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LABOUR & E. S. I. DEPARTMENT

NOTIFICATION

The 28th January 2014

No. 648—li/I (B)-11/2009-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 17th December 2013 in Industrial Dispute Case No. 10 of 2009 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of A.G.M. (Executive Engineer), Khurda Electrical Division, CESU, Khurda and their workmen Shri Purna Chandra Rath and B.B. Arisal was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR
INDUSTRIAL DISPUTE CASE NO. 10 OF 2009
Dated the 17th December 2013

Present :

Shri P. K. Ray, O.S.J.S. (Sr. Branch),
Presiding Officer, Industrial Tribunal,
Bhubaneswar.

Between :

The Management of
A.G.M. (Executive Engineer),
Khurda Electrical Division,
CESU, Khurda. . . First Party—Management

And

Their workmen
Shri Purna Chandra Rath,
and B.B. Arisal,
C/o Working President,
O.S.E.B. Shramik Mahasangha,
302/B, Nayapalli,
Bhubaneswar-12. . . Second Party—Workmen

Appearances :

For the First Party—Management	. .	Shri R. N. Acharya, Advocate
For the Second Party—Workmen	. .	Shri Sushant Dash, Advocate

AWARD

This case has been taken up for hearing on remand by the Hon'ble High Court in W.P. (c) No. 2156 of 2011 after giving opportunity to the parties to adduce further evidence in the case.

2. This case which has been instituted on a reference by the Government of Odisha in the Labour & Employment Department vide their Order No.5697—Ii-(B)/1(B)-11/2009-LE., dated the 29th June 2009 on the schedule as to "Whether the termination/retrenchment of Shri Purna Chandra Rath and B. B. Arisal, N.M.R. workers by the Management of A.G.M. (Executive Engineer), K.E.D., CESU, Khurda with effect from the 1st April 1995 are legal and/or justified ? If not, what relief to Shri Rath and Shri Arisal are entitled" ? which was disposed of by this Tribunal on 11-10-2010.

3. The case of the second party workmen is that they were engaged as NMR workers under the first party management with effect from the 11th January 1987 and discharging their duties under the direct control and supervision of the Junior Engineer, Electrical, Jankia and Malipada sections under the Electrical Subdivision, Jankia and Executive Engineer, Khurda Electrical Division under the erstwhile OSEB which was subsequently renamed as GRIDCO and presently under the CESU. The wages of the second party workmen were paid by the first party management as per rates prevailing at different times and lastly they were drawing wages @ Rs. 780 per month. Each of the workmen has discharged his duties continuously for a period of 240 working days in the preceding years. But, contrary to the stipulations contained under Section 25-F of the Industrial Disputes Act which is applicable to the first party management it illegally refused them employment with effect from 1-4-1995. Being aggrieved by such illegal action the second party workmen made representation to the Executive Engineer, Khurda Electrical Division. Since there was no response from him finding no other alternative they raised the present dispute before the Assistant Labour Officer, Khurda to set aside the illegal termination and to reinstate them in service with full back wages.

4. The first party management in its written statement challenging the maintainability of the case on the point of limitation has stated that at the time of their so called engagement from 11-1-1987 to 31-3-1995 the first party management was under the control of OSEB but in the meantime the management has been changed from OSEB to GRIDCO and then CESU. Further it has stated that the second party workmen had been engaged for construction and erection of electric line when it was so required. They had not been engaged continuously for 240 days in a calendar year. No Muster Roll was maintained for such type of workers who were engaged on daily need basis. The disputant workmen were never recruited nor terminated. Their nature of work being casual one such engagement was over on completion of the work for which they were engaged. The workmen were not NMR workers nor paid wages on NMR Muster Roll. Their disengagement comes within the purview of Section 2(oo) (bb) of the Industrial Disputes Act, 1947. Therefore, they are not entitled to any compensation as claimed under Section 25-F of the Industrial Disputes Act.

5. In the aforesaid premises, the issues framed in this case are as follows:—

ISSUES

(i) "Whether the termination/retrenchment of Shri Purna Chandra Rath and B.B. Arisal, N.M.R. workers by the management of A.G.M. (Executive Engineer), K.E.D., CESU, Khurda with effectt from the 1st April 1995 are legal and/or justified ?

(ii) If not, what relief Shri Rath and Shri Arisal are entitled to" ?

Additional Issue

1. Whether the reference is maintainable ?

6. In support of their respective case the second party workmen in addition to three witnesses and documents filed marked Exts. 1 to 10 admitted earlier examined one more witness as W.W. No. 4. Similarly, the first party management examined one more witness i.e. M.W. No.2 in addition to one witness examined as M.W. No.1 and documents filed marked Exts.A and B earlier.

FINDINGS

Additional Issue No.1

7.The first party management has challenged the reference on the ground of delay. The stand of the first party management is that the cause of action arose on 1-4-1995 and the second party workmen have raised the dispute at a belated stage in July, 2007, i.e. after lapse of more than twelve years. On perusal of the record it is found that the reference discloses the complaint to have been lodged on 19-7-2007 but at the same time on behalf of the second party workmen a copy of the application (Ext.4) made to the A.L.O., Kurda, Dt. 31-10-1997 has been filed and due to failure of the labour machinery to take any action on such complaint the second party workmen ventilated their grievance before the Chief Minister Grievance Cell vide Ext.5. In the case of Kuldeep Singh *Vrs.* G.M., Instrument Design Development & Facilities Centre & Another, reported in AIR 2011(SC) 455, the Hon'ble Supreme Court has observed as follows:

