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LABOUR & E. S. I. DEPARTMENT

NOTIFICATION

The 16th April 2012

No. 2965—li/1(B)-126/2005(Pt.)-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 17th December 2011 in Industrial Dispute Case No. 3/2006 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Aditya Steel Industries Ltd., Telengapentha, Cuttack and their workmen Shri B. K. Khuntia and 44 others represented through General Secretary, Cuttack Commercial Workers' Union, Gosala Road, Nayabazar, Cuttack was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 3 OF 2006

Dated the 17th December 2011

Present :

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

Between :

The Management of
M/s Aditya Steel Industries Ltd.,
Telengapentha, Cuttack. . . First-party—Management

And

Their workmen
Shri Basant Kumar Khuntia and
44 others (named in Annexure-A attached
to the Conciliation Failure Report),
represented through General Secretary,
Cuttack Commercial Workers' Union,
Gosala Road, Nayabazar, Cuttack. . . Second-party—Workmen

Appearances :

Shri R. N. Rath, Authorised Representative	. .	For the First-party—Management
Shri T. Lenka and Shri S. N. Biswal, Authorised Representative.	. .	For the Second-party—Workmen

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. 1332—Ii/1(B)-126/2005-LE., dated the 9th February 2006. The Schedule of reference runs as follows :

> "Whether the refusal of employment of Shri Basant Kumar Khuntia and 44 others (as in the Annexure-A attached to the Conciliation Failure Report) represented through Cuttack Commercial Workers' Union by the management of M/s Aditya Steel Industries Ltd., with effect from the 19th January 2005 which may amount to lock out is legal and/or justified ? If not, what relief they are entitled to ?"

2. Shorn of unnecessary facts pleaded in the claim statement, the case of the 45 disputant workmen represented by the Cuttack Commercial Workers' Union, in short, is that the workmen are the employees of the first-party Industry. Being directly engaged by the first-party they were engaged in different type of work in its factory. They had been working continuously since long. Despite of their long continuous service the management had turned a blind eye to their genuine demands. So, the Union had raised demands and brought the workers' grievances to the notice of different Government authorities. Being dissatisfied the management had often resorted to illegal lock-out but with the intervention of the labour machinery it used to withdraw the lock-out. When the matter stood thus, the management on 6-9-2004 suddenly forced the disputant workmen to receive their wages for the month of August 2004 by putting their signatures in the register of contractors to which they did not agree. Later on the management paid their wages for the month of August 2004 deleting the names of the contractors. However, on 20-9-2004 the management suddenly declared a lock-out. The Union raised a dispute before the labour machinery. There was conciliation but it failed. The District Labour Officer submitted conciliation failure report with recommendation to declare the lock-out illegal. Having come to know this the management lifted the lock-out with effect from the 8th November 2004. The management again compelled the workmen to receive their wages, bonus, etc. in the register of the contractors. When the disputant workmen reported this matter to the authorities, the management again locked-out the factory with effect from the 19th January 2005. The disputant workmen through their Union lodged complaint before the appropriate authority seeking them to take necessary legal action. During conciliation the management took the stand that the disputant workmen being engaged through contractors namely, Ramesh & Co. and Nayak Brothers, the management was not responsible for the dispute. But, as a matter of fact the disputant workmen were all directly employed by the first-party long before the abovenamed contractors were engaged by the management to supply contract labourers. It is further pleaded that during the conciliation proceeding before the Assistant Labour Officer, Cuttack the first-party made a report in the Sadar Police Station making false allegations for which the Police arrested some of the disputant workmen who were sitting peacefully in front of the Factory Gate in protest

against the illegal lock-out on 19-1-2005. When those workmen were in jail custody rest of the disputant workmen were refused employment. When the matter stood thus the first-party took new workmen in the place of the disputant workmen. Thus, the lock-out declared on 19-1-2005 is still continuing for the disputant workmen but the factory is running as usual. Thus, the lock-out declared on 19-1-2005 and the refusal of employment to the disputant workmen is in contravention of the Act.

With these pleadings the second-party seeks relief in the shape of an order prohibiting the first-party from continuing with the illegal lock-out with a direction to take back the disputant workmen with full back wages and other service benefits.

