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LABOUR & E.S.I. DEPARTMENT

NOTIFICATION

The 3rd April 2012

No. 2678–IR-ID-91/2010-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 26th March 2012 in Industrial Dispute Case No. 48 of 2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Ruchika Social Service Organisation, Bhubaneswar and their workman Shri Biranchi Narayan Dalabehera was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 48 OF 2010

Dated the 26th March 2012

Present :

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

Between :

The Secretary,  
Ruchika Social Service Organisation,  
3731-A, Sri Ram Nagar,  
Samantarapur, Old Town,  
Bhubaneswar.

. . First Party —Management

And

Shri Biranchi Narayan Dalabehera,  
C/o Smt. Sanjukta Samantaray,  
Plot No. 466, Nayapalli,  
Bhubaneswar.

. . Second Party —Workman

Appearances :

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

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Shri B. N. Dalabehera . . . For Second Party —Workman himself

### AWARD

The Government of Odisha in the Labour & Employment Department (presently the Labour & E. S. I. Department) in exercise of powers conferred upon them by sub-section (5) of Section 12, read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) for short the Act have referred the following dispute for adjudication vide their Order No.6791—ID-91/2010-LE., dated the 16th August 2010.

“Whether the action of the management of Ruchika Social Service Organisation in terminating the services of Shri Biranchi Narayan Dalabehera, Supervisor with effect from the 31st July 2009 is legal and/or justified ? If not, what relief he is entitled to ?”

2. In his claim statement the second party has pleaded that since 2-1-2000 he had been working in Ruchika Social Service Organisation (first party) under the direct supervision of the Programme Manager as well as the Secretary of the Organisation. However, no appointment order was issued in his favour. Initially he used to get salary of Rs. 1,000 per month which stood revised from time to time and lastly, he was getting Rs. 2,000 per month. Thus, he had worked under the first party continuously for a period of about eight and a half years. But without any reason the first party terminated his services with effect from the 31st July 2009 without complying with the provisions of Section 25-F of the Act. The second party claims that the management being vindictive removed the second party from employment due to the reason that he and other old employees of the Organisation had formed a trade union, got it registered and then demanded for better salary structure and other service conditions.

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

As regards the second party, it is claimed that he was engaged either as a supervisor or a Cluster Educator or a Cluster Resource Person on honorarium. There was no employer-employee relationship between the parties. The second party also cannot be said to be ‘workman’ as defined under the Act. He had been working in the capacity of a supervisor and the dominant nature of his work supervisory. That apart, the second party had been engaged purely for a particular project which was for a fixed period and after closure of the project the engagement of the second party automatically came to an end.

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

#### ISSUES

- (i) “Whether the first party is an industry as defined in the I. D. Act ?
- (ii) Whether the second party is a workman as defined in the I. D. Act ?
- (iii) Whether the action of the management of M/s Ruchika Social Service Organisation, Bhubaneswar in terminating the services of Shri Biranchi Narayan Dalabehera, Supervisor with effect from the 31st July 2009 is legal and/or justified ?
- (iv) If not, what relief Shri Dalabehera is entitled to ?”

5. The second party has examined himself as W.W. 1. He has exhibited documents which are marked Exts. 1 to 10. The first party has examined two witnesses. M.W. 1 is the Accounts Head in the establishment of the Organisation and M.W. 2 works as a Cluster Educator in the same establishment. On behalf of the first party, documents have been marked as Exts. A to R.

#### FINDINGS

6. *Issue Nos. (i)*—Claiming that the organisation is not an ‘industry’ the management has adduced evidence to the effect that it is a voluntary organisation. It gets donations from different sources and also gets financial assistance from the State Government as well as the Central Government. Though it imparts education to children it does not collect any fees from their parents. It is a non-profit motive institution. It does not produce or distribute any materials. The organisation engages some stray servants on hire basis to do some manual and technical work but its main activities are performed by volunteers having the inclination to serve for the destitutes without any remuneration.

During cross-examination of the second party it is elicited from him that the first party undertakes social services under different projects. It runs vocational training centers making people in the slum areas on sanitation and drinking water. It also imparts free education to children in slum areas.

