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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 17th February 2012

No. 1199—li/1(BH)-69/1997-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 6th January 2012 in Industrial Dispute Case No. 4 of 2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Nilachal Refractories Ltd., Gundichapada, Dhenkanal and their workmen Shri Anjan Kumar Sahoo and others was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 4 OF 2010

The 6th January 2012

Present :

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

Between :

The Management of M/s Nilachal
Refractories Ltd.,
Gundichapada,
Dhenkanal.

.. First Party —Management

And

(1) Shri Anjan Kumar Sahoo,
S/o Late Bauribandhu Sahoo,
At Ratan Bazar,
P.O./Dist. Dhenkanal.

.. Second Party —Workmen

- (2) Shri Sadasib Mishra,
S/o Krupasindhu Mishra,
C/o Saroj Kumar Satpathy,
At Deulasahi,
P.O. Jubilee Town,
Dist. Dhenkanal.
- (3) Shri Ramesh Ch. Mishra,
S/o Late Madhusudan Mishra,
At Mishra Lane, Kanchan Bazar,
Dist. Dhenkanal.
- (4) Shri Samarendra Mohapatra,
S/o Krushna Ch. Mohapatra,
At Ratan Bazar,
P.O./Dist. Dhenkanal.
- (5) Anwar Mohammed,
S/o Manir Mohammed,
At Kanchan Bazar,
P.O./Dist. Dhenkanal.

Appearances :

Shri S. Srinivasan, . . For Firsty Party —Management
Authorised Representative.

Shri A. Sahoo & S. Mohapatra, . . For Second Party —Workmen themselves
(Workmen named at Sl. Nos. 1 & 4)

AWARD

This is a reference under Section 10 of the Industrial Disputes Act, 1947 (for short, 'the Act') made by the Government of Odisha in the Labour & Employment Department vide their Order No.1380—li/1(BH)-69/1997-LE., dated the 18th February 2010. The Schedule of Reference runs as follows :—

“Whether the termination of services of Shri Anjan Kumar Sahoo, Supervisor (I&D), Shri Sadasib Mishra, Supervisor (Production), Shri Ramesh Ch. Mishra, Supervisor(Kiln), Shri Samarendra Mohapatra, Asst. Ceramist (R&D), Anwar Mohammed, Asst. Ceramist with effect from the 31st March 2005 by the management of M/s Nilachal Refractories Ltd., Gundichapada, Dhenkanal is legal and/or justified ? If not, to what relief they are entitled ?”

2. Though the reference is on the alleged illegal termination of services of five persons, only two out of them have filed a joint claim statement, the nutshell whereof is as follows :

Anjan Kumar Sahoo (second party No.1) was initially appointed as a Helper with effect from the 4th January 1982 and ultimately he got promoted to the post of Supervisor with effect from the 1st February 1991 and continued as such till his services were terminated on 31-3-2005. Though

he held the post of Supervisor, his job was purely clerical in nature. Similarly, Samarendra Mohapatra (second party No.2) was initially appointed as a Tester vide order, Dt. 12-10-1982 and ultimately got promoted to the post of Assistant Ceramist with effect from the 1st October 1990 and continued as such till his services were terminated on 31-3-2005.

In the year 2001 the industry of the first party -company having fallen sick was referred to the Board for Industrial & Financial Re-construction (BIFR) under the Sick Industrial Company (Special Provisions) Act, 1985 (for short 'SICA') upon which the BIFR Case No. 8 of 2002 was registered. In the year 2003 the then management of the first party-Industry had introduced a Scheme called "Voluntary Separation Scheme" (V.S.S) to be effective from the 1st February 2003. Under the said Scheme out of the 416 employees 406 opted for V.S.S. The disputant workmen, however, did not opt for V.S.S. Before introduction of V.S.S the erstwhile management had issued a general notice on 13-7-2002 to all the employees to the effect that because of its critical financial condition the Company would not be able to pay salary of the employees with effect August, 2002. Therefore, the disputant-workmen were not getting their wages from August, 2002 onwards. When they asked for payment of salary the management asked them to wait till the verdict in the BIFR case. The disputant-workmen filed a Misc. Case (Misc. Case No. 174 of 2002) under Section 33-C (2) of the Act for computation of their unpaid salary. When the management was served with the notice in the Misc. Case it vindictively terminated the services of the disputant workmen with effect from the 31st March 2005 specifically stating in the order of termination that they would not be entitled for any salary from August, 2002 on the principle of 'no work, no pay'.

It is the further case of the second party-workmen that on 20-5-2005 the BIFR gave a rehabilitation proposal. Subsequently, a Rehabilitation Scheme for revival of the first party- Industry was sanctioned on 21-11-2005. Pursuant to the BIFR Award in BIFR case No.8 of 2002 the industry has been takenover by I.J. Group of Companies represented by M/s Industrial Associates as the new promoter and the Industry is running smoothly with effect from the 19th December 2005. It is claimed that the disputant workmen approached the new promoter for their re-induction in the industry but the present management did not consider their prayer which amounts to contravention of Section 25-H of the Act. It is further alleged that the retrenchment under reference is not legally effected to in as much as prior permission as required under Section 25-H of the Act has not been contained. It is also alleged that at the time of retrenchment notice pay and retrenchment compensation were not paid. Another ground taken by the second party members is that the employees who had opted for V.S.S., many of whom are even juniors to the disputant-workmen, have been re-engaged by the present management after the take -over of the Company but the disputant-workmen have been denied employment.

