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LABOUR & EMPLOYEES STATE INSURANCE DEPARTMENT

NOTIFICATION

The 4th December 2012

No. 9986—li-I (B)-121/2008-L ESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 20th June 2012 in I. D. Case No. 6 of 2009 and 7 of 2009 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Overnite Express Ltd., Cuttack and their workman Shri Jayanarayan Das represented through the General Secretary, Cuttack, Commercial Workers' Union, Cuttack was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 6 OF 2009

AND

INDUSTRIAL DISPUTE CASE NO. 7 OF 2009

Dated the 20th June 2012

Present :

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

Between :

The Management of M/s Overnite Express Ltd., .. First Party—Management
Cuttack Branch, At Bombay Hotel,
College Square, Cuttack.

And

Shri Jayanarayan Das, Courier Boy, .. Second Party—Workman
C/o General Secretary, Cuttack
Commercial Workers' Union, Gosala Road,
Nayabazar, Cuttack.

Appearances :

Shri Deepak Pradhan, .. For the First Party—Management
Area Manager.

Shri T. Lenka, .. For the Second Party—Workman
Authorised Representative.

AWARD

The reference on which I. D. Case No. 6 of 2009 is registered is made by the Government of Odisha, Labour & E.S.I. Department vide their Order No. 3047—li/1 (B)-121/2008-LE, dated the 23rd March 2009. The Schedule of reference in the said I. D. Case runs as follows :—

“Whether the termination of services of Shri Jayanarayan Das by way of refusal for employment by the management of M/s Overnite Express Ltd., Cuttack Branch, Cuttack with effect from the 12th May 2008 is legal and/or justified ? If not, what benefits Shri Das is entitled to ?”

Likewise, the reference on which I. D. Case No. 7 of 2009 is registered is made by the Government of Odisha, Labour & E.S.I. Department vide their Order No. 3052— li/1 (B)-121/2008-LE., dated the 23rd March 2009. The Schedule of reference in the said I. D. Case runs as follows :

1. “Whether the reduction of wages of Shri Jayanarayan Das from Rs. 2,400 per month to Rs. 50 per day with effect from the 1st August 2003 by the management of M/s Overnite Express Ltd. is legal and/or justified ? If not, what should be the details ?
2. Whether the demand of the union for payment of wages at par with the other workman discharging duties of same and similar category like Shri Pradyumna Kumar Prusty, Saroj Padhi, Baburam Das and Prafulla Palai is legal and/or justified ? If not, what should be the details ?”

2. Since parties in both the references are the same and whereas in the former the legality and termination of service of the workman is under challenge and in the latter reduction of wages of the workman and his demand for payment of wages at par with other workmen is the subject-matter of reference, this Tribunal has passed order on 25-3-2011 for analogous trial of both the cases by recording one set of evidence and making a common Award for both the cases.

3. The case of the workman is that in the year 1990 he joined with the first party as one of its Office Staff. In 1992 he worked as “On Train Courier” (O.T.C.) from Cuttack to Paradip for delivery of Daks. In 1995 he was directed to work as ‘O.T.C.’ from Cuttack to Angul. The workman had been in continuous service discharging his duties satisfactorily. However, when he requested the management to regularise his service and to cover him under the E.S.I. and E.P.F. Schemes the management became aggrieved and stopped his salary with effect from the 1st August 2002. However, the workman was performing his duty as usual without salary but only receiving the daily bus fare and fooding expenses. His request for releasing his arrear salary was not heeded to. So he filed Misc. Case (bearing Misc. Case No. 73 of 2003) under the Payment of Wages Act. After filing of that case the management started paying his wages but at the reduced rate of Rs. 50 per

day from August, 2003. Earlier he used to get monthly wages of Rs. 2100. The workman was also discriminated by the management by not giving him other service benefits which his juniors used to get. For all that an industrial dispute was raised by the Cuttack Commercial Workers' Union who espoused the cause of the workman before the local Labour Authority. While conciliation proceeding on that dispute was in progress the management refused employment to the workman with effect from the 12th May 2008. Challenging such retrenchment to be illegal the said Workers' Union raised another dispute before the local Labour Authority. The conciliation proceedings having failed in both the matters, separate conciliation failure report was submitted on each dispute and accordingly separate reference has been made as stated earlier.

