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LABOUR & E. S. I. DEPARTMENT

NOTIFICATION

The 17th November 2012

No. 9420—IR(ID)-90/2010-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 29th September 2012 in Industrial Dispute Case No. 58 of 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 Shri Sanatan Sahu was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 58 OF 2010

Dated the 29th September 2012

Present :

Shri Raghubir Dash, o.s.J.s. (Sr. Branch),
Presiding Officer,
Industrial Tribunal, Bhubaneswar.

Between :

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

And

Shri Sanatan Sahu, .. Second Party—Workman
C/o Smt. Sanjukta Samantaray,
Plot No. 466, Nayapalli, Bhubaneswar.

Appearances :

For the First Party—Management .. Shri R. N. Rath,
Authorised Representative.

For the Second Party—Workman .. Shri Sanatan Sahu

A W A R D

The Government of Odisha, in the Labour & Employment Department (presently the Labour & E.S.I. Department) in exercise of powers conferred upon them by sub-section (5) of Section 12, read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) for short the Act, have referred the following dispute for adjudication vide their Order No. 6899—ID-90/2010-LE., dated the 18th August 2010 :—

“Whether the action of the management of Ruchika Social Service Organization in terminating the services of Shri Sanatan Sahu, Project Officer, Bhubaneswar with effect from 31-07-2009 is legal and/or justified ? If not, what relief Shri Sahu is entitled to ?”

2. In his claim statement the second party has pleaded that since 1-1-1993 he had been working in Ruchika Social Service Organisation (First party) under the direct supervision of the Programme Manager as well as the Secretary of the Organisation. However, no appointment order was issued in his favour. Initially he used to get salary of Rs. 500.00 per month which stood revised from time to time and lastly, he was getting Rs. 5000.00 per month. Thus, he had worked under the first party continuously for a period of about sixteen and a half years. But without any reason the first party terminated his services with effect from 31-7-2009 without complying with the provisions of Section 25-F of the Act. The second party claims that the Management being vindictive removed the second party from employment due to the reason that he and other old employees of the Organisation had formed a Trade Union, got it registered and then demanded for better salary structure and other service conditions.

3. The stand taken by the first party in its written statement is narrated in brief. According to the first party, the Organization is a Charitable Institution running on donations and financial aids received from various Government and Non-Government sources. Because of its non-profit motive as well as philanthropic activities it cannot be said to be an ‘industry’ as defined under the Act. Many persons having the inclination to serve for the destitutes have joined the Organization to work for free or for honorarium. The Organisation has engaged some stray servants on hire basis to do some manual and technical work.

As regards the second party, it is claimed that initially he was engaged as a teacher and then as a Project Officer on honorarium.

There was no employer-employee relationship between the parties. The second party also cannot be said to be a ‘workman’ as defined under the Act. He had been working in the capacity of a Supervisor and the dominant nature of his work was supervisory. That apart, the second party had been engaged purely for a particular project which was for a fixed period and after closure of the project the engagement of the second party automatically came to an end.

4. On the basis of the pleadings of the parties, the following issues have been settled :—

I S S U E S

1. Whether the first party is an Industry as defined in the I. D. Act ?
2. Whether the second party is a Workman as defined in the I. D. Act ?
3. Whether the action of the Management of M/s. Ruchika Social Service Organisation, Bhubaneswar in terminating the services of Shri Sanatan Sahu, Project Officer, with effect from 31-7-2009 is legal and/or justified ?
4. If not, what relief Shri Sanatan Sahu is entitled to ?

5. The second party has examined himself as W. W. 1. He has exhibited documents which are marked Exts. 1 to 14. The first party has examined one witness. M. W. 1 is the Accounts Head in the establishment of the Organization. On behalf of the first party, documents have been marked as Exts. A to W/1.

FINDINGS

6. *Issue No. 1*—Claiming that the Organisation is not an ‘industry’ the Management has adduced evidence to the effect that it is a voluntary organisation. It gets donations from different sources and also gets financial assistance from the State Government as well as the Central Government. Though it imparts education to children it does not collect any fees from their parents. It is a non-profit motive Institution. It does not produce or distribute any materials. The Organisation engages some stray servants on hire basis to do some manual and technical work but its main activities are performed by volunteers having the inclination to serve for the destitutes without any remuneration.

From the evidence of M. W. No. 1 it is found that the first party undertakes Social Services under different Projects. It runs educational Centres to educate poor children. It also provides free service to disabled and orphans by making people in the slum areas aware on sanitation and drinking water. It was giving shelter to them and making efforts for their rehabilitation.

