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LABOUR & E.S.I. DEPARTMENT

NOTIFICATION

The 26th June 2013

No. 5887—li/1(B)-55/2005-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 18th May 2013 in Industrial Dispute Case No. 48 of 2005 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the Management of (1) M/s Nicholas Piramal India Ltd., Nicholas Piramal Tower, Ganapatrao Kadam Marg, Lower Parel West, Mumbai-400013, (2) M/s Abbott Health Care Pvt. Ltd., 1st Floor, D. Mart Building, Goregaon Mulund Link Road, Mulund West, Mumbai-400080 and its Workman Shri Om Prakash Mohapatra was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE LABOUR COURT, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 48 OF 2005

Dated the 18th May 2013

Present :

S.A.K.Z. Ahamed, o.s.j.s. (Jr. Branch)
Presiding Officer,
Labour Court, Bhubaneswar.

Between :

The Managements of .. First Party—No.1
M/s Nicholas Piramal India Ltd.,
Nicholas Piramal Tower,
Ganapatrao Kadam Marg,
Lower Parel West,
Mumbai-400 013.

M/s Abbott Health Care Pvt. Ltd., .. First Party—No.2
1st Floor, D. Mart Building,
Goregaon Mulund Link Road,
Mulund West,
Mumbai-400 080.

And

Shri Om Prakash Mohapatra, . . . Second Party
 S/o Late P.K. Mohapatra,
 At/P.O.Jhanjirmangala,
 P.S. Purighat, Cuttack.

Appearances :

For the First Party No.1 . . . Shri Dilip B. Shelatkar, Authorised
 Representative.
 For the First Party No.2 . . . Shri S. K. Mishra, Authorised
 Representative.

 Shri Om Prakash Mohapatra . . . The Second Party 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 (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. 8765—li/1(B)-55/2005-LE., dated the 20th October 2005.

“Whether the termination of services by way of dismissal of Shri Om Prakash Mohapatra, Medicine Representative at Cuttack headquarters with effect from the 13th August 2004 by the management of M/s Nicholas Piramal India Ltd., Head Office at 17A ‘Sura’, 3rd Lane, Baliaghata, Kolkata is legal and/or justified ? If not, to what relief Shri Mohapatra is entitled ?”

2. The present dispute is between the management of M/s Nicholas Piramal India Ltd. (Whose name was subsequently change as Piramal Health Care Ltd.), first party No.1 and Shri Om Prakash Mohapatra, the second party. During pendency of the “lis” by way of a Business Transfer Agreement, the first party concern was taken over by M/s Abbott Health Care Pvt. and accordingly it has beenimpleaded as first party No.2 to the present dispute. All of them have filed their respective statements before this Court narrating their stand with regard to the present dispute.

3. The second party in the his claim statement has contended *inter alia* that initially he was appointed as a Medicine Representative under the management in the year 1987 and was subsequently confirmed and became a permanent member of the company with effect from the 1st January 1988. It is averred that although his employment under the management was treated as a sales promotion employee” and thus he was being treated as a workman for all purpose. He has stated that vide letter Dt. 30-7-2003 the management sent a proposal to all the Medicine Representatives to accept the post of Business Development Manager (BDM) which is a post of management cadre, to which he opposed by way of filing an affidavit before the management on 19-8-2004. It is alleged that when the matter stood thus he received a letter on 27-8-2004 wherein the management had written to have dismissed him from service with effect from the 13th August 2004 and had enclosed therewith certain unfounded allegations with one month’s wages. According

to the second party, his dismissal from service is illegal, in as much as, without affording him any opportunity of being heard in the matter and without following the procedures laid down under Section 25-F of the Industrial Disputes Act such an action was taken, which is neither legal nor justified. It is averred that although he made an appeal to the management to restore him in job but the same yielded no result. It is pleaded that since his dismissal amounts to termination of his service, he is entitled to reinstatement in employment with all back wages.

4. The first party No.1 filed written statement in the dispute stating that the reference in the present forum is not maintainable on the ground that as per the terms of conditions of the letter of appointment, which have been unequivocally accepted by the second party, this Court has no territorial jurisdiction to entertain and try the present dispute and the same shall be subject to Mumbai jurisdiction. The other ground on maintainability of the reference is that the nature of duty of the second party on the date of termination of employment being in the Managerial/Administrative Category and he was a Territory Business Manager, he is not a "Workman" within the meaning of Section 2(s) of the Industrial Disputes Act. It is also pleaded that even the second party was a Medicine Representative still he is also not covered under the Sales Promotion Employees (Conditions of Service) Act, 1976.

