

The Odisha Gazette

EXTRAORDINARY
PUBLISHED BY AUTHORITY

No. 882 CUTTACK, SATURDAY, MAY 5, 2012/BAISAKHA 15, 1934

LABOUR & ESI DEPARTMENT

NOTIFICATION

The 18th April 2011

No. 3032—li/1(B)-110/1995-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 3rd January 2012 in Industrial Dispute Case No. 121 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of District Transport Manager (A), Odisha State Road Transport Corporation, Cuttack and its workman Late Bihari Gochhi, Substituted by his legal heirs was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 121 OF 2008

(Previously registered as I.D. Case No. 54/1996 in the file of the P.C. Labour Court
Bhubaneswar)

The 7th May 2011

The 3rd January 2012

Present :

Shri Raghubir Dash, osjs (Sr. Branch),
Presiding Officer,
Industrial Tribunal,
Bhubaneswar.

Between :

The Management of
District Transport Manager (A),
Odisha State Road Transport
Corporation, Cuttack.

.. First Party—Management

And

Late Bihari Gochhi, substituted by
his legal Heirs namely,—
1. Sulochana Gochhi, Wife
2. Geetanjali Gohhee, Daughter,

.. Second Party—Workman

3. Binay Kumar Gochhee, Son
 4. Sanjit Kumar Gochhee, Son
 of village Ramachandrapur,
 P.O. Ragadi, Banki,
 Cuttack.

Appearances :

For the First Party—Management	..	Shri G. Tudu, L.W.O.
For the Second Party—Workman Advocate.	..	Shri Shri Susant Dash

/ORDERAWARD

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. 2112—li/1(B)-110/1995-LE., dated the 22nd January 1996 which was originally referred to the Presiding Officer, labour Court, Bhubaneswar for adjudication but subsequently transferred to this Tribunal for adjudication vide Labour & Employment Department's Order No. No. 4133—li/21-32110/2007-LE., dated the 4th April 2008. The Schedule of reference runs as follows :—

“Whether the termination of services of Shri Bihari Gochhi, Conductor with effect from the 30th August 1993 by the District Transport Manager (A), OSRTC, Cuttack is legal entitled to ?”

2. In this case of the Legal representatives of the deceased workman, namely, Bihari Gochhi have filed the claim statement through the deceased's wife. In the claim statement it is averred that the deceased was a conductor under the first party. Vide letter No. 7599 dated 19-6-1989 the deceased was charge-sheeted by the first party on false allegations. The charges were wages and not specific. The deceased submitted his explanation to the charges. But, the management without taking his explanation into consideration conducted a domestic enquiry. During the enquiry no fair chance was given to the deceased. The disciplinary authority did not apply his mind to the enquiry officer's report and dismissed the workman with effect from the 30th August 1993. Therefore, the order of dismissal is illegal and *malafide*.

3. In the written statement, the first party has taken the stand that for the deceased's misconduct he was charge-sheeted and his explanation to the charges being found not satisfactory a departmental enquiry was conducted. The deceased participated in the enquiry. Full opportunity was given to the deceased to defend his case. The enquiry officer (for short, 'the E.O.') had followed the principles of natural justice. On submission of report by the E.O. finding the charges proved, a copy of the enquiry report was served on the deceased and personal hearing was given to him. Considering the gravity of the charges the authority dismissed him from service vide order No.13321 date 30-8-1993.

4. At this stage it is worth-mentioning that in the schedule of reference there is no mention about the dismissal of the deceased -workman. According to the reference the legality of the

termination of service of the workman with effect from the 30th August 1993 is to be decided. But, as a matter of fact, the workman was dismissed from service preceded by a domestic enquiry. Initially when issues were settled on 25-1-2002 there was no issue on the fairness of the domestic enquiry as well as legality and justifiability of the dismissal order. Parties were asked to adduce evidence. Accordingly, the second party examined the deceased's widow as W.W.1 and then closed evidence from the side of the second party. Then the management was to adduce evidence. At that stage it came to notice that it was a case of dismissal preceded by a domestic enquiry. Therefore, in compliance with the principles laid down in *Cooper Engineering Ltd., Vrs. P. P. Mundhe*, AIR 1975 (S.C.) 1990 that when a domestic enquiry has been conducted by the management the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principle of natural justice, this Tribunal re-settled the issues on 5-10-2010 and on the same day passed orders to take-up issue on fairness of the domestic enquiry as a preliminary issue. The parties were given opportunity to adduce evidence. The second party did not adduce more evidence but the first party examined its D.T.M as M.W. No.1

5. Following are the issues settled on 5-10-2010 :—

ISSUES

1. “Whether the domestic enquiry conducted against the workman is fair and proper ?
2. Whether the dismissal of the workman from service with effect from the 30th August 1993 is legal and/or justified ?
3. To what relief, if any the workman is entitled ?

