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LABOUR & EMPLOYEES STATE INSURANCE DEPARTMENT

NOTIFICATION

The 3rd June 2013

No. 5191—li/1(B)-40/1999(Pt.)-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 15th April, 2013 in Industrial Dispute Case No. 23 of 2009 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the management of M/s Hotel Ashoka (A Unit of Shanti Combines Pvt. Ltd.), At Ice Factory Road, College Square, Cuttack and its workman Shri Bibhuti Bhusan Das was referred to for adjudication is hereby published as in the Schedule below :—

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 23 OF 2009

Dated the 15th April 2013

Present :

S. A. K. Z. Ahamed, O.S.J.S. (Jr. Branch)
Presiding Officer,
Labour Court,
Bhubaneswar.

Between :

The Managing Director,
M/s Hotel Ashoka (A unit of Shanti
Combines Pvt. Ltd.),
At Ice Factory Road,
College Square, Cuttack.

.. First Party—Management

And

Shri Bibhuti Bhusan Das,
S/o Late Bimal Charan Das,
At Firingi Bazar, P.O. Telenga Bazar,
Dist. Cuttack.

.. Second Party—Workman

Appearances :

Shri D. P. Nanda, Advocate and Associates	. . For the First Party—Management
Shri S. K. Das, Advocate	. . For the Second Party—Workman

AWARD

The Government of Odisha, in the Labour & Employment Department in exercise of powers conferred upon them by sub-section (5) of Section 12, read with Clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 have referred the following dispute to this Court for adjudication vide Order No. 8641—II/1(B)-40/2009-LE., dated the 16th September 2009 :—

"Whether the termination of services of Shri Bibhuti Bhusan Das by the management of M/s Hotel Ashoka (A unit of Shanti Combines Pvt. Ltd.), At Ice Factory Road, College Square, Cuttack with effect from the 18th August 2008 is legal and/or justified ? If not, to what relief the workman Shri Das is entitled ?"

2. The case of the workman, in brief, is that initially he joined under the management in the year 1980 as a Typist and subsequently on assessing his performance the management entrusted upon him the work of Office Assistant and thereafter engaged him as Accountant and lastly as Receptionist having the designation of Front Office Manager on a monthly salary of Rs. 1,036. It is averred in the claim statement that as Front Office Manager/Receptionist his main duty was to check the duty of the Reception Counter employees, allotment of shift duty, checking the occupancy and vacancy position, handling of cash counter and checking of restaurant bill, taking steps for advance booking of Hotel and depositing the amount in the Office Account. It is pleaded that being a regular employee he was subscribing to the E.P.F. and was covered under the E.S.I. Scheme. It is alleged that after rendering an unblemished service career for about 27 years, all of a sudden on 18-8-2008 the Managing Director of the management for no fault of his physically manhandled him on the road and abused him in filthy language for which he had lodged an F.I.R. before the Police and ultimately a G.R. Case was registered in the Court of the S.D.J.M., Cuttack. It is further alleged that upon such an incident he was not allowed to perform his duty in the Hotel on and from 18-8-2008 and according to him such refusal amounts to illegal termination of his service for non-compliance of the statutory provisions of the Industrial Disputes Act.

The further stand of the workman is that on his raising a complaint before the D.L.O., Cuttack regarding his illegal termination from service, the management issued him a letter alleging therein that he was absconding from employment with effect from the 18th August 2008 which was duly replied by him on the 3rd October 2008. It is pleaded that after illegally terminating his service the management has engaged another person to manage the work which was being done by him. The workman has pleaded that since he has no other source of income to maintain his livelihood he is leading a miserable life after his illegal termination from service. Under the circumstances the workman has prayed for his reinstatement in service with full back wages and other consequential benefits.

3. The management resisting the stand taken by the workman has filed its written statement. First of all it has taken the stand in its written statement that the reference is not maintainable owing to the fact that the second party was working under it as Front Office Manager and was discharging

managerial duties for which he is not a "workman" coming within the purview of Section 2(s) of the Industrial Disputes Act. Further ground raised by the management on maintainability of the reference is that the allegation of the workman being "refusal of employment", the "termination of service" indicated in the reference is contrary to the records available in the conciliation and that there being no allegation of dismissal/discharge of the workman, the reference made under Sections 10 (1), 12 (5), read with Section 2-A of the Industrial Disputes Act is not maintainable and as such the benefits of Section 25-F of the I. D. Act cannot be claimed in the present reference. Further ground raised on maintainability is that in absence of designation specified in the Schedule, the reference is not maintainable.