It is thus found that the first party is a charitable institution. But, all charitable institutions are not excluded from the definition of the word “industry” as explained by the Hon’ble Supreme Court in Bangalore Water Supply and Sewerage Board *Vrs.* A. Rajappa, AIR 1978 (SC)548. In the aforesaid case their Lordships have observed that in any profession, club, educational institution, co-operative, research institute, charitable projects and other kindred adventure where systematic activity organised by co-operation between employer and employee for the production and/or distribution of goods and a services calculated to satisfy human wants and wishes is undertaken, it comes within the definition of the term “industry”. With regard to charitable institutions, it is further observed that if they fulfil the aforesaid tests they cannot be exempted from the definition “industry”. The Hon’ble Supreme Court have further held that the following two categories of charitable institutions would fall within the definition of “industry”.

- (i) Where the enterprise, like any other yields profits but they are siphoned off for altruistic objects ;
- (ii) Where the Institution makes no profits but hires the services of employees as in other like businesses but the goods and services, which are the output, are made available, at low or no cost to the indigent needy who are priced out of the market.

The first party may come within the second category of the charitable institutions.

7. The second party relies on a decision of the Hon'ble High Court of Madras, reported in 2010 (I) LLJ -101 between Thilagavathi S. & P. O., Labour Court, Madurai and argues that the findings of the Hon'ble Madras High Court are squarely applicable to the case at hand. In Thilagavathi's case, the society by name "Madurai Children Aid Society" was being used as an Observation Home for children and the Government was providing aid to the society which also used to receive donations from other sources. The society was giving educational training to the children for self help jobs and the like. The society used to get the allocated works carried out as per its Rules and Regulations and in accordance with the duty hours. Its accounts were being audited every year. With such factual aspects their Lordships held that there were systematic activities in the society and there were joint efforts by the employer and employee being carried out for human necessities.

Now, it is to be examined as to how the first party organises/arranges its activities as a Charitable Institution. No doubt the activities of the first party is carried out with the object to render material services to the community. From its annual reports marked Exts.2 and 3 (2006-2007 & 2007-2008) it is found that the motto of the organisation is to advance opportunities to the under-privileged children through education and other services. Annually about 3,000 to 4,000 children receive primary education and 900 children receive free School Education through different projects undertaken by the first party. Page 7 of the Annual Report 2006-2007 (Ext.2) further reflects that the organisation's staff strength is 244 out of which 154 are part-timers. In the same page the salary structure of the staff is also elaborately described. It is also found that the organisation has one M/s S.N. Adalakra & Co., Saheednagar, Bhubaneswar as its auditor. The Annual Reports further reflect that in the year 2006-2007 the organisation had 19 projects and in the next year it had 16 projects to execute in achieving its charitable activities.

The materials on record show that the organisation gets donation from private persons besides financial aid from the Governmental Agency. Though it is claimed that most of the activities of the organisation are done by persons who do not get salary or wages from the organisation, it is not proved that such persons render free service for the organisation. It is claimed that persons rendering free service for the organisation get small honoraria but the Annual Reports reveal 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 Reports one cannot accept the first party's plea that it has engaged some stray servants on hire for manual and technical work. The first party claims that the organisation carries out different activities through a number of volunteers who get honoraria from the organisation. But, in the Annual Reports there is no mention about engagement of volunteers getting honoraria from the organisation. It appears, the management has consciously used the terms "Volunteers" and 'honorarium' in the place of words 'employees' and 'salary' respectively. For example, M.W. No.1 claims to be the Accounts Head of the organisation. He has been working in

