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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 17th February 2012

No. 1189—IR-ID-71/2010-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 27th January 2012 in Industrial Dispute Case No. 38 of 2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Sadhaba Marines Pvt. Ltd., Balasore and their workman Shri Abhiram Das was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR
INDUSTRIAL DISPUTE CASE No. 38 OF 2010
Dated the 27th January 2012

Present :

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

Between :

The Management of .. First Party—Management
M/s Sadhaba Marines Pvt. Ltd. ,Balasore.

And

Their Workman Shri Abhiram Das .. Second Party—Workman
S/o Late Akshay Kumar Das,
At Kanthi, P. O. Goseingaon, Dist. Mayurbhanj.

Appearances :

For the First Party—Management .. Shri Sudhir Kumar Nath
Manager, Accounts.

For the Second Party—Workman .. Shri S. Behera, Authorised
Representative.

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. 5848—ID-71/2010-LE., dated the 17th July 2010. The Schedule of reference runs as follows :—

“Whether the termination of services of Shri Abhiram Das, Foreman by the management of M/s Sadhaba Marines Pvt. Ltd., Biruan, Balasore with effect from the 1st September 2007 by way of refusal from employment is legal and/or justified ? If not, to what relief the workman is entitled ?”

2. The case of the second party workman is that he was working as a Foreman under M/s Sadhaba Marines Pvt. Ltd. (first party management) with effect from the 1st July 1991. On the 1st September 2007 the Management verbally refused employment to him. Neither any retrenchment notice was served on him nor notice pay and retrenchment compensation were paid. No enquiry was conducted for any alleged misconduct. Hence, the refusal of employment which amounts to retrenchment is illegal. Therefore, the workman is entitled to reinstatement with full back wages and other service benefits.

3. The first party management admits the existence of employer-employee relationship between the parties. However, it is contended that initially the workman was employed as an unskilled worker and subsequently he got promotion to the post of Operator and then to the post of Assistant Foreman. It is the case of the first party that while working as Assistant Foreman he was very much irregular in attending duties which resulted in loss of production which ultimately made the first party company sick. The management transferred him to its another sister unit at Mancheswar Industrial Estate, Bhubaneswar. The workman refused to receive the transfer order and failed to report for duty either in the first party's establishment or at the new place of posting. Because of his long absence the management was compelled to come to a conclusion that the workman had abandoned his job. The Management has never refused him employment. Therefore, the question of retrenchment does not arise.

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

ISSUES

- (i) “Whether the termination of services of Shri Abhiram Das, Foreman by the Management of M/s Sadhaba Marines Pvt. Ltd., Biruan, Balasore with effect from the 1st September 2007 by way of refusal from employment is legal and/or justified ?
- (ii) Whether the workman has voluntarily left the job ?
- (iii) If not, to what relief the workman is entitled ?”

5. The workman has examined himself as W. W. No. 1. The Management has examined its Manager (Accounts) as M. W. No. 1. and has exhibited documents marked as Exts. A to Q.

FINDINGS

6. *Issue Nos. (i) and (ii)*—These two issues being inter-linked are taken up together for convenience.

There is no specific denial that the employment of the second party disrupted with effect from the 1st September 2007. While the workman says that the management did not allow him to work with effect from the 1st September 2007 the management without specifying any date has taken the stand that because of frequent absence of the workman he was transferred to the Management's sister unit at Bhubaneswar and thereafter the workman did not report for duty either in the establishment of the first party or in its sister unit. The workman in his cross-examination has denied that under an order he was transferred from Balasore to Bhubaneswar. However, he has admitted in his cross-examination that on the 21st August 2007 the Security Guard at the main gate refused him entry into the establishment of the first party telling that he had already been transferred to Bhubaneswar. He has denied the suggestion that on the 1st September 2007 the Personnel Officer of the first party asked him to receive the transfer order but he refused to accept the same. He has further stated that when the Security Guard told him that he had already been transferred to Bhubaneswar, he proceeded to Bhubaneswar to join in the sister unit of the management but he was not allowed to meet the Authorities.