3. In the written statement the first-party has denied the existence of employer-employee relationship between the first-party and the disputant workmen. It is specifically pleaded that some of the disputant workmen are contract labourers and some are outsiders. None of the disputant workmen was ever under the employment of the first-party. Neither the management had declared any lock-out with effect from the 19th January 2005 nor did it refuse employment to the disputant workmen. It is specifically denied that the first-party had ever compelled the disputant workmen to receive their wages, bonus, etc. in the register of contractors as alleged by the second-party. According to the management, some contract labourers went on strike with effect from the 1st December 2004. During the period of the strike they had resorted to criminal activities. On 14-2-2005 and 15-2-2005 the striking labourers assaulted and prevented the willing workers from reporting for work and assaulted the Manager of the factory. So, the Police intervened and arrested many of the striking workers of the Contractors. Though the labour machinery had made several attempts to resolve the disputes between the contract labourers and the contractors there was no achievement in bringing about normalcy mostly due to unwillingness on the part of the contract labourers and second-party Union.

The management further takes a specific stand that the second-party Union which represents the disputant workmen is not competent to espouse their cause inasmuch as it is neither operating in nor concerned with the industry of the first-party. It is also contended that the reference itself is bad in the eye of law.

4. The following issues have been settled :—

ISSUES

(*i*) "Whether the reference is maintainable ?

(*ii*) Whether the refusal of employment of Shri Basant Kumar Khuntia and 44 others represented through Cuttack Commercial Workers' Union by the management of M/s Aditya Steel Industries Ltd. with effect from the 19th January 2005 which may amount to lock-out is legal and/or justified ? If not, what relief they are entitled to ?"

(*iii*) Whether the second-party workmen were directly employed by the first-party or they were engaged through Contractors ?"

5. On behalf of the second-party four witnesses have been examined and documents have been marked from Exts. 1 to 40. W.W. No. 1 is the General Secretary of the Union who has espoused the cause of the disputant workmen. W.W. Nos. 2, 3 and 4 are three of the disputant workmen

whose refusal of employment is the subject matter of the reference. On behalf of the management two witnesses have been examined. M.W. No. 1 is the Managing Director of the first-party and M.W. No. 2 is one Ramesh Chandra Nayak who has adduced evidence in the capacity of a contractor of the first-party. Exts. A to T have been marked for the management.

FINDINGS

6. *Issue No. (iii)*—The second-party's claim that the disputant workmen are the employees of the first-party is not admitted by the first-party. According to the first-party, some of the disputant workmen were working in the factory of the first-party through labour contractors and the rest are outsiders. To substantiate their respective stand both sides have adduced evidence. The management has examined M.W. No. 2 who claims to be a contractor of the first-party. In his affidavit evidence he has stated, he was engaged as a contractor to supply labourers to be engaged in the manufacturing process of the factory, and, to carry out the contractual job he had obtained licence (Ext. F) in the year 1990. He has named 13 out of the 45 disputant workmen as the labourers whom his Firm namely, M/s Nayak and Brothers had engaged in that factory. He has further stated that those workers were paid wages from the establishment of the Contractor. During cross-examination he has, however, admitted that all the 45 workmen were employed through contractors and they had been working in the factory of the first-party since 1990. He has also stated in his cross-examination that he has been supplying labourers to the first-party since 1990. Thus, the evidence of M.W. No. 2 establishes that the disputant workmen had been working in the factory since 1990. Besides his oral evidence there is documentary evidence to show that some of the disputant workmen had been working in the factory since long. Ext. 37 series are the E.S.I. Identity Cards in respect of 17 of the disputant workmen in which the date of entry of the employee concerned is reflected and from such entry it is found that those employees had entered into employment long back either in 1993 or in 1998. Thus, from the evidence on record it can be said that many of the disputant workmen had been working in the factory since 1993.

7. It is the case of the second-party that for the first time in the month of September, 2004 the first-party asked the disputant workmen to receive their wages for the month of August, 2004 by putting signature in the Contractor's Register. Further case of the second-party is that since September, 2004 the disputant workmen had been working in the factory without receiving their wages as the management insisted that they should receive their wages through a contractor. During trial the second-party had made a prayer to direct the first-party to produce the Attendance Register, Payment Register, Cash Book and Bonus Register for the period from 1990 to 2004. In its objection, dated the 14th July 2011 the management took the plea that since the documents called for were pretty old the management would be able to produce the same if they were available with the first-party. On 17-8-2011 the Tribunal called upon the first-party to clarify whether or not all the Registers called for by the second-party were traced out in the meanwhile and on 30-8-2011 the management intimated that the documents were not available with the management. However, the management exhibited Wage Payment Sheets (22 sheets) of the Contractor Firm M/s Nayak and Brothers through M.W. No. 2. The Wage Payment Sheets of the Contractor have been marked as Ext. S. The Wage Payment Sheets cover the period from September, 2004 to March, 2005. In these sheets, names of some of the disputant workmen find place but none of them have signed on those sheets in token of receipt of their respective wages. As already stated, the second-party has taken the stand that the disputant workmen refused to receive their wages by putting signature

