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LABOUR & E.S.I. DEPARTMENT

NOTIFICATION

The 27th November 2012

No. 9693—IR(ID)-63/2010-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 31st October 2012 in Industrial Dispute Case No. 42 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 Artatran Sarangi was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 42 OF 2010

Dated the 31st October 2012

Present :

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

Between :

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

And

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

Appearances :

For the First Party—Management	. .	Shri R. N. Rath, Authorised Representative.
For the Second Party—Workman himself	. .	Shri Artatrana Sarangi

AWARD

The Government of Odisha in their Labour & Employment Department (presently the Labour & E.S.I. Department), exercising power conferred upon them by Section 12 (5) readwith Section 10 (1) (c) of the Industrial Disputes Act, 1947 (for short, the Act) have referred the following dispute to this Tribunal for adjudication vide their Order No. 6389—ID-63/2010-LE., dated the 30th July 2010.

> "Whether the action of the management of Ruchika Social Service Organisation, Bhubaneswar in dismissing Shri Artatrana Sarangi, Cluster Co-ordinator from service with effect from the 23rd March 2009 is legal and/or justified ? If not, to what relief he is entitled to ?"

2. The first party namely, Ruchika Social Service Organisation will be hereinafter referred to also as the 'Organisation' and the second party will be referred to as the 'disputant'.

The case of the disputant is that from the 8th November 1992 he had been continuously working under the first party till he was dismissed from service with effect from the 23rd March 2009. At the time of his dismissal he was working as a Cluster Co-ordinator with monthly salary of Rs. 5,000. The management used to utilise his services in different activities of the Organisation and he was discharging duties mainly of manual and clerical nature. On the 2nd February 2009 a charge sheet was served on him with the allegation that without any provocation he physically assaulted one Shri Dipak Kumar Parida, the Accountant of the Organisation, inside the Accounts Department. His explanation to the charge sheet having been found to be unsatisfactory, an enquiry was conducted into the charges and ultimately he was dismissed from service on the said charge being found established. According to the disputant, the enquiry was not conducted fairly and properly and no proper opportunity was given to the disputant to defend his case. It is the case of the disputant that when the workers of the Organisation formed a Trade Union in the name of Ruchika Social Service Organisation Employees' Association with the disputant as the President of the said Association the management was searching for an opportunity to get rid of him and ultimately on a flimsy charge he was dismissed from service.

3. The first party in its written statement has contended 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 service to the destitutes. Being a Charitable Institution having no profit motive it cannot be said to be an 'industry'. In order to implement the objectives of the organisation it has not engaged any employees. Several persons, including the disputant, volunteer themselves to render service without any remuneration/wages. However, they are paid small honoraria in lieu of their voluntary service. Therefore, there did not exist employer-employee relationship between the parties. That apart, the job of the second party as project co-ordinator was mostly supervisory in nature.As such, he is not a 'Workman' as defined under the Act.

On the charge of assault as well as the domestic enquiry it is contended that on the 30th January 2009 at about the 10-30 A.M. the disputant assaulted Shri Dipak Kumar Parida inside the office premises and in the enquiry which was held fairly and properly the charge was found established and considering the report of the enquiry officer the management decided to dismiss him from service.

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

ISSUES

(i) ‘‘Whether the reference is maintainable on the ground that the management of Ruchika Social Service Organisation is not an Industry ?

(ii) Whether the disputant Shri Artatrana Sarangi a ‘Workman’ under Section 2 (s) of the Industrial Disputes Act ?

(iii) Whether the domestic enquiry initiated against Shri Artatrana Sarangi is fair and proper ?

(iv) Whether the action of the management of M/s Ruchika Social Service Organisation, Bhubaneswar in dismissing Shri Artatrana Sarangi, Cluster Co-ordinator from service with effect from the 23rd March 2009 is legal and/or justified ?

(v) If not, what relief Shri Sarangi is entiled to ?’’