the institution for the last fifteen years. He says that he gets RS. 5,800 per month as honorarium. Similarly, M.W. No.2 says that he works as Cluster Educator in the organisation and gets Rs. 1,500 as his monthly honorarium. He has further stated that initially he used to get Rs. 500 as his monthly honorarium. He has also stated that like the second party and many other persons he has worked in different projects undertaken by the organisation from time to time. The first party has not clarified as to how persons like M.W. Nos.1, 2 and the second party are not members of the staff of the organisation whose salary structure is given at Page-7 of Ext.2. Be that as it may, it is found from the materials on record including the facts stated in the Annual Reports that the first party organisation has been undertaking various projects and its activities under all these projects are executed through its staff whose strength by no stretch of imagination can be said to be minimal or nominal. Apart from all this, the second party has also placed reliance on Ext.4 which is the "Human Resource Policy" formulated by the first party organisation. It seems to be just like Certified Standing Orders. It embodies, *inter alia*, the definition of an "employee" method of recruitment of employees, policy on the salary structure of employees, provisions on the conduct of employees and procedure as to how charges on employee's misconduct ought to be dealt with. The first party has framed this policy for its employees. No doubt, it is stated in Ext.4 that the Human Resource Policy shall be effective from 1st January 2009. But, there is no explanation as to how the matters specified in Ext.4 used to be dealt with before the policy was made effective. From Clause No. 1 of the policy it is to be construed that the organisation had a verbal Human Resource Policy prior to formulation of the written policy vide Ext.4 which gives rise to further inference that the organisation had its employees prior to 1-1-2009 who used to be governed by unwritten Rules and Regulations. The case of the first party is that it has not appointed any employees to execute its work under different projects (except some stray servants engaged for manual and technical work). Thus, the management's plea that in order to carryout its social activities it engages volunteers who serve the destitutes either for free or on payment of honorarium and that it has never engaged any employees for that purpose is not believable.

There is no material, not even in the evidence of M.W. Nos. 1 and 2, to show that charitable activities undertaken by the organisation are performed by men who work not because they are paid wages but because they share the passion for the cause and derive job satisfaction from their contribution. In Bangalore Water Supply & Sewerage Boards's case (*supra*) Hon'ble Supreme Court have observed that institutions which are called to be philanthropic entities are industries if they involve co-operation between employers and employees to produce and/or supply goods and/or services. In the case at hand, the first party is found to have been undertaking its social service activities with co-operation of its employees who get salary from the management/organisation. Considering the materials available on record, I am of the considered view that like Madurai Children Aid Society in Thilagavathi's case (*supra*) the first party organisation can be said to be an 'industry'.

8. The first party has placed reliance on another decision of the Hon'ble Madras High Court, reported in 1996 (III) LLJ (Supp.) 482 in which a Single Judge of the Hon'ble High Court have held that the Madurai Children Aid Society is not an 'industry'. In that reported decision his Lordship had observed, *inter alia*, that the said Society was discharging sovereign functions as an agent of the state Government. The first party in the case at hand has not shown to have been discharging sovereign functions. Therefore, this decision of the Single Judge is not applicable to the case at hand.

9. *Issue No. (ii)*—The second party claims to be a ‘workman’ whereas the first party says that the former was ‘volunteer’. There is no materials showing that the second party was working as a ‘volunteer’. The first party has not brought on record any materials to show the distinction between its employees on one hand and the second party who is claimed to be a ‘volunteer’. So, it is to be presumed that he is an employee.

The alternative plea of the first party is that the second party is excluded from the definition of ‘workman’, because as a supervisor he used to get monthly honorarium exceeding Rs. 1,600 and was also discharging functions which were mainly of supervisory nature. In this regard evidence has been adduced by M.W. No. 1 as follows :—

“xx xx Basically the duties performed by the disputant was to supervise the implementation of the project work at different places like basties, slums, railway station etc,. The disputant has also worked as headmaster and he was supervising fifteen Schools independently and those 15 runs were fully run as per the instructions and directions of the disputant. The disputant was monitoring the work of the teachers, signed supervisory note, attendance of the teachers and students, Food register, Basti Education Committee register and other School records. xx xx xx xx. As a Cluster Resource Person, the disputant was taking decisions independently on behalf of the Society with regard to organise/arrange meetings, seminar and activities for the interest of the funding agencies. xx xx.”

The management has exhibited some documents in which the second party has described himself as a supervisor. There is also no dispute that sometimes the second party had worked with the designation of “supervisor”. There must be materials to show that the principal nature of work of the second party was nothing but supervisory. The management has not produced materials to support what M.W. No.2 has stated in his affidavit evidence. Whatever he has stated about the nature of the second party’s work could have been supported by documentary evidence. M.W.2 has stated that as supervisor the second party used to sanction leave of the teachers besides looking after proper distribution of the mid-day meal and maintaining Basti Education Committee Register. Not a single leave application sanctioned by the second party has been brought on record.