As regards the dismissal of the second party, the first party No.1 has taken the stands that for his furnishing false information regarding taking up tours in connection with visiting different doctors and thereby claiming and subsequently receiving emoluments for the same, the management had lost confidence in him and ultimately terminated him from service and as because he was in the managerial cadre, it was not incumbent upon it to conduct a domestic enquiry into the matter and thereafter proceed as per the provisions of the Industrial Disputes Act. The first party No.1 in the premises has prayed not to grant any relief in favour of the second party.

5. The first party No.2 has also filed its written statement in the present dispute. While stating that it is no way concerned with the present dispute, it has elaborated in its written statement that by virtue of a Business Transfer Agreement dated the 21st May 2010 it has taken over all the employees of first party No.1 who were in its roll as on 8-9-2010 and the services of the second party having been terminated much prior to that, it is in no way liable for the reliefs claimed by the second party as per the stipulations contained in the Business Transfer Agreement.

Regarding the maintainability of the reference as also merit of the dispute, it reveals that the first party No.2 has almost adopted the stand of the first party No.1 and has prayed to exonerate it from the dispute by disallowing the claim made by the second party as against it.

6. A rejoinder to the written statement has been filed by the second party denying the averments made by the managements in the written statements.

7. In terms of the reference, the following two issues have been settled in the proceeding.

ISSUES

- (i) "Whether the termination of services by way of dismissal of Shri Om Prakash Mohapatra, Medicine Representative at Cuttack headquarters with effect from the 13th August 2004 by the Management of M/s Nicholas Pirmal India Ltd. Head Office at 17A 'Sura', 3rd Lane, Baliaghata, Kolkata is legal or justified ?
- (ii) If not, to what relief Shri Mohapatra is entitled ?

8. Parties to the disputes have adducted oral as well as documentary evidence to support their respective stand. The second party has examined himself as W.W. No.1 and proved as many as six documents which have been marked Exts.1 to 6. On the contrary, M.W. Nos.1 and 2 have been examined on behalf of first party No.1 and one witness has been examined on behalf of first party No.2 as M.W.No.3. Documents marked A to H have been exhibited on behalf of both the first parties.

9. Though pleadings of the parties, particularly the averments made in the written statements reflect that the maintainability of the reference is the primary question to be decided, yet no issue seems to have been framed on that score. However, this Court considers it appropriate to deal with that aspect first instead of entering into the merit of the claim, which has been referred for adjudication.

10. It is specifically pleaded and argued on behalf of the managements that the reference is not maintainable before this forum and the Courts of law situated in the city of Bombay (Mumbai) have alone the jurisdiction to entertain any dispute that would arise relating to the terms and conditions of service of the second party. The managements advanced the aforesaid contention basing on the stipulations endorsed in the appointment order of the second party marked Ext.1. True it is that the second party after knowing the contents of Ext.1 and agreeing to the terms and conditions embodied therein has acknowledged the document on 21-11-1988. But, by accepting the terms relating to jurisdiction, it cannot be presumed that even after removal from service the second party (who is a permanent resident of the State of Odisha) by staying at Mumbai should have raised the dispute with regard to his termination from service. By the action of the management the second party ceased to be an employee under it with effect from the 13th August 2004 and thereafter he raised the dispute in the State of Odisha. So, keeping in view the legislative intention of the Government in enacting the Industrial Disputes Act, this Court finds that the objection raised on the question of maintainability on the ground of lack of jurisdiction of this Court to entertain the present reference is not tenable.

11. The other argument advanced on the question of maintainability is with regard to non-applicability of the provisions of the Industrial Disputes Act in favour of the second party owing to the fact that at the time of termination of his service the second party was borne in the managerial cadre. *Per contra*, it was contended on behalf of the second party that till his removal from employment he was continuing as a sales promotion employee doing the field work only and therefore he is clearly coming within the purview of Section 2(s) of the Industrial Disputes Act, in other words he being a "workman" was neither doing any managerial nor supervisory work under the managements. In view of the contradictory stand, it becomes necessary to discuss the evidence in detail so as to arrive at a right conclusion on this score.

Though in this evidence in chief the second party has stated that although he was being treated as a sales promotion employee but in Para.2 of his cross-examination he has admitted that at time of his dismissal from service he was working as Territory Business Manager. It is also found admitted by him in the said paragraph that Territory Business Manager is a change of designation of the Business Development Manager. Apart from the oral evidence, the document Ext.4 filed and proved on behalf of the second party also reflects that by the time of dismissal from service the second party was continuing as a Territory Business Manager under the management. The evidence further reveals that the medical representatives, after exercising their option become the Business Development Manager, and thereafter as a result of change of such designation they all became Territory Business Manager.