on the Contractor's Register and that they have not received their wages since September, 2004. This being the stand taken by the second-party, production of the documents marked Ext. S through the contractor does not serve any purpose. It would have been appreciated if the contractor had produced the Wage Payment Sheets for any period preceding the month of September, 2004 to show that prior to September, 2004 any of the disputant workmen had received wages from the contractor by signing the Wage Payment Sheets maintained by the Contractor. Since M.W. 2 admits that the disputant workmen had been working in the factory since 1990 and they were all along employed through the Contractor's Firm and the second-party claims that for the first time in September, 2004 they were asked to receive their wages through a Contractor, the Contractor or, for that the Principal employer, should have exhibited documents like Wage Payment Sheets maintained prior to September, 2004 to disprove the claim of the second-party. It is not explained by the first-party as to why the Wage Payment Sheets for the period preceding September, 2004 were not placed before this Tribunal. For non-production of such materials a valid presumption can be raised to the effect that even prior to September, 2004 the disputant workmen had never received their wages from the Contractor by putting signatures on the Wage Payment Sheets. When the management has taken the pain to examine the Contractor to disprove the second-party's claim that the disputant workmen were directly employed by the first-party, care should have been taken to produce the relevant documents maintained by the Contractor to show that the disputant workmen or any of them used to receive wages from the Contractor. When Wage Payment Sheets from the month of September, 2004 onwards could be exhibited there is no reason why the Payment Sheets for the period preceding September, 2004 were not exhibited. So, an adverse inference has to be drawn against the management.

8. The second-party, on the other hand, has exhibited some Sheets of Register of Wages marked Ext. 32 series claiming that the same is in proof of the employees having received salary directly from the first-party. Ext. 32 series have been marked without objection. On most of the sheets forming part of Ext. 32 series the seal of the first-party appears. On the last sheet of Ext. 32 series the Assistant Labour Officer, Cuttack has made his endorsement on 24-7-2004 pointing out some defects in the matter of maintenance of the Register. There is no doubt that Ext. 32 series are some sheets of the Regiser of Wages of the establishment of the first-party for the periods from March, 2004 to August, 2004. There is also no cross-examination on Ext. 32 series which renders it suspicious. On a close scrutiny of these sheets it is found that names of all the disputant workmen except that of Mrutyunjay Mohapatra find place and they have received their wages by putting signature on the Register of Wages maintained by the first-party. From Ext. 32 series it is found that the disputant workmen used to receive their wages from the first-party prior to September, 2004. It supports the plea taken by the second-party that the management for the first time in September, 2004 asked the disputant workmen to receive their wages by putting signatures in the Contractor's Register. The management did not produce Registers like the Register of Wages, Attendance Register, etc. taking the plea that those were no more available with it which is not at all reliable. Therefore, for non-production of important documents without sufficient cause an adverse inference is to be drawn to the effect that if produced those documents would have supported the stand taken by the second-party.

9. The second-party has exhibited some E.P.F. Slips (Ext. 38 series) and E.S.I. Identity Cards (Ext. 37 series) of some of the employees. It is claimed by the second-party that first-party

was deducting the amount of contribution towards E.S.I. and E.P.F. from the wages of the first-party but the first-party takes the stand that the requirement of law is that even if a person is engaged under a Contractor he is to be brought under the E.S.I. and E.P.F. Schemes. So it is submitted, documents like E.S.I. Cards and E.P.F. Slips cannot be taken as proof that the workmen are direct employees of the Principal employer. The E.S.I. Cards and E.P.F. Slips exhibited in this case do not indicate that the workmen are the employees of the first-party. Therefore, these documents are of no use.

There are no other documents giving clear indication that the disputant workmen were the employees of the first-party. However, the failure on the part of the management to prove that the disputant workmen were engaged through Contractor and the entry in the Register of Wages marked Ext. 32 series showing that the disputant workmen used to receive wages prior to September, 2004 directly from the management are sufficient to arrive at a conclusion that the disputant workmen were directly employed by the first-party.