3. The stand taken by the first party represented by the present management of the Industry is that the reference as against the present management is not maintainable in as much as it has purchased the defunct factory from the operating agency by virtue of an order of the BIFR with no past liability of employees except the liability to utilise a specified amount which was kept in deposit

by the erstwhile management to meet the liability of its ex-employees who had opted for V.S.S. but not yet claimed or received their dues. Further contention of the first party is that the present management has no statutory liability for the alleged illegal retrenchment of the disputant-workmen which was effected to by the erstwhile management much prior to the takeover of the industry by the present management. The first party's further stand is that the disputant-workmen are not the employees of the present management and as such there dues no exist any industrial dispute between the parties.

The second party -workmen in their rejoinder have further pleaded that the first party is a Public Limited Company and it does not claim that the Company was liquidated in terms of the provisions of the Companies Act, 1956. It was an ongoing Company and pursuant to the Award of the BIFR the present management has been appointed as the new promoter for the revial of the Industry which had nerely stopped its operation in 2002.

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

ISSUES

- (i) "Is the reference maintainable as against the present management M/s Nilachal Refractories Ltd., Gundichapada, Dhenkanal ?
- (ii) Whether the termination of services of the workmen with effect from the 31st March 2005 is legal and/or justified ?
- (iii) Whether the management of M/s Nilachal Refractories Ltd. is liable for the consequences of the termination of services under reference ?
- (iv) What relief (s) ?"

5. The two workmen have examined themselves as W.Ws.1 & 2. They have exhibited documents which are marked Exts.1 to 14. The first party has examined one witness who is its General Manager (HR). Exts. A & B are marked on behalf of the management.

FINDINGS

6. *Issue Nos. (i) & (iii)*—Both the issues being inter-linked are takenup together.

It is the case of the first party that the present management has purchased the defunct factory from the Operating Agency by virtue of the order of the BIFR with no past liability of employees, except to utilise a specified amount which has been deposited by the past employer for the specific purpose of meeting the liability of the ex-employees of the erstwhile management who had opted

for V.S.S. It is, therefore to be decided at the outset as to whether it is a case of transfer of ownership of management of the concerned undertaking either by agreement or by operation of law from the employer in relation to the undertaking to a new employer.

There is no dispute that the IJ Group of Companies took over the management of the Industry with effect from the 19th December 2005 in terms of the order of the BIFR, Dt. 6-12-2005. Ext.8 is a copy of the order of the BIFR Award, Dt. 6-12-2005 along with a copy of the Scheme approved by the BIFR for rehabilitation of the Company (hereinafter referred to as the 'Sanctioned Scheme'). Ext.8 reflects that the company was incorporated in the year 1977, being jointly promoted by the Industrial Promotion and Investments Corporation of Odisha Ltd. and TATA Refractories Ltd. It started its commercial production in the year 1982. However, it stopped operations in the year 2002 and the entire workforce was offered a Voluntary Retirement Scheme. 406 employees out of 416 accepted the Scheme. The Company was dealing with Canara Bank as its sole Banker. Upon closure of the Unit there was no operation in the account and the Bank was forced to send the account to LPD in September, 2003. The Company having made a reference to BIFR to declare it sick the Board declared it sick and appointed Canara Bank as operating agency under Section 17 (3) of SICA. The Director of the then management requested the BIFR to order for change of management. The BIFR directed the operating agency to advertise for change of management of the Company. The operating agency issued an advertisement seeking offers from prospective bidders for change of management of the Company. There were six bidders. Out of them, the IJ Group of Companies being the highest bidder was asked to submit rehabilitation proposal to the operating agency. Its proposal was found acceptable by the operating agency. The rehabilitation proposal was submitted to the BIFR. On that basis a draft rehabilitation Scheme was prepared which was ultimately approved by the BIFR for rehabilitation of the Company. Consequent upon approval of the Scheme the IJ Group of companies represented by M/s Industrial Associates became the new management for the Company with effect from the 31st March 2005.

7. Thus, it is found that under the provisions of the SICA the management of the Company stood transferred by operation of law to IJ Group of Companies with effect from the 31st March 2005. Therefore, it is a case of transfer of undertaking covered under Section 25-FF of the Act. Before the industry was declared to be a sick industrial company. IJ Group of companies was not the employer in relation to that undertaking. So, there has been a change of employers by reason of the transfer of the management of the undertaking and it is not shown by the second party that the three conditions of the proviso to Section 25-FF are there in the BIFR Award. With regard to the employees of the erstwhile employer it is repeatedly mentioned in the Award that the cash and the Bank balance of Rs. 55.79 lakhs as on 31-3-2005 should be made available for the new management to utilise the amount only to clear the dues of the earlier employees of the undertaking who had opted for V.S.S. but did not claim their dues till 31-3-2005. In the Award there is no provision regarding liabilities of the old employees other than the liabilities related to the employees who had opted for V.S.S but had not claimed their dues till the new management came

to picture. No such provision has been made presumably, because before the takeover all the employees except six had opted for V.S.S. and the services of those employees who had not accepted the V.S.S had been terminated. Here, it is pertinent to mention that the termination of services of these six employees is the subject matter of the present reference.