It is thus found that the first party is a Charitable Institution rendering Social Services to the needy children. But, all Charitable Institutions are not excluded from the definition of the word “industry” as explained by the Hon’ble Supreme Court in Bangalore Water Supply & Sewerage Board *Vrs* A. Rajappa, AIR 1978 (SC) 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 organized by co-operation between employer and employee for the 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 term “industry”. With regard to Charitable Institutions, it is further observed that if they fulfil the aforesaid tests they cannot be exempted from the definition “industry”. The 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 or no cost to the indigent needy who are priced out of the market.

The first party may come within the Second Category of the Charitable Institutions.

7. The second party relies on a decision of the Hon’ble High Court of Madras, reported in 2010 (I) LLJ 101 between Thilagavathi S. & P. O. Labour Court, Madurai and argues that the findings of the Hon’ble Madras High Court are squarely applicable to the case at hand. In Thilagavathi’s case, the Society by name “Madurai Children Aid Society” was being used as an Observation Home for 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 and there were Joint efforts by the employer and employee being carried out for human necessities.

Now, it is to be examined as to how the first party Organises/arranges its activities as a Charitable Institution. No doubt the activities of the first party is carried out with the object to render material services to the community. From its Annual Reports marked Exts. 2 and 3 (2006-2007 &

2007-2008) it is found that the motto of the organization is to advance opportunities to the under-privileged children through education and other services. Annually about 3,000 to 4,000 children receive primary education and 900 children receive free School Education through different projects undertaken by the first party. Page. 7 of the Annual Report 2006-2007(Ext. 2) further reflects that the Organisation's staff strength is 244 out of which 154 are part-timers. In the same page the salary structure of the staff is also elaborately described. It is also found that the Organisation has one M/s. S. N. Adalakra & Co., Saheednagar, Bhubaneswar as its Auditor. The Annual Reports further reflect that in the year 2006-2007 the Organisation had 19 projects and in the next year it had 16 projects to execute in achieving its charitable activities.

The materials on record show that the Organisation gets donation from private persons besides financial aid from the Governmental Agency. Though it is claimed that most of the activities of the organization are done by persons who do not get salary or wages from the organization, it is not proved that such persons render free service for the organization. It is claimed that persons rendering free service for the Organisation get small honoraria but the Annual Reports reveal that the organization 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 one cannot accept the first party's plea that it has engaged some stray servants on hire for manual and technical work. The first party claims that the Organisation carries out different activities through a number of volunteers who get honoraria from the organization. But, in the Annual Reports there is no mention about engagement of volunteers getting honoraria from the Organisation. It appears, the Management has consciously used the terms 'Volunteers' and 'honorarium' in the place of words 'employees' and 'salary', respectively. For example, M. W. No.1 claims to be the Accounts Head of the organization. He has been working in the Institution for the last fifteen years. He says that he gets Rs. 5,800.00 per month as honorarium. The first party has not clarified as to how persons like M. W. No. 1 and the second party are not members of the staff of the Organisation whose salary structure is given at Page. 7 of Ext. 2. Be that as it may, it is found from the materials on record including the facts stated in the Annual Reports that the first party Organisation has been undertaking various Projects and its activities under all these Projects are executed through its staff whose strength by no stretch of imagination, can be said to be minimal or nominal. Apart from all this, the second party has also placed reliance on Ext. 5 which is the "Human Resource Policy" formulated by the first party Organisation. It seems to be just like Certified Standing Orders. It embodies, *inter alia*, the definition of an "employee", method of recruitment of employees, policy on the salary structure of employees, provisions on the conduct of employees and procedure as to how charges on employee's misconducts ought to be dealt with. The first party has framed this policy for its employees. No doubt, it is stated in Ext. 5 that the Human Resource Policy shall be effective from the 1st January 2009. But, there is no explanation as to how the matters specified in Ext. 5 used to be dealt with before the policy was made effective. From Clause No. 1 of the Policy it is to be construed that the Organisation had a "Verbal Human Resource Policy" prior to formulation of the written policy vide Ext. 5 which gives rise to further inference that the Organisation had its employees prior to 1-1-2009 who used to be governed by unwritten Rules and Regulations. The case of the first party is that it has not appointed any employees to execute its work under different Projects (except some stray servants engaged for manual and technical work). Thus, the Management's plea that in order to carryout its social activities it engages volunteers who serve the destitutes either for free or on payment of honorarium and that it has never engaged any employees for that purpose is not believable.