10. *Issue No. (ii)*—On the alleged refusal of employment, it is the case of the second-party that when the management adopted an unfair labour practice by trying to make payment of the wages of the disputant workmen asking them to receive the same by signing on the Contractor's Register, the workmen made complaints to different authorities and being aggrieved the management locked-out the factory on 19-1-2005. Further case of the second-party is that on the same day, i.e. 19-1-2005 the second-party made complaints to appropriate authorities to take necessary action against the management for the illegal lock-out. On their complaint there was a conciliation and in course of the conciliation the management for the first time took the plea that the disputant workmen being contract labourers the management of the first-party should not be held responsible for the dispute. It is further pleaded that during the conciliation proceeding the disputant workmen were sitting peacefully in front of the Factory Gate opposing the illegal lock-out. But, on a false information made by some of the henchmen of the first-party in the Sadar Police Station, Cuttack the Police arrested many of the disputant workmen who remained in jail custody for more than fifteen days. When the arrested workmen were in jail and the remaining disputant workmen were not allowed to work, the first-party employed new workmen in their place. Thus, the lock-out continued as against the disputant workmen whereas the factory was running as usual. On the other hand, the plea taken by the first-party is that there was never any refusal of employment to the disputant workmen by the first-party with effect from the 19th January 2005. There was also no lock-out with effect from the said date. Further plea of the management is that some Contractor's workers went on strike from 1-12-2004. They also resorted to criminal activities. On 14-2-2005 and 15-2-2005 some workers reported for work but the striking contract labourers prevented them and assaulted the Manager of the factory for which report was lodged in the local Police Station. Some of the striking workers were arrested. The striking workers did never report before their contractor-employer for duty.

11. It is not proved by the management that the disputant workmen went on strike from 1-12-2004. On the other hand, the second-party has exhibited many of its representations made from time to time either to the labour machinery or to the first-party in which it is alleged that the management had declared lock-out in respect of the disputant workmen with effect from the 19th January 2005. Ext. 23 is a representation purportedly made on 19-1-2005 wherein it is alleged that

the management had locked-out the plant from 7 A.M. of 19-1-2005. But, there is no other evidence showing that the management had declared a lock-out with effect from the 19th January 2005. There is no satisfactory evidence to show that either the disputant workmen went on strike from 1-12-2004 or the management effected the lock-out with effect from the 19th January 2005. But, there can be a presumption that from 19-1-2005 onwards the disputant workmen either abstained from their work or they were denied employment. The main plea of the first-party that the disputant workmen are Contractor's workers is found not believable. It is already held that they were the direct employees of the first-party. The management does not appear to have taken any action against them for their long absence from duties, may be either from 1-12-2004 or 19-1-2005. It is found that the disputant workmen had not received their wages from the first-party from the month of August, 2004 onwards for the reason that the first-party insisted that they should receive their wages through a Contractor. Exts. 11 and 12 are two representations of the Union addressed to the District Labour Officer, Cuttack alleging that the Management was trying to pay wages to the disputant workmen through a Contractor and that with effect from 30-8-2004 the management had denied them employment by closing down the production section of the plant. Ext. 13 is a notice from the District Labour Officer, Cuttack to the management to participate in a conciliation proceeding on the alleged change of status of the workmen from regular workmen to Contractors' Labourers as well as the alleged illegal refusal of employment with effect from the 30th August 2004. Thus, it is found that some months prior to the disputed termination of service which is under the present reference the workmen had alleged that they were denied employment with effect from the 30th August 2004.

These are the circumstances created by the management with a view to deny employment to the disputant workmen. In the facts and circumstances, this Tribunal comes to a conclusion that the management had refused employment to the disputant workmen with effect from the 19th January 2005. It amounts to retrenchment. But it is not the case of the management that the retrenchment of the workmen was effected on due compliance of the mandatory provisions of the Act. Therefore, the refusal of employment from 19-1-2005 amounts to retrenchment of the disputant workmen which is in violation of the provisions of the Act. Therefore, it is neither legal nor justified.

12. The issue on the maintainability of the reference is not yet taken up. If the reference is found maintainable, then the disputant workmen whose retrenchment is found to be illegal will be entitled to be reinstated. So far the relief of back wages is concerned, there is neither pleading nor evidence that the disputant workmen after their retrenchment are not in gainful employment. Therefore, the Tribunal considers it just and appropriate to award 50% of their back wages.

13. *Issue No. (i)*—On the maintainability of the reference, the management has raised different points. It is contended that because of lack of employer-employee relationship between the management and the disputant workmen the labour machinery could not have made the present reference. But, it is already held that there exists employer-employee relationship between the management and the disputant workmen and therefore, the maintainability of the reference cannot be challenged on that ground.