5. This being a dispute related to dismissal of a disputant workman preceded by a domestic enquiry, the Tribunal took-up Issue No. (iii) as a preliminary issue which is in conformity with the settled procedure laid down by the Hon’ble Supreme Court in so many reported cases including M/s Cooper Engineering Ltd. *Vrs.* P.P. Mundhe, AIR 1975 (SC) 1990. On the preliminary issue the disputant examined himself as W.W. No. 1 and the Organisation examined M.Ws. 1 and 2. On the remaining issues the disputant adduced evidence by his further examination whereas the Organisation examined another writness as M.W. No. 3.

FINDINGS

6. *Issue No. (iii)*—This issue has already been answered in the afirmative. Extract of the findings thereon recorded separately in the order sheets vide Order No. 36, dated the 18th April 2012 is annexed to this Award to form part thereof.

7. *Issue No. (i)*—In support of the 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 u/s 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 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 for free, or for small honoraria, to serve the destitutes.

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 the Hon’ble Supreme Court in Bangalore Water Supply & Sewerage Board *Vrs.*

A. Rajappa, AIR 1978(SC) 548. In the aforecited case their Lordships have observed that in any profession, club, educational institution, co-operative, research institute, Charitable projects and other kindered 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 if undertaken, it comes within the definition of the word ''industry''. In respect of Charitable Institutions it is further observed that if they fulfil the aforestated 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 meterials available on record.

The written Statement readwith the oral evidence of M.W. No. 1 reveals that the first party is a Voluntary Organisation. Its goal is to provide education to disabled and orphans free charges. Many persons join with the Organisation to perform charitable work either without or for small honorarium. The Organisation employs some staray servants on hire for manual or technical work. Ext. 5 is the Organisation's Annual Report for the year 2006-2007 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 Report further reflects that during the said year 2,100 children received primary school education in 63 Centres and 750 children received pre-school education in 21 Centres run by the Organisation. Page 7 of Ext. 5 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 Report further reflects that the Organisation has one S.N. Adalakha & Co. as its Auditor. The Annual Report further reflects that in the year 2006-2007 the Organisation had 19 project to execute.

The materials available on record establish that the Organisation gets donations from private persons/institutions, besides finacial 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 service for the organisation get small honoraria, but the Annual Report reveals 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 Report, the management's plea that it has engaged some stray servants on hire for manual and technical work cannot be accepted. The first party claim that the Organisation carries out different activities through a number of volunteers who get honoraria

from the Organisation. But, in the Annual Report there is no mention about engagement of Volunteers as well as the amount paid to them towards honorarium. With the Annual Report 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 'employees' 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. 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.

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 Institutios 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 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 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 'industry'. In this case his Lordship has observed *inter alia,* that the said Society was discharging soverign 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 soverign functions.

In the result, it is held that the Organisation, though not a profit earning Institution, 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'.

8. *Issue No. (ii)*—The disputant claims that he was an employee of the Organisation and he used to be paid monthly salary for the work he used to discharge for the Organisation. The first party on the other hand, submits that the disputant was rendering 'seva' for the Organisation in lieu of monthly honorarium and as such there was no employer-employee relationship between the parties. Further case of the first party is that as a Field Organiser/cluster Co-ordinator his duty was

to move around places like railway stations, slums & bustis to oversee whether the purpose and goal formulated by the Organisation was properly carried out or not. He was not required to any clerical or technical work. His job was partially teaching oriented and partially supervisory in nature. Therefore, it is contended, the disputant is not a 'workman' as defined under the Act.