The second party, on the other hand, has stated that his duty was to collect survey data and children’s data from different centres by making personal visits to the centres from time to time. He used to distribute nutritions, learning materials, books and stationeries to different centres. He also used to attend the Community Awareness Meetings and consolidate reports of different activities of the organisation and submit half-yearly and annual report to the Secretary as well as the programme manager of the organisation. In cross-examination he says that on being directed by the project manager he used to visit different centres located in different area to see whether the centres were properly running and used to submit reports to the project officer and verify the attendance of the teachers. From the oral evidence of the second party it can be said that the principal nature of his work was operational and clerical but not supervisory.

The management has failed to prove that the duties of the second party involved any sort of supervision over any other staff of the organisation. With the few documents exhibited by the first

party, it cannot be said that the predominant nature of duties discharged by the second party was supervisory. It is well settled that designation or nomenclature cannot form the basis to determine whether a workman is a supervisor or not. It is the performance of duties which is to be seen. The management has failed to discharge its onus to prove that the work performed by the second party was supervisory in nature. Taking all these into consideration, I am of the considered view that the second party is a 'workman'.

10. *Issue No. (iii)*—Admittedly, the services of the second party got terminated with effect from 31-7-2009. Ext.9 is the order of termination. The reason of such termination is stated to be closure of the Alternative School's Project. But, in the written statement the management has taken the plea that due to some activities of the second party which ran against the interest of the organisation the latter was forced to close-down a number of platform Schools and ultimately the management decided to close some project works, specifically the Alternative School Project, as a result the Alternative School Project was closed with effect from 31-7-2009 and with the closure of the project the engagement of the second party automatically came to an end. There is no dispute that sometime prior to the disputed retrenchment the second party and some other staff of the first party had formed a trade union and took up activities to secure better service conditions including higher pay. From the pleadings of the parties it can be perceived that being dissatisfied with such trade union activities the management terminated the services of the second party and some other staff on the plea of closure of projects.

The management does not claim that the statutory requirements laid down under Section 25-F of the Act have been complied with. The management claims that the action is covered under Section 2(00) (bb) of the Act. Admittedly, no appointment order containing terms of employment was issued to the second party. Undisputedly, the second party had been working with organisation since 2-1-2000. It is not shown by the management that the second party was employed in a particular project. In the case of *S. M. Nilajkar and others vrs. Telecom District Manager, Karnataka*, reported in 2003 (97) FLR-608 (SC), the Hon'ble Supreme Court have laid down certain criteria which are to be considered to ascertain whether a workman is engaged in a scheme or project and whether the termination of service of such a workman would fall within clause (bb) of Section 2 (oo) of the Act. The Hon'ble Supreme Court have observed as follows :—

“The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied :

- (i) that the workman was employed in a project or scheme of temporary duration ;
- (ii) the employment was on contract, and not as a daily-wager simpliciter which provided *inter alia* that the employment shall come to an end on the expiry of the scheme or project ;
- (iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract ; and
- (iv) the workman ought to have been appraised or made aware of the above said terms by the employer at the commencement of the employment.”

In the case at hand it is not shown that the second party was employed on a contract with a condition that the employment would come to an end on the expiry of the scheme of project. It is also not proved that the second party was made aware of the said terms or employment from the very commencement of his employment. Therefore, this case does not come within Clause (bb) of Section 2 (oo) of the Act. Consequently, the termination of service of the second party with effect from 31-7-2009 is illegal.

11. *Issue No. (iv)*—It is alleged by the second party that when some of the workmen including himself formed a Trade Union and made a representation to the management to enhance their salary the management became vindictive and denied employment to the second party. Ext.5 reflects that on 12-1-2009 some of the workers submitted a representation to the management to raise their salary structure and to provided better service conditions to the employees. A few months thereafter the second party had been denied employment. Without any other reason the management denied employment to the second party. Therefore, the second party should be reinstated in service with full back wages.

12. In the result, the reference is answered in favour of the second party. The first party is to reinstate the second party and to pay him full back wages from the date of his termination till the date of reinstatement.

Dictated and corrected by me.

RAGHUBIR DASH  
26-3-2012  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

RAGHUBIR DASH  
26-3-2012  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

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By order of the Governor

T. K. PANDA

Under-Secretary to Government