# The Odisha Gazette

**EXTRAORDINARY**

**PUBLISHED BY AUTHORITY**

**No. 738 CUTTACK, TUESDAY, APRIL 4, 2023/CHAITRA 14, 1945**

**LABOUR & E.S.I. DEPARTMENT**

NOTIFICATION

The 28th March 2023

**S. R. O. No. 160**/2023. —In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the award dated the 14th March 2023 passed in the I.D. Case No. 35 of 2019 by the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Institute of Medical Science & Sum Hospital, Ghatikia, Khandagiri, Bhubaneswar and Shri Biswanath Behera, S/o Bihari Behera, Vill. Baligaon, Saraswatipur, Balanga, Dist. Puri was referred to for adjudication is hereby published as in the schedule below :—

SCHEDULE

BEFORE THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 35 OF 2019

Dated the 14th March 2023

*Present :*

Shri Hiranmaya Bisoi, LLM.,
Presiding Officer,
Industrial Tribunal,
Bhubaneswar.

*Between :*

The Management of
M/s Institute of Medical Science & Sum Hospital,
Ghatikia, Khandagiri, Bhubaneswar. . . First Party—Management

And

Shri Biswanath Behera,
S/o Bihari Behera,
Vill. Baligaon, Saraswatipur,
Balanga, Dist. Puri. . . Second Party—Workman

*Appearances :*

| | | |
|---|---|---|
| Subrat Mishra, Advocate. | . . | For the 1st Party—Management |
| Shri S. S. Pati, Advocate. | . . | For the 2nd Party—Workman |
| Date of Argument | . . | 27th February 2023 |
| Date of Award | . . | 14th March 2023 |

AWARD

Non-employment of second party by way of termination from the job with effect from the 18th July 2018 has flared up the present industrial dispute.

2. No sooner did the termination take place from the side of first party than a written complaint was lodged before the Conciliation Officer-*cum*-ALO, Bhubaneswar to make the conciliation proceeding underway. Nevertheless, no providential resolution seemed to have come out from the said conciliation; resultantly a failure report was submitted by the Conciliation Officer to get the present dispute referred according to law.

3. Accordingly, the Government of Odisha in the Labour and E.S.I. Department, in exercise of powers conferred upon it by sub-section (5) of Section 12 read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act,1947 (for short 'the Act') have referred the following schedule of dispute for adjudication by this Tribunal vide Order No.IR(ID)43/2019/5963/LESI., dated the 15th October 2019 :—

SCHEDULE

> "Whether the action of the management of M/s.Institute of Medical Science & Sum Hospital, At: Ghatikia, P.S.Khandagiri, Bhubaneswar, Dist: Khorda in terminating the service of Sri Biswanath Behera, Ex-workman with effect form 18th July 2018 is legal and/or justified ? If not, what relief Shri Biswanath Behera is entitled to ?"

4. Concisely stated the statement of claim is that the second party claimed to be appointed as Blood Bank Technician under the first party-management vide Office Order No. Sum/appoint/HR/148/18 dated the 1st February 2018 with a monthly salary of Rs. 14,000. The principal duty of the second party stated to be performed Blood Grouping, Cross Matching etc., for incessant supply of blood to the Blood Bank under the control of first party. During course of employment, he was allegedly subjected to casteist remark and demand of bribe. It was the case of the second party that on the 18th July 2018 he was illegally terminated from his duty without any rhyme and reason. Neither any notice nor show-cause was invited prior to giving him the elbow. Moreover, it was vitriolically alleged that no retrenchment notice, EPF and ESI benefits were given to the second party workman. Hence he claims for the relief of reinstatement along with full back wages and other service benefits.

5. Having received the notice the first party management caused its appearance through Advocate and filed written counter to the statement of claim.