The disagreement between the parties over payment of honorarium/salary has already been dealt with under Issue No. 1. Regarding the nature of work that the disputant used to perform, it is stated by the disputant in his affidavit evidence that the dominant nature of his duty was manual and clerical without any supervisory power; that no other employees were working under him as subordinates and as such there was no chance of supervising their work; that he used to perform his duties under the direction of the Programme Manager as well as the Secretary of the Organisation; that he used to visit different slum areas to see the day to day progress of construction work of community Sanitation Block, household latrines, tube well installation works and the like and to submit daily report to the Programme Manager; that he used to prepare the inventory of construction and other materials used for the construction work and submit the stock/account of day to day utilisation of materials in the said construction work; that he used to maintain Register of day to day construction work and submit the same to the Programme Manager for verification and that he used to prepare monthly, quarterly and annual progress report of the construction work and submit the same to the management from time to time. No question has been asked to the witness in course of his cross-examination to discredit him on what he has stated to be the nature of his work. However, it is suggested to but denied by the disputant (W.W. No. 1) that he being the Cluster Co-ordinator was the Head of the Project and he used to supervise the work of other staff working under the Project. But, not a single scrap of paper is exhibited by the management in support of that claim.

M. W. No. 3 has stated in his affidavit evidence that as cluster Co-ordinator the disputant was exercising supervisory nature of 'seva' such as giving instruction to the Teachers who were bound to act according to his instructions. He has further stated that the disputant was taking decisions and attending meetings on behalf of the Organisation over which there was no interference from the Secretary as well as the Programme Manager of the Organisation. He has further stated that the disputant used to supervise the work of other Volunteers who were working under the Project headed by the disputant. But, this oral evidence does not get support from any documentary evidence. Whatever has been claimed by the Organisation as to the nature of the disputant's work could have been supported by documentary evidence. With the materials available, it cannot be said that the predominant natuer of duties discharged by the disputant was supervisory. It is well settled that designation or nomenclature of the post held by a person cannot form the basis to determine whether he is a Supervisor or not.

The management places reliance on the decision in S. Kalyan Krishnan *Vrs.* Bluestar Ltd., reported in 2012 LLR 123 (Gujarat High Court). But, the reported Judgment does not support the stand of the first party. In the reported case the employee was the Authorised Signatory to the Sales Tax Forms. He was responsible for co-ordination and management of accounting activities. Some other employees were working under him. He was issuing direction to his subordinates and exercising

supervision and control upon their work. Therefore, he was held to be not coming within the purview of the definition of 'workman' under the Act. But, in the case at hand no such evidence is available. In Anand Rgional Co-operative Oilseeds Growers Union Ltd. *Vrs.* Sailesh Kumar Harshad Bhai Shah, reported in 2006(6) SCC 548, the following observations of the Hon'ble Apex Court have been quoted in the case of S. Kalyan Krishnan *(supra) :*

> ''Supervision contemplates direction and control. While dertermining 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 naswer the test.''

Following the aforestated observations it can be said that the Management having failed to show that there were some persons working under the disputant whose work was required to be supervised by him, it cannot be said that the disputant was employed in a supervisory capacity.

Taking all the materials into consideration, I am of the considered view that the disputant comes within the definition of ''workman'' under the Act.

9. *Issue No. (iv)*—On the charge of physical assault the disputant has been dismissed from service. While answering the issue on the fairness of the domestic enquiry this Tribunal has observed that the enquiry held is fair and proper. The materials placed before the Enquiry Officer and exhibited in this case reflect that the disputant, while challenging Shri Dipak Kumar Parida, an Accountant in the establishment of the first party, that he had spoken lies to R.P. Dwivedy, Programme Manager in the establishment of the first party, by falsely stating that the disputant had refused to sign on the Salary Register unless and until it would be signed by Shri Dwivedy, caught hold of the cheek of said Dipak Kumar Parida. The Enquiry Officer has concluded that the charge has been duly proved. Even the disputant has admitted to the extent that he had caught hold of the Lips of Dipak Kumar Parida challenging that the latter had time and again told lies against him.

