the services of the second-party and some other staff on the plea of closure of projects.

11. The management has taken an alternative plea of refusal of employment by stating that when the Donor Agency (AJWS) agreed to renew Balwadi Project for another one year, the management invited the disputant to work in the project but she did not agree. Ext. 4 is the letter issued to the disputant inviting her to join with the organisation to work for the project which was renewed for one year only. Ext. 4 further contemplates that the management wanted the disputant to sign a contract in terms of the organisation's Human Resource Policy. As already observed, the disputant who is held to be a 'workman' had continuously worked in the organisation for about 19 years without having been required to enter into any contract. She had worked in different capacity and in different projects from time to time. It is not proved that during the long span of employment her services got terminated on any occasion on the ground of termination of any project. Therefore,

the termination of her service without following the mandatory provisions of the Act is illegal. Having terminated her service illegally the management subsequently invited her to accept a contractual appointment which was definitely going to change the disputant's service conditions to her prejudice. Therefore, her refusal to accept the contractual appointment is quite justified.

Though the management attempted to justify its action taking the plea that with the closure of the project the disputant's employment came to an end, it is found to be unacceptable. Therefore, the retrenchment can also be said to be unjustified.

12. *Issue No. (iv)*—Since it is held that the disputant's termination of service is illegal as well as unjustified, she is entitled to be reinstated with full back wages.

Accordingly, the reference is answered in favour of the second-party. The management to implement the Award within a period of two months of its publication in the Official Gazette.

Dictated and corrected by me.

RAGHUBIR DASH  
7-8-2012  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

RAGHUBIR DASH  
7-8-2012  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

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By order of the Governor  
J. DALANAYAK  
Under-Secretary to Government