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LABOUR & EMPLOYEES STATE INSURANCE DEPARTMENT

NOTIFICATION

The 18th April 2012

No. 3037—li-1(BH)-161/1997(Pt.)-L & ESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 17th March 2011 in I. D. Case No. 142 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of Executive Engineeer, Balasore Electrical Division, Balasore and its Workmen Shri Baida Tudu and 6 others represented through the Working President, O.S.E.B. Workers Union, Balasore was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 142 OF 2008

The 17th March 2011

Present :

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

Between :

The Management of Executive Engineer, Balasore Electrical Division, Balasore. .. First Party—Management

And

Its workmen Shri Baida Tudu and 6 others represented through the Working President, O.S.E.B. Workers Union, Balalsore. .. Second Party—Workmen

Appearances :

Shri R. C. Das, Legal Assistant. .. For the First Party—Management

Shri S. Behera .. For the Second Party—Workmen

AWARD

The Government of Odisha in the Labour & Employment Department, in exercise of powers conferred upon them by Section 10 of the Industrial Disputes Act, 1947 (for short, 'the Act') have referred the present dispute for adjudication by this Tribunal vide their Order No. 7613—Ii-1 (BH)-161/1997-LE., Dt. 1-7-1997. The schedule of reference runs as follows :

> "Whether the action of the Executive Engineer, Balasore Electrical Division, Balasore in terminating the services of Shri Baida Tudu, Shri Bhagabat Murmu, Shri Purnachandra Murmu, Shri Mangala Hansda, Shri Kanhu Hemram, Shri Bijay Tudu and Shri Bharat Hemram, unskilled workers by way of refusal of employment with effect from the 31st May 1992 is legal and/or justified ? If not, what relief the workmen are entitled to ?"

2. Though names of seven workmen appear in the Schedule of reference, five of them have filed their claim statements separately but the contents of all the claim statements are indentical. Bhagabat Murmu and Mangala Hansda are the two workmen who have not filed their claim statements.

In their claim statement the workmen have not made any averment as to the duration of their employment. It is simply pleaded that on 1-6-1992 they were denied employment by the first party. It is further alleged that the first party engaged and absorbed persons who were junior to the workmen.

3. Admitting the second party workmen's employment under the first party, it is contended that the workmen used to be engaged in Rural Electrical Construction work subject to availability of work and funds. They were not engaged regularly. The workmen used to work on daily wage basis.

On alleged retrenchment, it is submitted by the first party that the management has never denied employment to the workmen. It was due to their non-attendance the management could not give them work.

4. The following issues have been settled :—

ISSUES

(i) Whether the action of the Executive Engineer, Balasore Electrical Division, Balasore in terminating the services of Shri Baida Tudu, Shri Bhagabat Murmu, Shri Prunachandra Murmu, Shri Mangala Hansda, Shri Kanhu Hemram, Shri Bijay Tudu and Shri Bharat Hemram, unskilled workers by way of refusal of employment with effect from the 31st May 1992 is legal and/or justified ?

(ii) If not, what relief the workmen are entitled to ?

5. On behalf of the second party workmen three witnesses have been examined, W.W. No.1 and W.W. 2 are two of the workmen and W.W. 3 is their co-worker. On behalf of the first party, the present Executive Engineer has been examined as M.W. 1 and a Peon working in the establishment of the Executive Engineer has been examined as M.W. 2. Each party has exhibited some documents.

FINDINGS

6. Though there is no averment in the claim statement on the commencement of employment of each of the workmen, the witnesses examined on behalf of the second party have stated that the

workmen had been working since 1-1-1986 and their services were terminated on 1-6-1992. Though the witnesses were subjected to cross-examination, no question was put to them touching on the duration of the employment. Even in the written statement the management has not pleaded as to from which date the workmen had been working under the first party. That apart, the management has not taken any plea that any or all of the workmen had never completed 240 days of work in any year during the entire period of their employment. Though it is pleaded that the workmen used to be engaged as and when the work and funds were available, the different spells of their employment are not mentioned in the written statement, nor any evidence has been adduced to that effect. So, it is a case wherein the management has not taken the plea that as because the workmen did not complete one year of continuous service, they are not entitled to any notice or notice pay and retrenchment compensation as contemplated under Section 25-F of the Act.

7. The specific plea taken by the management is that due to non-attendance of the workmen the management could not give them work. It implies that if the workmen were available as on the date of alleged termination of service they could have been continued beyond the alleged date of termination. But the plea of abandonment of employment, in the absence of other materials, cannot be accepted. In M. G. Pattel *Vrs*. Mastan Baug Consumers Co-operative W & R Stores Ltd. reported in 1997 Lab. I. C. 2537, Hon'ble Bombay High Court have held that burden lies on the employer to establish and prove that the employee has abandoned his service. It is further observed that even in the case of abandonment of service the employeer is to give notice to the employee calling upon him to resume his duty. It is not proved by the management that any notice was served on the workmen calling upon them to resume duty. Whether an employee has abandoned service or not is a question of fact which has to be adjudicated on the basis of evidence and attending circumstences. Abandonment of service is a matter of intention which cannot be attributed to the employee in the absence of supportable evidence. Since the burdon is on the management to prove the alleged abandonment of service, the first party ought to have adduced evidence to that effect. The evidence of M.W. 1 shows that he has not personal knowledge about the employment of the workmen. He has no spoken anything about the abandonment of job. M.W.2 has been examined to prove some documents. He has not stated anything about the alleged abandonment. Therefore, the plea of abandonment of service cannnot be accepted.