Thus, the materials placed before the Enquiry Officer reflect that the disputant, under an impression that Dipak Kumar Parida had repeatedly told lies to the Programme Manager against him got provoked and, challenging as to why Shri Parida was repeatedly telling lies to the Programme Manager, caught hold of Shri Parida's Lips/Cheek. There is total absence of materials as to whether Shri Parida had suffered any pain or bodily injury. Thus, there is some element of provocation though it may not be said to be grave and sudden. Undoubtedly, the act committed by the disputant amounts to disorderly behaviour during working hours within the office premises. The act is also subversive of discipline. Therefore, the misconduct comes under Clause 14 (3) (h) of the Model Standing Orders for Workmen [Schedule-I of the Odisha Industrial Employment (Standing Orders) Rules, 1946]. The management has proved vide Exts. W/1 and W/2 that long back on the 6th March 1995 while the disputant was working as a Teacher in the establishment of the first party had assaulted another Teacher but on the apology of the disputant the matter was dropped.

10. On behalf of the disputant it is argued that the punishment of dismissal is grossly disproportionate to the act of misconduct found proved. In reply, it is submitted by the first party that the punishment is justified in as much as the misconduct amounted to subversive of discipline and the disputant's previous record was also found unsatisfactory. It is not in dispute that the disputant had been under the employment of the first party since the 8th November 1992 till he was dismissed from service from the 23rd March 2009. The past misconduct on which reliance has been placed does not appear to have been considered by the Disciplinary Authority while imposing the punishment. The order of dismissal is not exhibited by either side. Even in the notice marked Ext. 3, inviting show cause from the disputant as to why his service should not be terminated, there is no reference about the past misconduct. It is for the first time before this Tribunal reliance has been placed on Exts. W/1 and W/2. These two documents have been exhibited with the disputant's objection. Prior to exhibiting these two documents the Management had not given any scope to the disputant to explain on his previous misconduct. Therefore, he would be highly prejudiced if at this stage the disputant's past conduct is taken into condideration while adjudicating on the justifiability of the punishment. The propriety of the punishment is to be considered keeping in mind the facts found proved during the domestic enquiry.

As already stated, soon before the alleged incident the disputant got provoked as he felt highly aggrieved under a *bona fide* notion that Dipak Kumar Parida had repeatedly told lies against him. Under such provocation he proceeded to the Accounts Section where Shri Parida was present and while challenging as to why Shri Parida had told lies against him the disputant caught hold of his Lips/Cheek. Under such circumstances, the punishment of dismissal of an employee who had served the organisation for about 16 years appears to be quite disproportionate.

10.-A. The disputant alleges that this is a case of victimisation. His case is that in the year 2008 the employees of the Organisation had formed a Trade Union of which he was the President and for that he became the eye-shore for the management. The assertion as to formation of the Trade Union finds support from the documents exhibited on behalf of the disputant but it is difficult to say that the disciplinary action was as a result of victimisation. The disputant has clearly admitted to have committed the act of disorderly behaviour. Therefore, there is no scope for any presumption that because of his Trade Union activities he was falsely implicated.

Considering the nature and gravity of the act of misconduct, which is found established, this Tribunal is of the considered view that the severest form of punishment, i.e. dismissal from service is quite disproportionate to the act of misconduct. Therefore, the action of the management in dismissing the disputant is held to be unjustified.

11. *Issue No. (v)*—Since the order of dismissal is held to be unjustified, the disputant is entitled to some reliefs. At the same time he is also to suffer punishment for his act of misconduct. The Medel Standing Orders provides that if a workman is found guilty of the charges framed against him, the employer can pass an order of dismissal or suspension or fine or stoppage of annual increment or reduction in rank as would meet the ends of justice. Since the disputant is found guilty of disorderly behaviour during working hours at the establishment which is also subversive of

discipline, he shall be awarded the punishment of suspension from the date he was placed under suspension pending the domestic enquiry, i.e. on the 2nd February 2009 till the date of this Award, i.e. on the 31st October 2012 without any wages/salary for the said period. However, he is entitled to be reinstated in service with salary from the 1st November, 2012 till the date of his actual reinstatement.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
31-10-2012
Presiding Officer
Industrial Tribunal, Bhubaneswar

RAGHUBIR DASH
31-10-2012
Presiding Officer
Industrial Tribunal, Bhubaneswar

The following Extract of Order No. 36, dated the 18th April 2012 containing the findings on issue No. (iii) relating to the fairness and propriety of the domestic enquiry to form part of the Award passed in I.D. Case No. 42/2010

‘‘Below are the findings on *Issue No. 3* which is taken up as a preliminary issue.