6. As already stated, the deceased widow is examined as W.W. No.1 and she has exhibited two documents. The first party has examined its present D.T.M. as M.W. No. 1 and has exhibited documents marked Exts. A to E.

FINDINGS

7. *Issue Nos. (i)*—which is taken up as a preliminary issue. W. W. No. has no direct knowledge as to how the enquiry was conducted. She has claimed to have heard from her husband that the enquiry was not fair and enquiry was not fair and property that the E.O. was biased, that the principles of natural justice were not followed and that her husband was illegally dismissed from service. Similarly, M.W. No.1 has got no direct knowledge about the departmental proceeding. However, the documents related to the domestic enquiry have been marked without objection and both sides rely on the exhibited documents. During cross-examination it is suggested to but denied by M.W. No.1 that the workman was E.O. was not impartially he himself cross-examined the witnesses which is not permissible and that the enquiry was not conducted in a fair and proper manner. Except the suggestion that the E.O. himself cross-examined the witnesses all other objection raised by the second party challenging the fairness of the domestic enquiry are general allegations having no evidentiary value. The second party has to lead evidence to prove the specific facts and circumstances wherefrom it can be gathered that the enquiry was not conducted fairly and properly.

8. In course of argument learned counsel for the second party submitted that since no Presenting/Marshalling Officer was appointed by the management, the E.O. himself cross-examined the witnesses as well as the delinquent workman which is not permissible and on that ground the enquiry is to be held to be unfair. In support of his contention he cited a decision in State of Uttaranchal and others *Vrs. Kharak Singh*, reported in 2008 LLR 1171. Having carefully through the cited judgment of the Hon'ble Supreme Court, I do not find any observation that merely on the ground that the E.O. has cross-examined the witnesses the enquiry shall be held to be unfair. In the reported case the delinquent-employee was a temporary Forest Guard. Illegal felling of trees had taken place in the area which was in his charge. It was reported that the delinquent was involved in the illicit felling of trees. He was charge sheeted and an enquiry officer was appointed. No Presiding Officer was appointed. The enquiry officer had himself inspected the areas in the forest and after making note of certain alleged deficiencies put certain questions to the delinquent-employee, secured some answers from him and then submitted his report. Under such facts and circumstances their Lordship observed that the enquiry officer had acted as the investigator, Prosecutor and Judge which is opposed to the principles of natural justice. Other infirmities in the reported case were that the E.O. himself had strongly recommended the punishment of dismissal from service of the employee the departmental witnesses were not examined in presence of the delinquent and the copy of the report of the enquiry officer along with all the relied upon documents were not supplied to the delinquent. Under such circumstances, the order of dismissal was found to be illegal.

But, in the case on hand there is no specific objection except the allegation that the E.O. himself had cross-examined the witnesses including the workman. I have gone through the statements of the witnesses recorded by the E.O. which collectively has been marked as Ext.E A number of departmental witnesses were examined in course of the enquiry. But, nowhere it is found that the E.O. had cross-examined the departmental witnesses or he had put any question to the departmental witnesses. It is found that the E.O. first recorded the statements of each of the witnesses partial on behalf of the department and thereafter, allowed the workman to cross-examine each of the witnesses. From the exhibited documents it is not forthcoming as to whether a Marshalling Officer was appointed by the department. So, it may be presumed that no such officer was appointed. But, the plea that the witnesses were cross-examined by the E.O. is not borne out from the exhibited documents. However, it is found that after examination of the departmental witnesses the E.O. proceeded to record the statement of the delinquent-workman. At that time the workman did not make elaborate statement on his defence and simply took the stand that his defence has there in his show-cause and he would not say anything more. Thereafter, the E.O. cross-examined the delinquent by putting questions on different charges.