There is no material, not even in the evidence of M. W. No. 1 to show that charitable activities undertaken by the Organisation are performed by men 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), 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/Organisation. Considering the materials available on record, I am of the considered view that like Madurai Children Aid Society in Thilagavathi's case (Supra) the First party Organisation can be said to be an 'industry'.

8. 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 High Court have held that the Madurai Children Aid Society is not an 'industry'. In that reported decision his Lordship had observed, *inter alia*, that the said Society was discharging sovereign functions as an Agent of the State Government. The First party in the case at hand has not shown to have been discharging sovereign functions. Therefore, this decision of the Single Judge is not applicable to the case at hand.

In the result, it is held that the organization though not a profit earned 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 Second party, though he was designated as Project Officer, but all along he used to discharge clerical and manual duties under the direct control and supervision of the Programme Manager. He has further contended that no other person was working as subordinate to him. The Management, on the other hand, takes the stand that the jobs the Second Party used to perform were of supervisory nature. Detailing the jobs that the Second party was to discharge as Project Officer it is stated in the Written Statement that he was to visit all the Platform Schools and supervise the work of Cluster Educators and School Teachers, guide the Teachers and Cluster Educators to help them to improve their capacity in the matter of effective management of the Project, supervise the work of over 100 persons who were working as Teachers and Supervisors, etc. It is further claimed that he had the power to sanction leave to the Teachers and Supervisors up to three days and that beyond three days he used to recommend their leave applications to the Secretary of the Organisation for sanction of leave. He was marking attendance of the Teachers and Supervisors. He had the power to take independent decision in the matter of procurement of materials for the project. He was also conducting meetings and preparing plan of action for the Projects. He also used to represent the Organisation in various meetings organized by the Funding agencies of the Projects concerned. Also he used to prepare policy for effective management of the Project and when it was approved by the Management he used to implement the same in the field.

Since both the parties have adduced evidence on their respective stand, it is to be considered as to how far they have established their respective stand.

The Second party (W. W. No. 1) has stated in Para. 4 of his affidavit that his duty was to collect survey data and children's data from different Centres functioning under the Organisation by making personal visit to the Centres from time to time; to distribute nutritions, learning materials, books and stationeries to the Centres; to attend the Community Awareness Meetings at slum areas and to

consolidate reports of different activities of the Organisation; to submit half-yearly and annual report to the Secretary/Programme Manager. In Para. 25 of his cross-examination he has admitted that the Project Officer (he himself is a Project Officer) sanctions leave to the Teachers up to three days at a time. He also admits that he used to issue show-cause notice to the Teachers. It is also admitted that he used to verify the Attendance Register of the Teachers once in a month. He has further stated that as Project Officer he used to issue Transfer Certificate to the students of the Education Centres run by the First party.

M. W. No. 1 has stated in Para. 6 of his affidavit evidence that as Project Officer the Second party used to check the daily work of the Teachers and submit report to the Management on effective running of the Project work; sanction leave to the Teachers not exceeding three days; recommend for sanction of leave of the Teachers when the period of leave exceeded three days; prepare honorarium list of the Teachers and recommend for payment and disbursement of their honorarium. He has also stated that he used to attend various meetings organized by the Funding Agencies and he was authorized to take independent decision in such meetings for and on behalf of the Society. He was also fully entrusted with the Student admission matters. He also used to decide what activities were necessary to be taken up for smooth functioning of the Project with a view to achieving the aims and objectives of the Project.

Coming to the documentary evidence, the Second party has not exhibited any documents related to the nature of work he used to perform as the Project Officer, whereas the Management has exhibited some documents which speak of the nature of work the Second party used to perform.

Ext. B is a counterfoil of a School Transfer Certificate which is, admittedly, issued by the Second party. As already stated, the Second party has admitted that as Project Officer he used to issue Transfer Certificates to the students.

Ext. O is a copy of the Daily Report submitted by the Second party. It reflects that the Second party used to visit different Education Centres to note the attendance of children as well as the School Teachers, to advise the Teachers as to how the lessons should be taught to the children and other matters relating to the functioning of the Centres, to check all the registers maintained in the Centres, and, the like.