8. To strengthen their case the second party take the stand that the Company being a Public Limited Company never liquidated in terms of the Companies Act, 1956. So, it is an ongoing industry. That apart, the new management has given re-employment to a large number of employees who had already opted for V.V.S., besides allowing some of the retrenched employees to avail the benefit of V.V.S which was floated by the erstwhile management. So far the application of Section 25-FF of the Act is concerned, all these aforesaid grounds are not relevant. If there is transfer of ownership or management of the concerned undertaking resulting in change of employers and yet the workmen of the erstwhile employer claim that their services do not stand terminated, then it is to be shown that—

- (1) the services of the workmen have not been interrupted by such transfer ;
- (2) the terms and conditions of service applicable to the workmen after such transfer are not in any way less favourable to the workmen than those applicable to them immediately before the transfer ; and
- (3) the new employer is under the terms of such transfer or otherwise legally liable to pay the workmen, in the event of their retrenchment compensation on the basis that their services have been continuous and have not been interrupted by the transfer.

As already stated, all those three conditions are not forthcoming from the materials placed before this Tribunal. In *Anakapalla Co-operative Agricultural and Industrial Society Vrs. Its workmen and others*, reported in 1962 (II) LLJ (SC) 621, there was change of management and it was held that the new management was a successor-in-interest of Company. Yet, because of absence of the three conditions specified in the proviso to Section 25-FF the concerned workmen were held to be entitled to claim for compensation against the erstwhile management and not to make any claim against the transferee i.e., the successor-in-interest of the Company.

9. It is admitted by the management witness that ten employees of the erstwhile management who had accepted VRS/VSS from the previous management have been given employment by the present management. The witness has stated that they have been given fresh employment under the present management on merit. Such re-employment or fresh appointment does not appear to be in compliance with any statutory provisions laid down under the Act. The present management is at liberty to give fresh appointment to any of the employees whose services under the erstwhile management stood terminated before the takeover.

10. It is also not in dispute that like the present two disputant-workmen services of three others were also terminated with effect from the 31st March 2005 by the erstwhile management as they did not opt to accept the VSS, but those three persons have availed the benefit of VSS from the present management. The second party-members take the plea that payment of benefits of VSS made to the retrenched employees by the present management is a circumstance, indicating the existence of employer-employee relationship amongst the retrenched employees and the new management. On behalf of the first party it is argued that making payment to some retrenched employees does not give rise to any legal right in favour of the second party-members. The submission made on behalf of the first party seems to be quite tenable. No legal right accrues in favour of the second party-members merely because the present management has paid certain amount to some of the retrenched employees of the erstwhile management, may be in order to buy industrial peace. Merely from the factum of such payment, existence of employer-employee relationship between the present management and the retrenched employees cannot be presumed. To support their contention that the present management is liable for the illegal termination of services effected by the erstwhile management reliance is placed on Clause -3 (iv) of an order passed by the BIFR, Dt. 11-11-2010 which is marked Ext.9. This order has been passed by the Board on a review of the progress of the implementation of the sanctioned Scheme by the present management. After such review the Board has made some observations which is narrated in different clauses of Para. 3 of the order. Clause (iv) of Para.3 relied on by the second party runs as follows :

“The Company would settle/pay the dues of its employees/workers including those who retired from the services offered VRS(s) and also the outstanding statutory dues *viz.* ESIC, EPFO, etc. in terms of the provisions of SS-05 and submit/include their report in this regard in the progress report to be submitted to the MA (CB)/Board.”

It is not forthcoming from the above quoted Clause that the present management has got liabilities in respect of the employees of the erstwhile management except those who retired from their services accepting the VRS/VSS floated by the erstwhile management. In my considered view, Clause (iv) emphasises that the new management would settle/pay the dues of its own employees/workers, besides the dues of the employees of the erstwhile management who had accepted VRS/VSS. As already stated, the sanctioned Scheme is silent on the liabilities of the present management with respect to the employees of the previous management except those who accepted VRS/VSS but have had not yet claimed/received their dues under the scheme.

In view of the discussions made above, both the issues are answered in favour of the management and against the second party-members.

11. *Issue Nos. (ii) & (iv)*—In view of the answer to Issue Nos. (i) and (iii), the second party-members are not entitled to get any relief from the first party even if the termination of their services is found to be illegal or unjustified. In the absence of the erstwhile management it is not desirable to thrash out whether the termination of services of the second party-members is legal and/or justified. So far the present management is concerned, both the issues are answered against the second party-members.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
6-1-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
6-1-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

By order of the Governor
T. K. PANDA
Under-Secretary to Government