It transpires from the written statement that since on the allegation of the workman a criminal case is pending against the Managing Director of the management, the same cannot be raised in the present reference and the reference made ought to be answered as per the provisions of the I. D. Act.

With regard to the merit of the claim, it is pleaded in the written statement that as because the workman was found involved in serious financial irregularities he has been absconding from employment without any prior intimation, which can be termed to be an act of voluntary abandonment of job. Termination of service having not at all taken place, as alleged by the workman, the management has pleaded to answer the reference as against the second party disentitling him from any relief.

4. Basing on the pleadings, as aforesaid, the following five issues have been framed :—

ISSUES

- (i) Whether the reference is maintainable?
- (ii) Whether this Court has the jurisdiction to decide the present reference made by the Government ?
- (iii) Whether the employee is coming under the purview of Section 2(s) of the I.D. Act ?
- (iv) Whether the termination of services of Shri Bibhuti Bhusan Das, by the management of M/s Hotel Ashoka (A unit of Shanti Combines Pvt. Ltd.), At Ice Factory Road, College Square, Cuttack with effect from the 18th August 2008 is legal and/or justified ?
- (v) If not, to what relief the workman Shri Das is entitled ?

5. Both parties have adduced oral as well as documentary evidence to substantiate their respective stand. The workman examined himself as W.W. No. 1 and exhibited four documents as Exts. 1 to 4. On the other hand, the management examined its Accountant as M.W. No. 1 to be the sole witness on its behalf and filed and proved documents which have been marked as Exts. A and B.

FINDINGS

6. *Issue Nos. (i), (ii) and (iii)*—Issue Nos. (i), (ii) and (iii) being interlinked with each other are taken up for consideration simultaneously. Findings on issue Nos. (ii) and (iii) would automatically lead this Court to dispose of issue No. (i), which is on the question of maintainability of the reference.

The first objection raised on behalf of the management with regard to the maintainability of the reference is that the second party being not a "workman" this Court lacks jurisdiction to decide the present reference. In this connection, it is found admitted in the pleadings of the workman that at the time of alleged refusal of employment he was working as Front Office Manager and by taking advantage of that the management contends that the duties performed by him as Front Office Manager do not bring him within the purview of Section 2(s) of the Industrial Disputes Act. It being the settled principle of law that designation is not sufficient to determine the status of a person and that the duties performed by him would be the appropriate consideration to arrive at a right conclusion in the matter, it is necessary to discuss the evidence laid by the parties. It transpires from the materials available on record that although the management has vehemently opposed to the status of the second party but surprisingly it has not produced any documentary evidence indicating that the second party was discharging managerial functions under it, inasmuch as, he had absolute control over his subordinates in the matter of sanction of their leave; asking them explanations/ show cause for any dereliction in duty, initiating disciplinary proceedings against any errant employee, etc. As pleaded in the claim statement and in his deposition the duties performed by the second party while in the employment appear to be all clerical in nature and by no stretch of imagination it can be termed to be managerial or administrative in nature. Apart from it, it is admitted by M.W. No. 1 in his cross-examination at Paras. 3 and 4 that the Managing Director and General Manager were the reporting authority of the second party and everyday the latter was reporting to the General Manager. The assignments such as checking the duties of the Reception Counter employees, allotment of shift duty, checking occupation and vacancy position of the Hotel rooms and other reception connected duties of the second party being clerical in nature, it is not at all proper to exclude him from the definition of "workman". The dominant nature of duties of the second party is found to be clerical in nature and as such he is held to be a "workman" within the meaning of Section 2(s) of the Industrial Disputes Act. In the context, a decision of the Hon'ble Supreme Court reported in 1986(52) F.L.R.-19 (*Arkal Govind Raj Rao Vrs. Ciba Geigy of India Ltd.*) is well supported to the facts and circumstances of the present case.