It was specifically pleaded by the first party that the proceeding is not maintainable as framed; there was no cause of action; the permission for initiation of criminal proceeding against the first party over the assault on a scheduled caste member uuder section 3 ST/SC(POA) Act is a peculiar relief, as such foreign to the scope of the reference; the 2nd party raised the present dispute having no locus standi as he was a probationary workman and the service was terminated within the

probationary period. The second party found to have categorically admitted the fact of his appointment as Blood Bank Technician with certain remuneration and termination from his service. It was the case of the first party that the disputant terminated from service primarily because of loss of confidence, inefficiency, involved in misconduct and did some acts detrimental to the best interest of first party organization. On receipt of serious complaint from the patients in neglecting the duty in various forms called for explanations and let off with warning facilitating to change of his attitude and behaviour, but to no effect. Lastly, when the first party management felt it proper the service of the second party to be no way beneficial, interest of the patient, terminated him from service. So far as assertions made in Para-1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are concerned, the answering party denied the same more or less and put the other party strict proof of the facts. Ultimately, the first party prayed to answer the reference negatively.

6. A rejoinder was filed by the 2nd party denying the most part of the assertions made in the WS.

7. The material propositions as pleaded by both parties led this Tribunal to frame as many as two issues to answer the reference :—

ISSUES

*"(i)* Whether the action of the management of M/s Institute of Medical Science & Sum Hospital, At: Ghatikia, P.S.Khandagiri, Bhubaneswar, Dist: Khorda in terminating the service of Shri Biswanath Behera, Ex-workman with effect form the 18th July 2018 is legal and/or justified ?

*(ii)* If not, what relief Shri Biswanath Behera is entitled to ?"

8. In order to substantiate the rival claims, one witness each from either side was pressed into service and examined as WW.No.1 and M.W.No.1 respectively. Over and above, the workman cited three documentary evidence and four documents were relied on by its counterpart.

9. The principal question that has been involved as per the schedule of reference is over the legality of the action of the first party management in terminating the service of the second party with effect from the 18th July 2018. The very languages employed in the order of reference are self-suggestive of the fact that the workman has already been terminated by the management regardless to the fact that the same is legal or illegal. Therefore, there remains only triable issue over the legality of such termination which can be well adjudicated *vis-a-vis* the collateral issues such as nature of service, reason of termination and other factors raised by both parties to the dispute.

10. There is no denial of fact that the second party got appointed under the first party-management as a Blood Bank Technician with a monthly salary of Rs. 14,000. WW.No.1 deposed that even though he joined on the 1st February 2018 as Laboratory Technician in Sum Hospital, yet no appointment letter was issued to him. It further stated that he worked sincerely and neither any adverse remark nor any memo was issued against him attributing any act of misconduct. In support of the above supposition, there is no evidence on record but it specifically relied on Identity Card, Original Pass Book of Punjab National Bank, the copy of written representation dated the 26th July 2018 made before DLO, Khurda and marked as Exts.1, 2 and Ext.3 respectively without any objection from the other side. The very reliance of the documentary evidence by second party could not get the better of in proving a blot free service career, rather it irresistibly proved employer-employee relationship between parties to the dispute and a systematic activity of a phlebotomist is to satisfying the want of Patient under treatment. Therefore, this Tribunal is of opinion that the issues of industry,

employer-employee relationship and existence of industrial dispute are in beyond question when Ext.1, Ext.2 and Ext.3 are considered in proper prospect.

10.1. It was asserted by the 2nd party that the employer and employee relationship came to an end when the employer illegally terminated the present workman. The question of illegal termination can be regarded as a material consideration only when the employee proves its case of within the scope of retrenchment as defined under Section 2 (oo) of the Industrial Dispute Act (here in after called the Act). As a rule, the initial burden is on the workman to prove that the termination of service falls within the definition of retrenchment. Once the burden of workman is discharged, duty of the employer to prove that the order of termination is justified because it is its positive action and most of evidence must be available with it.