Referring to Ext.B, M.W. No. 2 has stated that the second party has accepted the letter, Ext.B and therefore he is not a workman. Ext.B reflects that the Business Development Manager is a post covered under the Management Cadre and Clause 7.11 of Appendix-II thereof discloses that the position of the second party was in the management cadre and having knowing it fully the second party had exercise his option and accepted it by signing the same on 4-8-2003. In this connection though the second party states that he was not furnished with the Annexures (Appendix-I & II) enclosed with Ext.3 but the same is not at all believable in view of his clear-cut admission in cross-examination that he had not lodged any complaint in writing regarding non-receipt of the enclosures of Ext. B. In view of the documentary evidence available in record showing clearly that the second party while in employment was enjoying all benefits applicable to the management cadre employees and further he having agreed not to claim any benefit available to the workman under the Industrial Disputes Act, 1947 or under any other Labour Legislations, this Court holds that he is not a “workman” coming within the purview of Section 2(s) of the Industrial Disputes Act.

12. Apart from what has been stated above there in, yet another aspect which needs discussion. The management in its argument has placed reliance on a decision of the Hon’ble Supreme Court reported in 1994 Supreme Court cases (I & S) (H. R. Adyanthaya and others *Versus* Sandoz (India) Ltd. and others) and contended that even assuming that the second party was a Medical Representative, i.e his primary post still also he is not covered under the definition of “workman”. On a perusal of the aforesaid decision of the Hon’ble Apex Court, this Court finds substantial force in the contention of the management. In the said decision the Hon’ble Supreme Court have held as follows :—

It was contended by Shri Sharma, appearing for the workmen that the definition of workman under the I.D. Act, includes all employees except those covered by the four exceptions to the said definition. His second contention was that in any case, the Medical Representatives perform duties of skilled and technical nature and, therefore, they are workmen within the meaning of the said definition. We are afraid that both these contentions are untenable in the light of the position of law discussed above. The first contention was expressly negated by two three Judge Benches in *May & Baker* and *Burmah Shell* cases as has been pointed out in detail above. As regards the second contention, it really consists of two sub-contentions, *viz.*, that the Medical Representatives are engaged in ‘skilled’ and ‘technical’ work. As regards the word ‘skilled’, we are of the view that the connotation of the said word in the context in which it is used, will not include the work of a sales promotion employee such as the medical representative in the present case. That word has to be construed *ejusdem generis* and thus construed, would mean skilled work whether manual or non-manual, which is of a genre of the other types of work mentioned in the definition. The work of promotion of sales of the product or services of the establishment is distinct from and independent of the types of work covered by the said definition. Hence the contention that the Medical Representatives were employed to do skilled work within the meaning of the said definition, has to be rejected. as regards the ‘technical’ nature of their work, it has been expressly rejected by this Court in *Burmah Shell* case. Hence that contention has also to be rejected.

In view of the dictum of the Hon'ble Supreme Court, as quoted above, even if the second party is held to be a Medical Representative, still he cannot be held to be a "Workman".

13. In the result, this Court is of the view that as the second party was an employee of the management cadre and was discharging Managerial/Administrative functions being designated as BDM/TBM and more so he has admitted the same through documents, referred to above, he is not a workman coming within the purview of I. D. Act.

14. Now coming to the question of legality and justifiability of the order of dismissal of the second party, it is found admitted by the managements that neither any enquiry was conducted against the second party for dereliction of duty nor any terminal benefit was extended in his favour as per the provisions of the Industrial Disputes Act. It is asserted that the dismissal of the second party was as a result of his poor performance and furnishing false information to the employer in connection with his undertaking tours to visit different doctors at different times and when the aforesaid instances came to light the management issued an order of dismissal in favour of the second party strictly adhering to the terms and conditions of employment applicable for the BDM/TBM. Though the dismissal of the second party appears to have been effected in gross violation of the principles of natural justice but in view of the finding that he is not a workman covered under the Industrial Disputes Act, such dismissal cannot be held to be either illegal or unjustified.

15. The discussions in the preceding paragraphs therefore lead this Court to conclude that the second party is not entitled to any relief in the present proceeding.

The reference is answered accordingly.

Dictated and corrected by me.

S. A. K.Z. AHAMED
18-5-2013
Presiding Officer
Labour Court, Bhubaneswar

S. A. K.Z. AHAMED
18-5-2013
Presiding Officer
Labour Court, Bhubaneswar

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