Thus, it is found that in the domestic enquiry no Marshalling/Presenting Officer was appointed by the management and the E.O. himself had cross-examined by the workman. No other specific allegation having been made and found from the documents exhibited in this case, it is to be considered as to whether on the basis of the aforesaid infirmities the enquiry can be said to be unfair and improper.

9. In Pravin Ratilal Dudhara Vrs. Municipal Corporation of Greater Bombay, reported in 1996 (II) LLJ 529 (Bombay High Court), the management had not appointed any Presiding Officer to represent its case before the enquiry officer. In that situation the enquiry officer had asked some clarificatory questions to the witnesses. The enquiry was challenged on the ground that the enquiry officer combined the role of the Judge and the Prosecutor by asking questions to the witnesses. The Hon'ble Bombay High Court held that the questions asked by the enquiry officer were not in the nature of cross-examination but were merely clarificatory in nature. Further more, it was observed, the enquiry officer had given full opportunity to the delinquent to cross-examine all the witnesses of the management. It is further observed that it is not obligatory on the part of the management to appoint a Presiding Officer and in the situation the enquiry is not vitiated for violation of the rules of natural justice. In the case on hand the E.O. has put questions to the workman which is in the nature of cross-examination. There may be some force in the contention that the E.O. should not have cross-examined the workman. But, merely on him was not fair and proper. It is not the case of the second party that the E.O. was influenced by the answers given by the workman in course of such cross-examination and the workman was prejudiced in any manner.

In Pravin Ratilal's case (supra), it is further observed that non-appointment of Presenting Officer did not vitiate the proceedings in as much as, the provisions of Bombay Municipal Corporation Act do not obligate the disciplinary authority to appoint a Presenting Officer. I have gone through the Odisha State Road Transport Corporation Employees (Classification, Recruitment and Conditions of Service) Regulations, 1978 and found that under Regulation No. 141(5) (a) the disciplinary authority may nominate any person to present the case in support of the charges before the enquiring authority. The Regulation does not make it obligatory on the part of the disciplinary authority to appoint a Presenting Officer. Therefore, this lacuna is not going to affect the fairness of the domestic enquiry.

Regulation 141 (8) empowers the enquiring authority to put such questions as it may deem necessary to the delinquent employee or to the witnesses to elicit information on any points which, in its opinion, requires clarification. Therefore, the E.O. seems to have put questions to the deceased workman in exercise of the powers given to him under the Regulations. Taking that into consideration the submission that the enquiry officer's cross-examining the delinquent will vitiate the enquiry proceeding is not to be up-held.

10. In the result, it is held that the domestic enquiry conducted against the deceased workman was held fairly and properly.

Dictated and corrected by me.

RAGHUBIR DASH
7-5-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
7-5-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

Findings on the remaining Issues

11. *Issue No. (ii)*—This issue is on the legality and/or justifiability of the order of dismissal of the deceased workman from service with effect from the 30th August 1993.

While deciding issue No.1 which is on the fairness of the domestic enquiry this Tribunal has already concluded that the enquiry conducted against the deceased workman was fair and proper. From the documents exhibited without objection it is found that vide counts and most of them related to carrying of passengers without valid tickets. The E.O. submitted his report (Ext.C) with the conclusion that all the charges were found established. In order to prove that the past service records of the deceased workman was not good and that previously he had been punished for as many as 17 times mostly on the charges of carriage of passengers without valid tickets, the management has produced xerox copy the service book of the deceased workman but the same has not been marked as an exhibit.

12. Admittedly, the deceased workman was working as a bus conductor under the Odisha State Road Transport Corporation (OSRTC). As per the enquiry report he is found guilty of carrying ticketless passengers on several occasions. This kind of misconduct justifies the punishment of discharge/dismissal from service. In that sense the order of dismissal from service is found to be justified.