2. Admittedly, the second party was charge sheeted (vide Ext. D) on the written complaint of one Dipak Kumar Panda, the Accountant in the establishment of the first party. Ext. C is the written complaint. The charge was to the effect that on the 30th January 2009 at about 10 A.M. in the Accounts Department of the first party the second party assaulted the complainant without any provocation. It is also not disputed that the explanation to the charge sheet being found not satisfactory, the Disciplinary Authority appointed an Enquiry Committee consisting of two members namely, Shri R.P. Dwivedi, Programme Manager of the first party and Shri Niranjan Swain, an Advocate. It is also not in dispute that the second party participated in the enquiry proceedings. It is also adimitteed that on conclusion of the enquiry, the committee submitted a report finding the second party guilty of giving physical assault to the complainant which was ultimately accepted by the Disciplinary Authority and order was passed dismissing the second party from service.

3. However, the second party challenges the fairness of the domestic enquiry on the following gounds :—

(i) The members of the Enquiry Committee being paid officers of the first party were partial to the management;

(ii) The second party was not permitted to cross-examine the management witnesses;

(iii) Copy of statements of management witnesses were not supplied to the second party to enable him to prepare for his defence;

(iv) The second party was not given a fair opportunity to produce his defence witness namely, Ramesh Chandra Sahu;

(v) The Enquiry Committee did not submit a reasoned report. In other words, the conclusions arrived at by the Committee are not supported by reasons and for that the findings are perverse.

While adducing evidence the second party has raised the following additional grounds :—

(a) The Enquiry Committee did not issue notice to the second party to attend the enquity;

(b) The Enquiry Committee did not ask the option of language to the second party and conducted the enquiry in English language;

(c) The statements of the management's witnesses were not recorded in presence of the second party and those were prepared at a later stage to suit the management's need;

(d) The complainant was permitted to cross-examine the second party and his witness and no representative of the management was appointed as the presenting officer;

(e) The Enquiry Committee did not properly record the statement of the second party;

(f) The Enquiry Committee did not maintain a note to record the day to day proceeding and that a copy of the day to day proceeding and that a copy of the day to day proceeding if any, was not supplied to the second party;

(g) The Enquiry Committee did not take the statement of the defence witness into consideration while recording its findings;

(h) Shri R.P. Dwivedi having ledged F.I.R. against the second party on the alleged incident and he being appointed as a member of the Enquiry Committee, was permitted to act as both a prosecutor and Judge.

All these grounds are to be dealt with in seriratim hereunder :—

4. *Ground No. (i):*—Admittedly, Shri R.P. Dwivedi, a member of the Enquiry Committee, is working as Programme Manager in the establishment of the first party. During cross-examination he admits that he is a member of the management committee of the first party and that he and the other Managing Committee Members had passed a Resolution on the 5th February 2009 to initiate a domestic enquiry against the second party. Thus, there is no doubt that Shri Dwivedi holds managerial post in the said establishment. But, it is well settled that more fact that the Enquiry Officer is an Employee of the Management cannot lead to the assumption that he is bound to decide the case in favour of the management. In the absence of any special bias attributable to a particular officer in cannot be said that the enquiry is bad only for the reason that it has been conducted by an Officer of the management.

The other member of the Enquiry Committee is an Advocate. While adducing evidence as M.W. No. 1 he has stated that he has conducted some other cases on behalf of the first party in different Courts of Law. Even if on the basis of this admission M. W. No. 1 is considered to be a retainer of the first party, there cannot be a presumption solely on that ground that he is not an impartial prerson. It is also well settled that a person who has been engaged as a Lawyer by the employer in some other prior cases and is subsequently engaged to hold a domestic enquiry against a workman is not incompetent on the ground of bisas to conduct the domestic enquiry.