4. The management of M/s Overnite Express Ltd. has filed written statement contending that it is a Company registered under the Companies Act, 1956. Its Head Office is at New Delhi. Its Regional Offices are at different parts of India. For carrying out courier business it has about 2,000 franchisees. In Odisha it has its Branch Office at Bhubaneswar which is under its Regional Office at Calcutta. As many as 26 franchisees are there at different places in the State of Odisha.

Further case of the first party is that the second party was never its employee. Never was he directly employed by the first party. If at all he was working as on 'O.T.C.' at Cuttack, he might have been engaged as such by its franchisee based at Cuttack. It is further contended that the first party enters into Agreement with its franchisee with terms, *inter alia*, that all persons engaged by the franchisee are to be deemed as employees of the franchisee. Therefore, it is pleaded, the second party working under the franchisee at Cuttack is an employee of that franchisee. The franchise-holder at Cuttack is one Mr. Ushakanta Mishra who is responsible for appointment and retrenchment of the staff employed for his franchise establishment. The second party being never under direct or indirect employment of the first party, the question of raising an industrial dispute against the first party does not arise.

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

ISSUES IN I. D. CASE No. 6 OF 2009

- (i) "Whether termination of services of Shri Jayanarayan Das by way of refusal for employment by the management of M/s Overnite Express Ltd., Cuttack Branch, Cuttack with effect from the 12th May 2008 is legal and/or justified ? If not, what benefits Shri Das is entitled to ?
- (ii) Whether the second party Jayanarayan Das is/was an employee/workman under the first party ?"

ISSUES IN I. D. CASE No. 7 OF 2009

- (i) "Whether the reduction of wages of Shri Jayanarayan Das from Rs. 2,400 per month to Rs. 50 per day with effect from the 1st August 2003 by the management of M/s Overnite Express Ltd. is legal and/or justified ? If not, what should be the details ?

- (ii) Whether the demand of the union for payment of wages at par with the other workmen discharging duties of same and similar category like Shri Pradyumna Kumar Prusty, Saroj Padhi, Baburam Das and Prafulla Palai is legal and or justified ? If not, what should be the details ?
- (iii) Whether the second party Jayanarayan Das is/was an employee/workman under the first party ?”

6. In support of their respective stand both sides have adduced evidence. The second party has examined himself as W. W. No. 1 and has exhibited documents marked Exts. 1 to 11. The first party has examined its Area Manager, Bhubaneswar Branch Office as M.W. No. 1 and exhibited, two documents marked Exts. A and B.

FINDINGS

Issue No. (ii) of I. D. Case No. 6 of 2009/

Issue No. (iii) of I. D. Case No. 7 of 2009

7. Since employer-employee relationship is in dispute, a common issue has been framed in both the I. D. Cases as to whether there exists such relationship between the parties. Even though the first party denied it before the Conciliation Officer that there was employer-employee relationship between the parties, references have been made assuming the first party to be the employee of the second party. However, this issue seems to be incidental to the other issues those have been framed in terms of the references. Fate of both the references depends on the determination of the issue on the existence of employer-employee relationship. Therefore, this issue is taken up first.