13. But, it is submitted on behalf of the against of the second party that the order of dismissal passed against the deceased workman is void and inoperative in as much as it contravenes the based on the observation made by the Hon'ble Supreme Court in Jaipur Z.S.B.V, Bank Ltd. Vrs. Shri Ram Gopal Sharma, AIR 2002 (S.C.) 643, wherein their Lordships have observed that non-approval of order of dismissal or failure to make an application under section 33 (2) (b) seeking approval renders the dismissal ineffective from the date it was passed. Paragraph-15 of the judgement of the Hon'ble Supreme Court is re-produced hereunder for reference :—

“The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under section 33A, cannot be accepted. In our view, not making an application under section 33 (2) (b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to make an application under section 33 (2) (b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him in to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee of file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside

under section 33A notwithstanding the contravention of section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under section 33A or to raise another industrial dispute or to make a complaint under section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.”

14. Now, it is to be considered as to whether the observation made in Jaipur Z.S.B.V. Bank's case are applicable to the facts and circumstances of the case in hand. It is not disputed by the parties that on the day the impugned order of dismissal was made by the first party an application under section 33(2)(b) of the Act was filed before this Tribunal seeking its approval on the order of dismissal on the ground that as on the date of dismissal I.D. Case No. 19 of 1989 and 21 of 1989 were pending disposal before this Tribunal in which the deceased workman was a concerned workman. The management's application under section 33(2)(b) of the Act was registered as I.D. Misc.case No.34 of 1993. It is also not in dispute that the deceased workman had also filed an application under section 33-A of the Act, registered as I.D. Misc.case No.1 of 1995 alleging that he being concerned in the pending industrial disputes and the alleged misconduct being connected with the pending disputes the management ought to have obtained express permission from this Tribunal and the permission having not been obtained the management contravened section 33(!) (b) of the Act.

15. It is asserted by the second party that the management withdraw the application under section 33(2) (b) of the Act and the management takes further stand that the case on the application under section 33-A of the deceased workman has been dismissed but the parties have failed to adduce any documentary evidence in support of their respective stand. So this Tribunal has obtained the concerned case records from its record room to find out as to what happened to both the proceedings. On verification of both the records it is found that during pendency of both the proceedings (I.D.Misc.case No. 34 of 1993 and I.D.Misc.case No.1 of 1995) the workman having died his widow was allowed to be substituted vide Order dated Dt. 27-10-1997. On the same date this Tribunal passed order in Misc. case No. 34 of 1993 that both the Misc.cases be heard analogously. On 21-2-1998 the management filed a petition to withdraw its application under section 33(2) (b) of the Act on the ground that the workman was already dead. Though there was objection against such withdrawal this Tribunal allowed the application and dismissed the Misc.case (Misc.case No. 34 of 1993) as withdrawn. However, order was passed as to whether the other Misc.case (Misc.case No1 of 1995) should proceed. The parties did not take any step in the other Misc.case (Misc.case No1 of 1995) and, therefore, till date no order has been passed on the application under section 33-A of the Act.

Thus, it is found that the management filed an application under section 33(2)(b) of the Act to obtain approval from the Tribunal admitting that the deceased workman was a concerned workman in respect of the pending disputes but subsequently the same was withdrawn. As a result, no approval could be obtained by the management. In view of the observations of the Hon'ble Supreme Court in

Jaipur Z.S.V.B.Bank's case, it being a clear case of contravention of the proviso to section 33(2)(b) of the Act the dismissal order impugned in this case is invalid.

Applying the principle pronounced in Jaipur Z.S.B.V. Bank's case, Hon'ble Supreme Court in United Bank of India Vrs. Sidhartha Chakraborty, AIR 2007 (S.C.) 3071 have upheld the Judgement of the Division Bench of Guhati High Court holding that the dismissal of the respondent workman by an order Dt.20-12-1985 is invalid for non-compliance of the provisions of section 33(2)(b) of the Act. The fact situation in United Bank of India's case (supra) is similar to that of the case in hand. In that case the respondent workman was dismissed from service preceded by a departmental enquiry which was held by the concerned Industrial Tribunal to be fair and proper. That apart, as on the date of the order of dismissal there was pendency of an industrial dispute but the management failed to comply with the provisions of section 33(2)(b) of the Act. Therefore, the workman in that case raised an industrial dispute and the conciliation having failed the concerned Government referred the matter to the industrial Tribunal at Gauhati for adjudication of the question of legality and validity of the order of dismissal for non-compliance of the provisions of section 33(2)(b) of the Act. The learned Tribunal on conclusion of the reference proceeding held that the enquiry being fair and proper the imposition of punishment of dismissal in view of the series of misappropriation and irregularities is justified. Being aggrieved the workman moved the Hon'ble Gauhati Court. Before the Hon'ble Supreme Court the management took plea that approval of the action taken by it in dismissing the workman was not necessary in as much as the provisions of section 33(2)(b) of the Act are not mandatory. In support of this contention reliance was placed on the decision in Punjab Beverages (P) Ltd., Chandigarh Vrs. Suresh Chand, 1978 (II) SCC 144 by that time the view taken in Punjab Beverages's case (supra) was held to be incorrect by the Hon'ble Supreme Court in Jaipur Z.S.B.V.Bank's case (supra). Therefore, relying on the subsequent decision in Jaipur Z.S.B.V.bank's case, Hon'ble Gauhati Court held that the decision in Punjab Beverages's case (supra) could not have any application having been over-ruled in Jaipur Z.S.B.V. Banks case