The second party has not made any specific allegation against either of the members of the Committee in support of his assertion that they are not impartial persons to conduct the enquiry.

5. *Ground No. (ii)*—It is alleged that the Enquiry Committee did not permit the second party to cross-examine the management witnesses. But the enquiry proceeding reflects that the second party declined to ask any question to the management witnesses namely, Dipak Kumar Parida and Dilip Kumar Sahu. The second party does not appear to have raised any objection soon after the alleged refusal to cross-examine the management witnesses. There is another management witness namely, Hemant Kumar Sahu whose statement was recorded by the Enquiry Committee and the second party cross-examined that witness. But, the mode of cross-examination of this witness reveals that the second party did not put any question on the alleged assault. That apart, while making his own statement before the Enquiry Committee the workman has admitted the assault part of the Complainant's allegation by stating that he caught the lips of the Complainant and warned him against telling any lie against him any more. From the kind of statements the second party has made in his defence before the Enquiry Committee as well as the mode of cross-examination of one of the management witnesses, presumption goes in favour of the first party's plea that the second party declined to ask any question to D.K. Parida and D.K. Sahu. On the other hand, his plea that he was not permitted to cross-examine the management witnesses is not found to be reliable.

6. *Ground No. (iii)*—It is admitted that copies of statements of management's witnesses were not supplied to the second party. According to the first party, the second party did never ask for supply of copy of such statements. The second party also fails to show that he had made any request for supply of copy of such statements. The question as to whether non-supply of copy of statements of witnesses has caused any prejudice to the second party affecting the fairness of the domestic enquiry is to be considered later on.

Ground No. (iv)—It is claimed by the workman that the Enquiry Committee did not allow him to examine one Ramesh Chandra Sahu as his defence witness. In this regard, the plea taken by the first party is that no such request was made by the second parrty. The second party exhibits one document, marked Ext. 1, in support of his contention that he had made a written request to the Enquiry Committee that he would examine Smt. Sanjukta Samantaray and Shri Ramesh Chandra Sahu. But, it is not shown that the written request was actually presented before the Enquiry Committee. The enquiry proceeding does not reflect that such a prayer was made by the second party but the Committee did not permit the second party to examine Ramesh Chandra Sahu. On the body of Ext. 1 no one from the side of the Management/Enquiry Committee has given any endorsement. Such a document can be created at any time. This being in the nature of self-serving document no importance should be attached to it unless it is shown that such a petition was, in fact, made to the Enquiry Committee.

7. *Ground No. (v)*—Ext. M is the enquiry report. A perusal of the report reveals that the findings of the Committee are supported by reasons. The charge is that the workman had assaulted the Complainant. The Complainant has stated before the Enquiry Committee that the second party had caught his cheek. The second party in his recorded statement has admitted to have caught the Complainant's lips. This admission is sufficient to make out a case of assault. Therefore, the enquiry Committee's finding that the second party had committed an act of misconduct cannot be said to be perverse or without materials.

8. *Ground Nos. (a) to (h)* are not reflected in the claim statement. However, the same may be taken into consideration to find out whether the grounds, if found proved, can make the enquiry unfair.

It is a fact that the Enquiry Committee did not issue any notice to the second party to appear before it to participate in the proceeding. However, there is no dispute that the management had issued him notice and in response thereto the second party participated in the enquiry proceeding. Therefore, no prejudice seems to have been caused to him. Further allegation is that the Enquiry Committee conducted the enquiry and recorded that proceeding in English language. In this regard it is to be noted that the second party in his cross-examination has admitted to have passed B.A. It is also found that letters marked Exts. 2 and E which are signed by the second party are in English language. The second party does not appear to have raised any objection against recording the enquiry proceedings in English. It is neither pleaded nor proved that the second party does not know English. For all these reasons this ground appears to be after thought. Another allegation that statements of the management withnesses namely, D.K. Parida and D.K. Sahu were recorded behind his back and that those were prepared at a later stage to suit the need of this case also seems to be an after thought. Because, such a plea was not taken either in the claim statement or in the second party's reply (Ext. 2) to the second show cause notice. (It is claimed by the second party that Ext. 2 is a copy of his reply to the second show cause notice and it is marked as an exhibit at the instance of the second party himself.)