Another contention is that the dispute is not raised by a registered Trade Union which operates in or connected with the industry of the first-party. The Union that has espoused the cause of the

disputant workmen is "Cuttack Commercial Workers' Union". It is found from a series of documents exhibited by the second-party that this Union has all along espoused the cause of the workmen. The parties have not adduced any evidence as to whether the disputant workmen and/or any other employees of the first-party are/were members of this Union. There is also no evidence as to whether there is any Trade Union formed by the employees of the first-party's establishment. The management's plea is that the second-party Union neither operates in nor is connected with the industry of the first-party. This is not refuted by the second-party. During argument it is submitted that the Union is a general Union. However, it is not argued by the first-paty that the disputant workmen are not the members of the Union. This is a case of retrenchment of as many as 45 workmen of an establishement. After insertion of Section 2-A into the Act the dispute relating to retrenchment of an individual workman is deemed to be an 'industrial dispute'. Therefore, it is no more necessary for a group of workmen to espouse the cause of an individual workman to challenge the legality of his retrenchment by raising an industrial dispute. Therefore, in my considered view the espousal of the cause of the disputant workmen is not a condition precedent for raising a valid dispute. Even the disputant workmen in their individual capacity could have raised the dispute. However, on their behalf the second-party Union has raised the dispute which is not expressly or impliedly barred by any provisions of the Act. That apart, the disputant workmen who are 45 in number have themselves formed a group and they have raised the dispute through a Union. In Workmen of Dharampal Premchand (Saughandhi) *Vrs.* Dharampal Premchand (Saughandhi), reported in 1965(I) LLJ 668 (S.C.), the Respondent–Firm was carrying on business as perfumers and tobacconists. It had dismissed the services of 18 out of its 45 employees. The dismissed employees were members of Mercantile Employees Association. The said Union took up the cause of the dismissed employees and carried the dispute before the Conciliation Officer. Besides the dismissed employees no other employee of the Respondent–Firm was a member of the said Association. Therefore, objection was raised to the effect that the Association was not authorised to raise the dispute. This contention was upheld by the Tribunal. Their Lordships of the Hon'ble Supreme Court while holding that the Tribunal was in error in rejecting the reference have observed as follows :—

> "It is well known that in dealing with industrial disputes, industrial adjudication is generally reluctant to lay down any hard and fast rule or adopt any test of general or universal application. The approach of industrial adjudication in dealing with industrial dispute has necessarily to be pragmatic, and the tests which it applies and the consideratiion on which it relies would vary from case to case and would not admit of any rigid or inflexible formula.
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> In every case where industrial adjudication has to decide whether a reference in regard to the dismissal of an industrial employee is validly made or not, it would always be necessary to enquire whether the Union which has sponsored the case can fairly claim a representative character in such a way that its support to the cause would make the dispute an industrial dispute. "Industry" has been defined by Section 2(j) of the Act and it seems to us that in some cases the Union of workmen working in one industry may be competent to raise a dispute about the wrongful dismissal of an employee engaged in an establishment belonging to the same industry where workmen in such an establishment have no Union of their own,

and an appreciable number of such workmen had joined such other Union before their dismissal. In fact, the object of trade union movement is to encourage the formation of larger and bigger unions on healthy and proper trade union lines, and this object would be frustrated if industrial adjudication were to adopt the rigid rule that before any dispute about wrongful dismissal can be validly referred under Section 10(1) of the Act, it should receive the support of the Union consisting exclusively of the workmen working in the establishment concerned."

In the aforecited case the Association which espoused the cause of the dismissed workmen was not an Association of Workers of another establishment belonging to the same industry. Yet, their Lordships held that the Association was competent to espouse the cause of the dismissed workmen. In the case at hand, the second-party Union is not shown to be a Union of some establishments belonging to the same industry as the first-party. Yet, in my considered view it can espouse the cause of the disputant workmen.

In the result, I hold that the Union has validly raised the industrial dispute.

It is further contended that the reference being vague, absord and unspecific, is not maintainable. According to the first-party, in the conciliation report the Labour Machinery has termed the dispute as purported illegal strike whereas in the reference it is termed as refusal of employment. Having gone through the conciliation failure report nowhere it is found that the dispute raised was considered to be a purported illegal strike. Rather, the Conciliation Officer has opined that it is a case of refusal of employment. That apart, the Schedule of reference is very specific and there is no ambiguity, vagueness or absordity.

In the result, the reference is found to be maintainable.

14. The reference is answered accordingly. The disputant workmen are entitled to be reinstated in service with 50% of their back wages. The management to implement the Award within a period of two months of the date of its publication in the Official Gazette, failing which it shall liable to pay 100% back wages after expiry of the said period till the date of reinstatement of the disputant workmen.

Dictated and corrected by me.

RAGHUBIR DASH
17-12-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
17-12-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

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By order of the Governor

T. K. PANDA

Under-Secretary to Government

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Industrial Tribunal
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