8. It is argued that the abandonment of employment may be presumed from the fact that none of the workmen had raised any complaint alleging illegal retrenchment for more than three and a half years. It is true that the second party has not shown as to whether any complaint was made by any of the workmen before any of the authorities alleging denial of employment with effect from the 31st May 1992. From the conciliation failure report which is annexed to the Schedule of reference made by the State Government, it is found that the O.S.E.B. Workers' Union vide their letter, Dt. 18-12-1995 raised this dispute. Save and except this delay there are no other facts and circumstances in support of raising a presumption in favour of abandonment of job. The second party workmen are all illiterate persons hailing from a remote place. They might have approached the authorities alleging denial of employment but now they are not in a position to prove it by way of documentary evidence. The long delay may be a factor to be taken into consideration while determining the relief to be granted to the workmen. But merely on the basis of delay in raising the dispute a presumption in favour of abandonment of job cannot be formed.

9. Coming to the documentary evidence, the experiance certificates exhibited by the workmen (i.e. Exts. 1 to 7) do not inspire credibility. It is not shown that the experience certificates have been

issued following the official procedure. Further more, these certificates had not seen the light of the day till the second party workmen adduced evidence before this Tribunal. Further more, while the W.Ws. have claimed that their employment under the management commenced from 1-1-1986, in the experience certificate it is mentioned that the employment commenced with effect from the 1st April 1985. Though the certificates were issued on 1-6-1992, the age of the workmen mentioned in each of the certificate is in between 20-22. If it is believed that the workmen were within the age group of 20-22 as on 1-6-1992 then they were much below 18 years of age as on 1-4-1985, the data on which it is mentioned in the certificate that the employment commenced. It is not believable that at the age of 12 or 14 the workmen had entered into employment under the first party. For all these reasons the certificates are not taken into consideration. The management has exhibited Exts. A to E. All these documents do not appear to be relevant for the purpose of this case. Ext. A is an office order regarding absorption of N.M.Rs. working under the first party who had completed 400 days of work as on 1-9-1981 and 1-10-1986. It also contains the list of N.M.Rs. who were appointed as Helper under the said order. Ext. B is a list of N.M.Rs. who had completed 400 days of work as on 1-10-1986. The names of the second party workmen are not there in these lists as on their own evidence that their employment commenced from 1-1-1986. They had not completed 400days of work as on 1-10-1986. Ext. C and D are the letters relating to absorption of N.M.Rs. who had completed certain period of work on a given date. Ext. D reflects that there was instruction to furnish the names of N.M.Rs. who had completed 400 days of work as on 1-10-1991 in order to regularise them. This letter was issued on 17-10-1995. At the time of its issuance the second party workmen were kept out of employment. Otherwise, they had a chance to get their services regularised. It appears soon after issuance of this letter (Ext. D) the workmen raised this dispute. But the scope of this reference is limited to the legality and or justifiability of refusal of employment, Dt. 31-5-1992. No dispute is raised as to whether the workmen are to be regularised in terms of letter marked as Ext. D. Ext. E is a letter, Dt. 2-8-1983. But that letter was issued much prior to the commencement of employment of the second party workmen. Therefore, this letter cannot be made applicable to the workmen.

10. In the facts and circumstances, it is to be held that the workmen were denied employment with effect from the 31st May 1992 which is in contravention of Section 25-F of the Act. Therefore, it amounts to illegal retrenchment.

11. In Ashok Kumar Sharma *Vrs*. Oberoi Flight Services, AIR 2010 SC 502 it is observed that in the recent past Hon'ble Supreme Court have consistently taken the view that the relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given facts situation even though the termination of an employee is in contravention of the mandatory provision contained in the Act. In Jagdeep Singh *Vrs*. Haryana State Agricultural Marketing Board, AIR 2009 SC 3004, the award of reinstatement with full back wages, particularly in the case of daily wagers is not found to be proper and it was held that in such cases compensation may be awarded. It is also mentioned in the said reported judgment that an industry may not be compelled to pay the workman for the period during which he apparently contributed little or nothing at all to it.

12. In the case at hand, the workmen were not regular employees of the first party. W.Ws. have stated that the workmen were working as N.M.Rs. However, in the absence of any evidence to the contrary it would be held that they were in employment under the first pary for a period of little less then six and half years. It is also noticed that they failed to raise the dispute for a period of about three and half years. They have not adduced any evidence that they were not gainfully employed during the relevant period.

The management has contended that they were not given employment only because they did not reprot for duty. It is not the specific case of the management that in the present scenario there is no scope to engage the workmen as N.M.Rs. under the first party. Taking all these facts and circumstances into consideration, this Tribunal is of the considered view that the second party members may be reinstated without any back wages with an option that if both the parties agree then each of the workmen be paid a sum of Rs. 1,00,000 as compensation in lieu of reinstatement.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
17-3-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar

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17-3-2011
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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