8. The initial burden lies on the second party to prove that he is an employee of the first party. He has adduced oral evidence claiming that he took up employment under the first party in 1990 and since then he had been working continuously till the alleged retrenchment with effect from the 12th May 2008. He has also deposed to the effect that during this period his salary was hiked from time to time and he was directed to work at different places but in support of such oral evidence he does not appear to have exhibited relevant documents. In cross-examination he has admitted that the first party had not issued any appointment order. His further admission is that the Branch Manager had orally instructed him to work as an ‘O.T.C.’. According to him, the then Branch Manager of Cuttack Branch was one Padam Charan Jain. It is suggested to but denied by him that said Padam Charan Jain was not the Branch Manager of the first party but its Business Associate who was running the Cuttack Branch on franchise basis. However, it is admitted by the second party that one Mr. Ushakanta Mishra is presently the Branch Incharge of Cuttack Branch which is located in Bombay Hotel, Cuttack. He denies that said Ushakanta Mishra is the franchisee of Cuttack Branch. But, the first party has produced an Agreement (Ext. B) purportedly signed between the first party and said Ushakanta Mishra agreeing, *inter alia*, that said Ushakanta Mishra shall render services on behalf of the first party for the territory of Cuttack in lieu of service charges payable to him at the agreed rates. The first party has exhibited one undertaking purportedly executed by said Ushakanta Mishra in favour of the first party to the effect that the employees whom he may engage for complying with the obligations under the Agreement (Ext. B) shall be deemed to be his employees

and they shall work under his supervision and direction. Both Exts. A and B were purportedly executed on 1-1-1999. It is suggested to M. W. No. 1 that Exts. A and B were executed on 19-4-2011 but this is found to be a wrong suggestion. It appears, Exts. A and B being xerox copy of the original documents were got signed by a Notary at Bhubaneswar on 19-4-2011 to make the copies authenticated to be used in this I. D. Case. While cross-examining on the two documents it is elicited from M. W. No. 1 that the Stamp Papers used for the preparation of the two documents were purchased on 24-12-1997 whereas the documents are shown to have been executed on 1-1-1999 and that the signatories to both the documents have not put any date below their signatures. On that basis it is suggested to the witness that old Stamp Papers were used by the management at a later stage so as to create antedated documents for the purpose of this case. But, the suggestion has been denied. Exts. A and B *prima facie* support the consistent stand taken by the first party that the courier business which runs in Bombay Hotel, Cuttack is carried on through a franchisee and that as per the terms of the franchise agreement all the persons employed by the franchisee are the employees of the franchise-holder who alone is responsible and liable for payment of salary and other service benefits of such employees.

9. The workman has exhibited a number of documents which may be examined to find out if they support his stand. Documents marked Exts. 1, 3, 4, 9 and 10 series bear the logo "Overnite Express". But, merely on that basis it cannot be said that the second party is an employee of the first party. A franchise-holder is authorised to use Forms and Letterhead pads bearing the Logo of the Franchiser. Ext. 2 is a letter of request signed by Shri Ushakanta Mishra for issuance of a Gate Pass in favour of the second party. Ext. 3 is an Identity Card issued by said Ushakanta Mishra. In both the exhibits Ushakanta Mishra is stated to be the Branch Incharge of Overnite Express. The second party has not placed any material to show that Ushakanta Mishra is either an employee or an Agent of the first party. Therefore, it cannot be said that Exts. 2 and 3 are signed by him on behalf of the first party.

Ext. 1 and 1/1 are the xerox copy of two sheets of Attendance Register. Save and except the Logo part there is nothing in these documents from which it can be inferred that it was maintained by the first party and not by the franchisee. Ext. 4 is a statement of expenses showing the Rs. 5,050.00 was paid to the second party. The second party claims that it relates to his salary for the month of November 2007 and it was issued by the Accounts Section signed by one Pratima. But it is not sufficient to establish that payment of salary was made by the first party, and not by the franchisee. That apart, Ext. 4 if considered in the light of the averments made by the second party in his claim statement, is found to be of suspicious nature. The workman has averred that from 1-8-2002 the management stopped paying salary to him and it was only after his filing Misc. Case No. 73 of 2003 the management started paying wages at the reduced rate of Rs. 50.00 per day. But, Ext. 4 reflects that for the month of November 2007 the workman was paid wages @ Rs. 200.00 per day. In the absence of any explanation that after August, 2003 the workman's daily wages was raised from Rs. 50.00 to Rs. 200.00 it is difficult to place reliance on Ext. 4.