It is further pointed out that the Enquiry Committee permitted the Complainant to cross-examine the second party which, according to the second party, ought to have been done by the management's representative whereas in this case no such representative was appointed. It is true that the management does not appear to have appointed a Marshalling Officer/Presenting Officer for the purpose of the domestic enquiry. But, no authority has been cited in support of the contention that failure on the part of the management to engage a Presenting Officer reflects on the fairness of the domestic enquiry. The second party fails to show that any prejudice has been caused on account of his cross-examination being done by the Complainant.

9. Further allegation that the Enquiry Committee did not record the second party's statement properly also does not inspire credibility. Such a plea has been taken with a view to get rid of the consequences of the admission he has made in his statement. His statement was recorded on the 13th February 2009. Subsequent to that, on the 10th March 2009 he submitted his reply to the second show cause notice (Ext. 2). Even in the reply to the second show cause he has admitted to have caught hold of the lips of the Complainant. The explanantion consists of five pages. Throughout the lengthy explanation the second party has tried to justify his action. It is not specified as to which portions of his statements recorded by the Enquiry Committee were incorrectly recorded.

10. Further allegation is that the Enquiry Committee did not maintain notes to record the day-to-day proceedings and that a copy of such notice was not supplied to him. Ext. M is a note sheet maintained by the Enquiry Committee containing the day-to-day proceedings of the enquiry. The Management has not claimed to have supplied a copy of the day-to-day proceedings. At the

same time the second party has failed to show that he had asked for copy thereof. Non-supply of the copy of the notes containing the day-to-day proceedings cannot be considered as an unfair practice adopted by the Enquiry Committee and no importance should be attached to that objection unless it is shown that prejudice has been caused.

11. The allegation that the Enquiry Committee did not consider the defence evidence adduced by Sanjukta Samantaray is unfounded. In the enquiry report the evidence of Sanjukta Samantaray has also been taken into consideration. Even this defence witness has also stated before the Enquiry Committee that the second party had caught hold of the Complainant's lips and was challenging as to why the latter was lying against him. It is not pointed out as to which portion of her statement, omitted from consideration, would have affected the opinion formed by the Enquiry Committee.

12. The last but the very important ground raised by the second party is that Shri R.P. Dwivedi, one of the members of the Managing Committee acted as a prosecutor as well as a Judge. It is pointed out as to how Shri Dwivedi was a part of the decision making process that resulted in initiation of the domestic enquiry. It is also pointed out that Shri Dwivedi on the alleged incident of assault had lodged an F.I.R. against the second party. There are no other facts and circumstances in support of this contention. It is admitted by Shri Dwivedi that he is working as a Programme Manager in the establishment of the first party and that he is a member of the Managing Committee of the first party. He has also admitted that the members of the Managing Committee including himself had passed a Resolution to have a domestic enquiry into the alleged assault. It is also stated in the Written Statement that Shri Dwivedi had lodged an F.I.R. for police action against the seocnd party. However, in my considered view mere filing of an F.I.R. does not make Shri Dwivedi a prosecutor. He has filed the F.I.R. on behalf of the Management most probably for the reason that the incident occurred in the office of the first party.