7. The other ground raised on the question of maintainability on behalf of the management is with regard to the jurisdiction of the Court to adjudicate the present reference which has been made under Sections 10 (1) and 12 (5) read with Section 2-A of the Industrial Disputes Act. It is argued that there being no dismissal/discharge of the second party from service, the present reference is not maintainable. On a perusal of Section 2-A of the Industrial Disputes Act it is found that in enacting Section 2-A the intention of the Legislature was that an individual workman who was discharged, dismissed or retrenched or whose services were otherwise terminated should be given relief without its being necessary for relationship between employer and the whole body of employees being attracted to that dispute and the dispute becoming a generalised one between labourer on the one hand and the employer on the other.

Basing on the definition of Section 2-A now it becomes necessary to find out whether the services of the workman have been terminated by way of refusal of employment or, as pleaded by the management, he has left the job on his own accord, in other words he has voluntarily abandoned the job. To arrive at a conclusion on the point it is necessary to deal with the evidence adduced by both the parties.

The employment of the workman under the management from November 1980 till 17-8-2008 is not at all questioned. It is in the evidence of the workman that on 18-8-2008 there was an incident for which he had lodged a complaint against the Head of the Hotel, i.e., the Managing Director of the first party and basing on that complaint a Criminal Case was instituted. Ext. 1 is copy of such F.I.R. lodged before the Malgoldown Police Station. The workman asserts that although he reported to duty from 19-8-2008 onwards but he was not allowed to enter into the Hotel premises. The assertion of the workman is quite believable for the reasons to follow.

After the incident of 18-8-2008 the management remained silent over the matter and on 3-10-2008 it issued a notice (Ext. 3) to the workman alleging his absconding from employment and certain financial irregularities as well as non-handing over charge of official documents. No reason is assigned as to why it awaited for about one and half months to issue such notice to the workman. On the other hand, the records available disclose that such a course was adopted by the management to patch up its lacuna soon after the Labour Machinery took up conciliation, in other words to avoid the rigours of the provisions of the Industrial Disputes Act. Further, in reply to Ext. 3 the workman had sent a letter (Ext. 4) strongly opposing the notice Ext. 3 besides stating therein that the allegations indicated in Ext. 3 are all false and fabricated. For reason best known to it no step thereafter seems to have been taken by the management. If at all the workman was involved in any such financial irregularities and other alleged misconducts it is not understood as to why the management remained silent over the matter and did not chose to initiate any disciplinary action against the workman. All these circumstances and the incident that happened on 18-8-2008 when considered together constrains this Court to draw an inference that despite his reporting to duty the workman was refused employment by the management. The management by its aforesaid act has put an end to the employment of the workman and therefore it clearly comes under the definition of "retrenchment".

In view of the discussions made above, it is held that this Court has jurisdiction to adjudicate the present reference, the dispute being one well covered under Section 2-A of the Industrial Disputes Act. Accordingly the objection raised on this score by the management fails.

8. Keeping in view the findings arrived at on issue Nos. (ii) and (iii), the reference is held to be maintainable.

9. *Issue No. (iv)*—The employment of the second party under the first party since 1980 till 2008 has not been seriously disputed for which there is every reason to believe that he had rendered more than one year of continuous service under the management prior to his termination of service. In view of non-compliance of the provisions of Section 25-F of the I. D. Act by the management such termination/refusal of employment, which amounts to retrenchment, is not only illegal but also unjustified. Hence, issue No. (iv) is answered in favour of the second party workman.

10. *Issue No. (v)*—The action of the management having been held to be neither legal nor justified, the workman is entitled to some relief. It is seen that starting from the date of his initial engagement the workman has rendered satisfactory services under the management till he was ousted from employment. Taking into consideration the length of employment and the age of the second party (who is presently aged about 51 years), this Court considers it appropriate to grant him the relief of reinstatement in service with 50% of back wages. However, because of the strained

relationship between the parties if it is found to be not possible to implement the direction, as above, then the workman be paid a lump sum amount of Rs. 2,00,000 (Rupees two lakhs) only as compensation in lieu of his reinstatement and back wages.

The reference is answered accordingly.

Dictated and corrected by me.

S. A. K. Z. AHAMED
15-4-2013
Presiding Officer
Labour Court, Bhubaneswar

S. A. K. Z. AHAMED
15-4-2013
Presiding Officer
Labour Court, Bhubaneswar

By order of the Governor
J. DALANAYAK
Under-Secretary to Government