16. Like the respondent workman in United Bank of India case (supra) the deceased workman of the case in hand was dismissed from service preceded by a domestic enquiry which has been held to be fair and proper. The management has, admittedly, withdrawn its application for approval under section 33(2)(b) of the Act. So, approval having been obtained by the management the dismissal order is found to be in contravention of section 33(2)(b) of the Act. By the time the management withdrew the application for approval the principle laid down in Punjab Beverages case (supra) was holding the field. But, in the meanwhile that has been over-ruled and the principle laid down in Jaipur Z.S.B.V. banks's case holds the field. Applying that principle this Tribunal comes to a conclusion that the order of dismissal under challenge which is in contravention of section 33(2)(b) is invalid and inoperative.

17. *Issue No. (iii)*— The deceased workman was a Bus Conductor. he was dismissed from service with effect from the 30th August 1993. He died on 17-2-1997 (Ext.1). On so many occasions he was found guilty of carrying ticketless passengers. Had the position of law as stood at the relevant time the order of dismissal was passed not changed the order of dismissal would have been found valid and justified. All these relevant factors are to be taken into consideration while determining the relief to be granted to the deceased workman's legal heirs.

In United bank of India's case (supra) the workman was a cash clerk in the United Bank of India. He was dismissed from service by an order dated 20-1-1985. In the year 2005 the order of dismissal was held by the Hon'ble Gauhati High Court to be invalid which was subsequently confirmed by the Hon'ble Supreme Court in the year 2007. He was charge-sheeted on different counts related

to a series of misappropriation. Considering these peculiar facts of the case and the back-ground in which the disciplinary action was taken against him together with the position of law as stood at the relevant time the Hon'ble Supreme Court have restricted the quantum of back wages to Rs. 2 lacs giving liberty to the management to take action in terms of section 33(2)(b) of the Act.

18. In the case at hand the workman died about three and half years after he was dismissed from service. There is no chance of his reinstatement nor the management gets a chance to take action in terms of section 33 (2) (b) of the act. It is also found from the case record that for the fault of the second party the reference was earlier disposed of twice with no dispute award. Though the reference was registered in the Labour Court, Bhubaneswar on 29-2-1994 the second party could not file claim statement till September 2001. These are some of the factors for which there is long delay in disposal of the I.D. case. Documents showing the gross salary of the deceased workman immediately before his dismissal are not exhibited by either of the parties. With a hope to get date on this aspect I have verified the case record in I.D. Misc. case No. 34 of 1993 which was registered on the find that the management had calculated one month's wages of the deceased workman at Rs. 1,390. basing on this information it may be concluded that the deceased workman used to get around Rs. 1,500 per month as his monthly salary immediately before his dismissal. If he were in service he would have received salary from the date of his dismissal till the date of his death which covers a period of three and a half years.

19. Taking all the afore-stated facts and circumstances into consideration the Tribunal considers it just and appropriate to award a sum Rs. 75,000 as either back wages or compensation for the wrongful dismissal. the second party members are entitled to get rs. 75,000 (Rupees seventy five thousand only) under this Award.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
3-1-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

RAGHUBIR DASH
3-1-2012
Presiding Officer
Industrial Tribunal
Bhubaneswar

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