Exts. V, V/1 and V/3 reflect that as Project Officer he issued show-cause notice to the respective Teachers pointing out their negligence in duty and giving warning that on their failure to comply with the instructions disciplinary action would be taken against them. Ext. V/2 is a Certificate issued by the Second party certifying the date of birth of a student in accordance with the entry made in the respective Admission Register,

Ext. W is a leave application of a Teacher addressed to the Project Officer. It reflects that the applicant had applied for leave from 3-3-2005 to 11-3-2005. On the body of the application the Second party has passed order that three days C. L. was granted and the remaining three days be treated as leave without pay.

Thus, from the oral as well as documentary evidence read with the pleadings of the parties it is found that the main work of the Project Officer was to collect survey data and children data from different Centres functioning in the Organisation; distribute nutrition and learning materials to different Centres; attend Community Awareness meetings in slum areas and submit half-yearly and yearly reports to the Management on the activities of Centres. It is also found that the Second party as

Project Officer was authorized to issue Certificates to the students and grant leave to the Teachers. He was also authorized to invite show-cause from Teachers for their dereliction in duty. He used to supervise Education Centres to ensure their proper functioning. Though the Second party claims that he was discharging multifarious activities, mostly manual in nature, such as putting up tents for awareness meetings, selling items in the First party's food stall at the Exhibition Ground, Unit-I, Bhubaneswar during 'Adivasi Mela' on January 26th of every year and other Stalls organized by the Management in Saheednagar, Bhubaneswar, but all these do not appear to be the main or daily work of the Second party. That apart, he has not produced any documentary evidence to support this claim. To ascertain whether one is employed in a supervisory capacity the dominant nature of the work done by the employee is the determining factor. Materials on record show that the Second party was not doing any clerical or manual work as claimed by him. The dominant nature of his work appears to be more supervisory than either manual or clerical. It is found from the materials that his daily work was to supervise the work of the Teachers by visiting different Centres, besides collection of survey data from different Centres, submission of half-yearly and annual report on the activities of the Centres and attending Community Awareness meetings. It is also shown that he had some power of control over the Teachers. All these duties are not clerical or manual in nature. Therefore, in the considered view of this Tribunal, the Second party who was getting monthly remuneration of Rs. 5,000.00 as Project Officer at the relevant time was employed to do supervisory work.

Relying on the Judgment of the Hon'ble Supreme Court reported in AIR 1988 (SC) 329 (National Engineering Industries Ltd. *Vrs.* Sri Kisha Bhageria and Others) it is argued that the Management has failed to show that the Second party had the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees. But it is seen how the Second party had some authority to discipline Teachers/Educators.

In the result it is held that the Second party is not a 'workman' as defined under the Act.

10. *Issue No. (iii)*—Admittedly, the services of the Second party got terminated with effect from 31-7-2009. Ext. S is the Management's letter putting an end to the Second party's service with effect from 31-7-2009. The reason of termination is said to be closure of the Project in which he was working. It is claimed by the Management that he was working as Chief Educator in the Project called "VZW Thomas Ruchika Voor India" from September 2008 till the end of the Project on 31-7-2009. Thus, an attempt has been made to bring the termination under Section 2 (oo)(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 organization since 1-1-1993 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 his employment terminated and thereafter he 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 Alternative School Project, it is not shown that the Second party was employed on contract containing the condition that his 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 his employment under the said Project. In *S. M. Nilajkar and Others Vrs. Telecom District Manager, Karnatak, 2003 (97) FLR 608 (SC)* 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 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 above said terms by the employer at the commencement of employment.”

All these criteria are not found satisfied so far this case is concerned. It is found from the pleadings in the written statement that the Project was forcibly closed by the First party because of some alleged misconduct on the part of the Second party. It is claimed that due to some activities of the Second party which ran against the interest of the Organisation the latter was forced to close down a number of Platform Schools and ultimately it decided to close down the Project (VZW Thomas Ruchika Voor India Project) and with the closure of the Project the engagement of the Second party came to an end. The Second party, on the other hand, has established that some time prior to the impugned retrenchment the Second party 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. If the Second party is held to be a Workman then the termination of his service is not legal due to non-compliance of Section 25-F of the Act. It is also not justified in view of the fact that being dissatisfied with the activities of the Second party the Management denied him employment.

11. *Issue No. (iv)*—Since the Second party is found to be not a 'workman' as defined under the Act, he is not entitled to any relief. In the event it is held that he is a workman, then his retrenchment would be illegal and unjustified and for that matter he would be entitled to reinstatement with full back wages. Since *Issue No. (ii)* is answered against the Second party, he is not entitled to any relief and the reference is answered against him.

Dictated & corrected by me.

RAGHUBIR DASH
29-09-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
29-09-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

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