Ext. P is a copy of the transfer order dated the 31st August 2007. On the body of the order the Manager (Personnel) who has signed on the order, has given an endorsement to the effect that on the 1st September 2007 he offered the order to the workman explaining him about his transfer to the sister unit but the workman refused to accept the same and left the Company premises. The workman does not admit that the transfer order was offered to him. M. W. No. 1 has stated in his affidavit evidence that on the 6th February 2008 the Management once again issued a letter-*cum*-notice to the workman asking him to join at the place of posting but the workman did not respond. In cross-examination this witness has stated that the notice dated the 6th February 2008 was sent to the workman by ordinary post.

Since the workman denies to have been served with the order of transfer the management is required to adduce sufficient evidence showing that the transfer order was duly brought to the notice of the workman. The fact that the transfer order was offered to the workman but he refused to accept the same could have been proved by the Personnel Manager who has signed the transfer order and also endorsed thereon that he had offered the order to the workman but the later refused to accept the same. While the workman adduces oral evidence denying the fact that the transfer order was offered to him, the management also relied on the oral testimony of M. W. No. 1 who has stated that some other person had offered the transfer order to the workman. If the workman refused to accept the transfer order the management ought to have taken further steps to serve the same on the workman. It is not shown by the management that soon after the alleged refusal made by the workman the management sent the transfer order to the workman by Registered post. An attempt has been made by the management to prove by way of oral evidence that on the 6th February 2008 the management issued another notice to the workman asking him to join at the

place of posting. Ext. G is said to be a copy of the notice dated the 6th February 2008. This notice is said to have been sent to the workman by ordinary post. Since the workman denies to have received any such notice, it is difficult to record a finding that the notice marked Ext. G was actually served on the workman. That apart, the Management has not explained as to why no other official communication with the workman was made in between the 1st September 2007 and the 6th February 2008. Under such circumstances, the management's plea that the transfer order was duly served on the workman which he did not obey and that further notice was issued to the workman asking him to join in the place of posting in accordance with the transfer order but the workman did not respond is not convincing. Thus there is no convincing evidence in support of the management's contention on the factum of transfer and the workman's refusal to report for duty in accordance with the transfer order.

7. It is argued on behalf of the first party that since the workman admits that from the Security Guard he came to know about his transfer there can be a valid presumption that the transfer order was within his knowledge which he avoided to act upon. Such an argument is not at all acceptable. However, the workman in his deposition has stated that having heard from the Security Guard about his transfer he had come to Bhubaneswar Office but he was not allowed to meet the Authorities. If what is argued on behalf of the first party in this regard is reasonable, then what the workman has orally stated can also be said to be acceptable. Considering all the facts and circumstances available on record this Tribunal is of the considered view that the so called order of transfer was never served on the workman and no notice was served on him asking him to report for duty and to show-cause for his alleged unauthorised absence.

8. In the present case the legality of the order of transfer is not under consideration. However the following relevant facts are considered to be noteworthy.

In order to show that the management in terms of its standing orders has the right to effect transfer of an employee from its one Unit to another. Article 13 of the standing order which is marked Ext. Q is relied on. It is there in the standing order that an employee of the first party may be transferred due to exigency of work from one establishment to another establishment of sister concern. There is no other ground on which such transfer can be made under the standing orders. But in the present case the workman is said to have been transferred from the Management's Balasore unit to Bhubaneswar unit because of his unruly conduct and frequent absence from duty. Not only there is pleading to that effect but also M. W. No. 1 has stated in Para. 12 of his affidavit evidence that the "Management having no other alternative for remedies in the conduct of the Second Party/Workman at the work place and minimise the production loss" transferred the workman to Bhubaneswar. That apart even though it is claimed that because of the frequent absence of the workman the unit at Balasore became sick, the management has not shown to have taken any disciplinary action against the workman for any misconduct. In the standing order (Ext. Q) as many as 39 major misconducts and 16 minor misconducts have been enlisted and to deal with such misconducts a detailed procedure has been prescribed, besides prescribing the penalties for misconducts. The workman is said to have frequently remained absent from duties without obtaining

leave. It is also alleged that the workman did not obey the order of transfer which amounts to insubordination and disobedience of lawful orders of the Authorities. Yet the management has not acted in terms of the standing orders to deal with such alleged misconducts and to punish the workman. It appears, instead of following cumbersome procedure of a departmental enquiry the Management wanted to get rid of the workman by denying employment to him. If the workman did not join in the place of posting in terms of the standing orders, then the management ought to have initiated a disciplinary proceeding against him.