13. Now, it may be examined whether the appointment of Shri Dwivedi as a member of the Enquiry Committee who, as a member of the Managing Committee, was a part of the decision making process in which it was decided to initiate a disciplinary proceeding against the second party, affects the enquiry and its fairness. On this point the second party has relied on a decision of the Hon'ble Delhi High Court in Taj Mahal Hotel *Vrs.* Industrial Tribunal I and Others, 2010 LLR 1077. In the reported case the Petitioner i.e. M/s. Taj Mahal Hotel had appointed an Advocate as the Enquiry Officer. The said Advocate was found to be a member of the Lawyers' Firm which is the Legal Advisor of the Petitioner of the reported case. The same Advocate was authorised by the Petitioner to conduct the industrial dispute arising out of the dismissal of the workman on the basis of the enquiry report submitted by the same Advocate. The writ petition arising out of the Award made by the Industrial Tribunal was also filed by the same Firm of Advocates and the Vakalatnama executed by the Petitioner in the Writ Petition bore the name of the same Advocate. It was also found that in a span of 8-9 years the same Advocate had conducted about 30 enquiries against the employees of the Petitioner Hotel and in all those cases he had hold the workmen guilty of the charges. Apart from all these the workman in that case had, during the enquiry proceedings, objected

to the Advocate conducting the enquiry but the latter had over ruled the said objection. Taking all these facts into consideration the Hon'ble High Court presumed that in the normal course of business the Petitioner Hotel would not have taken the decision of suspending the Respondent Workmen and chargesheeting them without consulting the Lawyer's Firm of which the Enquiry Officer formed a part. With this presumption the Hon'ble High Court observed that the Advocate being a part of the decision making process which resulted in the Respondent Workmen being suspended and chragesheeted had disqualified himself from being the Enquiry Officer.

The fact situation of the case in hand is different. In this case the Managing Committee of which Shri Dwivedi was a member resolved to initiate a departmental proceeding against the second party. Save and except being a part of the Managing Committee passing a Resolution to initiate a proceeding against the workman he is not shown to have done anything else to say that he was biased against the workman. Even the workman had never raised any objection against Shri Dwivedi becoming a member of the Enquiry Committee. Even in his reply to the second show cause notice the second party did not raise any objection to that effect. In this case Shri Dwivedi was not the sole person to constitute the Enquiry Committee. An Advocate was also appointed as a member of the Committee. Both of them have not shown, by any conduct, that they were not impartial towards the second party. There is no proof that Shri Dwivedi had any personal ill-will as against the second party or that the management on one hand and the members of the Enquiry Committee on the other had a conspiracy to see that the second party was inflicted with the punishment. Above all it is also a case where the second party had admitted the assault part of the incident but tried to justify it. Even the defence witness stated that the second party had caught hold of the lips of the Complainant. Under such circumstances, it cannot be said that any prejudice was caused to the second party because of Shri Dwivedi being appointed as a member of the Enquiry Committee.

14. In Sur Enamel Stamping Works *Vrs.* Their Workman, AIR 1963(SC) 1914, it is observed that a domestic enquiry into the misconduct alleged against a Workman cannot be said to have been properly held unless—

(a) the workman proceeded against has been informed clearly of the charges levelled against him;

(b) the witnesses are examined ordinarily in the presence of the workman in respect of the charges;

(c) the workman is given a fair opportunity to cross-examine the witnesses;

(d) the workman is given fair opportunity to examine witnesses including himself in his defence; and

(e) the Enquiry Officer records his findings with reasons therefor in his report.

In the case in hand all the aforestated requirements have been duly complied with. While analysing the evidence it is found that the second party was not supplied with copy of statements of the management witnesses. But it is seen that the second party had never asked for supply of such copy. Even in his reply to the second show cause the second party did not raise this objection.

It is not a case where the workman was not furnished with copies of documents relied on by the management so that prejudice can be presumed even on more non-supply of copy of such documents. In the absence of other materials it cannot be said that the second party suffered prejudice on more non-supply of copy of statements of management's witnesses.

15. In view of the discussions made above, I held that the objections raised by the second party and the materials placed to support such objections are not sufficient to hold that the domestic enquiry was unfair or improper.

Accordingly, the issue is answered.

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

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