Ext. 9 and 9/1 are said to be two conveyance bills showing payment of conveyance charges to the second party. But, there is nothing in these documents to suggest that the second party received

the payment from the first party, and not from the franchisee. Ext. 10 series are said to be the courier manifests which are admittedly prepared by the second party. These documents do not bear the signature of anybody. Therefore, these documents assume the nature of self-serving documents for which no reliance should be placed on them.

Ext. 5 is a Booklet issued by the first party which contains the names of different stations where it has got its network. Page 26 of the Booklet reflects that the first party has got its Branch at Cuttack. But, according to the first party the Branch is managed by a franchisee in terms of the Agreement and Undertaking marked Exts. A and B respectively. Therefore, the second party cannot derive any advantage from out of Ext. 5.

Ext. 11 which is marked with objection is a mail dated 10-3-2008, purportedly sent by the Cuttack Branch to the Area Office at Bhubaneswar. In Ext. 11 it is stated that the second party has been working as an 'O.T.C.' of the first party from the very beginning. If this document is found to be reliable, then the second party will get documentary support to his stand. This is also not a signed document. It is purportedly sent by U. K. Mishra (said Ushakanta Mishra). The document is not produced from the proper custody. It is not explained as to how the second party could get this document. It was produced and exhibited at a latter stage. It was proved through the second party after he was being recalled to adduce further evidence. It is not proved as to who is the author of the document. If Ushakanta Mishra himself has admitted in Ext. 11 that the second party is an employee of the first party, then the second party ought to have produced him before this Tribunal to face cross-examination. For all these reasons Ext. 11 is found to be an unreliable document.

Thus, the documents exhibited by the second party are not sufficient for a conclusion that he is an employee of the first party. On the other hand, the materials placed by the first party *prima facie* show that its Branch Office at Cuttack is being managed by a franchisee and in terms of the Undertaking, Ext. A, persons employed by the franchisee are not the employees of the first party. Therefore, the second party has failed to establish that he was an employee of the first party.

10. On a petition of the second party Order, dated 10-2-2012 was passed by this Tribunal asking the first party to cause production of certain documents which are said to be in the custody of the franchisee, with observation that in the event the first party expressed its inability to cause production of those documents through the franchisee, then the second party might make a prayer for appropriate direction to the franchisee to produce the relevant documents. On 9-5-2012 the management made submission that it was not able to cause production of those documents. Thereafter the second party could have made a prayer seeking appropriate order for production of the documents from the custody of the franchisee. But, he has not made any such prayer. Under such circumstances, no adverse inference can be drawn against the first party.

In the result, the issue which is common in both the I. D. Cases is answered against the second party.

Issue No. (i) & (ii) of I. D. Case No. 7 of 2009

and

Issue No. (i) of I. D. Case No. 6 of 2009

11. It is already held that the First party is not the employer of the second party. So, it is presumed that the real employer is not present before this Tribunal. In absence of the employer these issues cannot be answered. From the very beginning the first party has been consistently taking the plea that the franchisee running the Cuttack Branch might be the employer of the second party. But, the second party has not arrayed Ushakanta Mishra, the so called, franchisee, as a party to the disputes. It appears, the second party is not prepared to accept himself to be an employee of any one other than the first party. Therefore, he has not impleaded the franchisee to get appropriate relief from either the first party or the franchisee. As already stated, the issues under consideration cannot be answered by this Tribunal in absence of the second party's employer. Both the references suffer from non-joinder of necessary party. The second party having opted not to make the franchisee a party to the industrial disputes under reference, the issues are answered against him.

Accordingly, both the references are answered against the second party.

Dictated and corrected by me.

RAGHUBIR DASH
20-6-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
20-6-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

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