9. It is contended that when the workman did not report for duty for a long period the management presumed him to have voluntarily abandoned his job. It is there in Article 16(1) of the standing order that if the workman remains absent for eight days without intimation and/or permission, it will be deemed that he has voluntarily left the service under the management and his name shall be struck off the Muster Roll without any reference to him. This Article cannot be made applicable to the case at hand. Because in this case the management's specific plea is disobedience of order of transfer by the workman. This is a major misconduct and the management ought to have initiated a disciplinary proceeding against the workman instead of raising a presumption of voluntary abandonment of service. In *M. G. Patel Vrs. Mastanbaug Consumers' Co-op. W. & R. Stores Ltd.* and another, reported in 1997 Lab. I. C. 2537 (Bombay High Court) the employee was granted leave for one month. He did not join after expiry of leave. The employer did neither initiate any disciplinary proceeding against him for allegedly not joining his duties after expiry of leave nor give notice to the employee calling upon him to resume duties. The employer took the stand that the employee on his own remained absent and abandoned the service and thus there was no question of termination. The Hon'ble Bombay High Court held that the burden lay on the employer to establish and prove that the employee had abandoned service. It is further held that even in the case of abandonment of service the employer has to give notice to the employee calling upon him to resume his duty and if the employee does not turn-up despite such notice the employer should hold enquiry on that ground and then pass appropriate order of termination.

In the case at hand the Management has failed to prove that the workman had the intention to abandon the service. There was disruption of employment of the second party with effect from the 1st September 2007. The workman made a complaint before the local labour machinery by sending a petition on the 23rd October 2007. The quick reaction on the part of the workman nullifies any presumption that he had the intention to abandon service. The conciliation failure report reflects that before the Conciliation Officer the Management did not take the plea of either transfer or abandonment of service which gives rise to a presumption that all these pleas taken before this Tribunal might be after-thought.

The Management has pleaded and also tried to prove by adducing some documentary evidence that the past conduct of the workman was not good and that on several occasions he had committed misconducts like negligence in duty and frequent unauthorised absence. While adjudicating on the Schedule of reference all these are not considered to be relevant and therefore, not dealt within details.

10. In view of discussions made above, this Tribunal comes to a conclusion that the workman did not abandon his service and that it is a case of refusal of employment. Compliance of the mandatory provisions of the Act to bring about a valid retrenchment is not pleaded by the management. Since it is a case of refusal of employment non-compliance of the provisions of Section 25-F of the Act makes the action of the management illegal. Therefore, the retrenchment is held to be illegal.

11. *Issue No. (iii)*—The workman was under the employment of the First Party for a long period. Though it is alleged that he was frequently committing misconducts it is seen that the workman who initially joined as an unskilled worker got promoted to the post of Assistant Foreman and the management was pleased not to initiate any disciplinary proceeding against him. The management refused employment to the workman without any justifiable ground. The action was taken against him as a punitive measure but no disciplinary proceeding was initiated against him. Under such circumstances, the workman is held entitled to be reinstated with full back wages.

The reference is answered accordingly. The management to implement the Award within a period of two months of the date of its publication in the Official Gazette.

Dictated and corrected by me.

RAGHUBIR DASH

27-1-2012

Presiding Officer

Industrial Tribunal, Bhubaneswar

RAGHUBIR DASH

27-1-2012

Presiding Officer

Industrial Tribunal, Bhubaneswar

By order of the Governor

T. K. PANDA

Under-Secretary to Government