> *"There is no prescribed time limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is more so in view of the language used, namely, if any industrial dispute exists or is apprehended, the appropriate Government "at any time" refer the dispute to a Board or Court for enquiry. The reference sought for by the workman cannot be said to be delayed or suffering from a lapse when law does not prescribe any period of limitation for raising a dispute under Section 10 of the Act. The real test for making a reference is whether at the time of the reference dispute exists or not and when it is made it is presumed that the State Government is satisfied with the ingredients of the provision, hence the Labour Court cannot go behind the reference. It is not open to the Government to go into the merit of the dispute concerned and once it is found that an industrial dispute exists then it is incumbent on the part of the Government to make a reference. It cannot itself decide the merit of the dispute and it is for the appropriate Court or Forum to decide the same. The satisfaction of the appropriate authority in the matter of making reference under Section 10(1) of the Act is a subjective satisfaction. Normally, the Government cannot decline to make reference for latches committed by the workman. If*

adequate reasons are shown, the Government is bound to refer the dispute to the appropriate Court or Forum for adjudication. Even though, there is no limitation prescribe for reference of dispute to the Labour Court/Industial Tribunal, even so, it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly, when disputes relate to discharge of workman. If sufficient materials are not put forth for the enormous delay, it would certainly be fatal".

In the case of Karan Singh *Vrs.* M/s. Executive Engineer, Haryana State Marketing Board (2007) 14 SCC 291, the Hon'ble Supreme Court has held as follows:—

"The Industrial Tribunal under section 10 gets its jurisdiction to decide an industrial dispute only upon a reference by the appropriagte Government. The Industrial Tribunal cannot invalidate the reference on the ground of delay. If the employer says that the workman has made a stale claim then the employer must challenge the reference by way of write petition and say that since the claim is belated, there was no industrial dispute. The Industrial Tribunal cannot strike the reference on this ground."

In view of the aforesaid principle decided by the Hon'ble Supreme Court more so in the case in hand when the second party workmen have lodged complaint in the year 1997 they are not at fault for such delay. Even if in case of delay when the Hon'ble Supreme Court has observed that Section 10 of the Industrial Disputes Act gives jurisdiction to decide an industrial dispute only on a reference by the appropriate Government, there is no scope for this Tribunal to repeat the same on the ground of delay. Therefore, in the aforesaid circumstances the stand of the first party management that the claim of the second party workmen is not maintainable because of their latches regarding delay deserves no consideration.

8. *Issue No. (i)*—In this case there is no dispute that the second party workmen have been engaged with effect from the 11th January 1987 till 1st April 1995 as workmen within the purview of the definition under Section 2(s) of the Industrial Disputes Act. When the second party workmen claim that they were engaged as NMR workers during the said period and discharging their duties continuously for 240 working days in the preceding calendar years, the stand of the first party management is that they were engaged as casual labourers as and when required but they have not discharged their duties continuously for a period of 240 days in the preceding year and no Muster Roll was maintained for their engagement. On perusal of record I find that on the petition filed by the second party workmen for production of the Muster Roll of NMRs the first party management took the plea of non-availability of the said record and probability of being damaged during the period of super cyclone. When no pleading or sufficient evidence has been led to the effect that during the supre cyclone the records of the said office are damaged, such isolated stand is not acceptable and adverse inference is bound to be drawn against the first party management on the same.

In the case of Director, Fisheries Teminal Division *Vrs.* Bhikubhai Meghajibhai Chavda, reported in AIR 2010 (SC) 1236 it has been held that "a workman would have difficulty in having access to all the official documents, muster rolls, etc. in connection with his service, he has come forward and deposed, so in our opinion the burden of proof shifts to the employer/appellants to prove that he did not complete 240 days of service in the requisite period to constitute continuous service."

In the case of R.M. Yellatty *Vrs.* Assistant Executive Engineer, reported in (2006) 1 SCC 106, the Hon'ble Supreme Court has held as follows :

> *"However, applying general principles and on reading the aforesaid judgments, we find that this Court, has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping up in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment of termination. There will also be no receipt of proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment of termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case."*

9. In view of the aforesaid principle decided by the Hon'ble Supreme Court it is the obligation on the part of the first party management to substantiate that the second party workmen have not been engaged continuously for a period of 240 days in the preceding year. In the absence of such evidence on record, rather for the attempt of the first party management to shift the responsibility to the second party workman, there is no scope for this Tribunal than to presume that the second party workmen had been engaged under the first party management for a period of 240 days continuously in the preceding calendar year. In the aforesaid circumstances, the undisputed position being that the first party management is an "industry" and the second party membes are "workmen", their disengagement requires compliance of the provisions of Section 25-F of the Industrial Disputes Act. Section 25-F of the Industrial Disputes Act envisages as follows :—

> *"No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—*
>
> *(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;*
>
> *(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and*
>
> *(c) notice in the prescribed manner is served on the appropriate Government (or such authority as may be specified by the appropriate Government by notification in the official Gazette)."*

There is no dispute that the first party management has not complied the provisions of Section 25-F of the Industrial Disputes Act at the time of disengagement of the second party workmen. Therefore, their disengagement in violatiion of Section 25-F of the Industrial Disputes Act is bad in law.

10. *Issue No.(ii)*—In view of the findings on Issue Nos.(i) and (iii), the disengagement of the second party workmen being illegal, they are entitled to be reinstated in their former post. However, since the second party workmen have not done any duties in the meantime they are not entitled to any back wages.

The reference is answered accordingly.

Dictated and corrected by me.

P. K. RAY
17-12-2013
Presiding Officer
Industrial Tribunal
Bhubaneswar

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17-12-2013
Presiding Officer
Industrial Tribunal
Bhubaneswar

By order of the Governor
N. BEHERA
Under-Secretary to Government

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