10.2. No doubt the oral and documentary evidence as produced by the 2nd party visibly secured the proof of his employment and termination from service by the action of the 1st party. In order to prove the positive action, MW No.1 deposed that the second party was not sincere and not discharging his duties properly for which he was warned by the first party management. In support of the above assertion it relied on Exts. B, C and D and assumes sufficient corroboration from the pleadings of the first party. However, during the proceeding second party raised objection over the marking of these documents to be of photocopies having no proof of acknowledgement of second party. No effort whatsoever was made by the first party to produce any original documents to dispel the objection as raised by the adversary. Now, the sole question is as to whether these documents can be read in support of the defence raised by the first party management. On the basis of the evidence on record, it was argued by the counsel appearing for the 2nd party that no appointment letter was issued at the time of appointment ; Ext.A was not served to him at any point of time and contents of the above document stated to be silent over any representation made by the workman; Ext.B and Ext.C did not bear any acknowledgement; The copy of appointment letter found to have issued to president and service conditions are stipulated as per bye law of Shiksha O Anusandhan; Ext.A did not speak about Ext.B, show cause dated the 4th May 2018 relating to negligence in duty of workman whereas copy of Ext.B was issued to HOD, Transfusion & Medicine Department, Sum Hospital. Therefore, the documentary evidence was not properly proved by the Management. On the other hand, learned counsel for the 1st party-management submitted that WW.1 fairly conceded that he had not specifically pleaded in his statement of claim these documents to have not supplied with relating to his appointment and MW.1 being the Medical Superintendent of 1st party-management hospital duly proved the documents, so there is no legal impediment to read these documents against the workman.

10.3. In light of submission made by counsels of party in the backdrop of theirs evidence, the Tribunal is of opinion that admittedly Exts.A, B and D do not bear any acknowledgement of the second party, so it can safely be inferred that no copies of said document were served on the second party who has been affected by the action of management as per Ext.C. However, on close scrutiny of Ext.A, it reveals that it is an Office Order No.Sum/Appointment/IMS/148/18 dated the 1st February 2018 which seems more likely to be a communique passed by Medical Superintendent of the 1st party than an appointment letter as alleged by the 2nd party. Regard being had to the nature of document; it appears to be not such type appointment as the 2nd party expects to be ordinarily issued to a person in employment. Therefore, non-supply of copy to the 2nd party does not *ex-facie* invalidate Ext.A. Similarly, Ext.B is a copy of letter issued to the second party on the 4th May 2018 questioning the performance of duty of the second party as a Blood Bank Technician. The allegation contained in the said document is that the second party was sleeping during night duty shift, did not

respond to phone calls from Wards and ICU etc. and a warning was given him to be more careful to his duty as a Blood Bank Technician. Ext.D is an internal administrative letter issued on the 12th July 2018 by Dr. B.Pati to Medical Superintendent, IMS Sum Hospital, Bhubaneswar over the complaint of gross delay in service in Blood Bank to the SR on duty and suggestion was made to withdraw his service from the Blood Bank. Ext.C is the Office Order issued on the 17th July 2018 for termination of the second party on the basis of Exts.B and D.

10.4. On careful scrutiny of the documents, admittedly, there is no evidence on record showing proof of any acknowledgement of the 2nd party. But, during course of cross-examination of W.W. No.1, it ingenuously admitted to have not specifically pleaded in his statement of claim over the supply of objected documents relating to the appointment. Nor did it make any endeavor to cause production of any other documents from the custody of the Management in support of its objection. Not having followed the proper procedure, it went on objecting the documents on the ground of xerox copy and specifically relied on a reported judgment of Hon'ble Madras High Court in the case of D.Suganthi Vrs. PO, CGIT-*cum*-Labour Court and others. On careful examination of the above reported judgment, it can be distinguishable as the management has not only filed xerox copy of objected documents but also adduced oral evidence. When the matter stood like thus, the 2nd party strongly alleged that MW. 1 was not an authorized person on behalf of the 1st party, yet the evidence on record stands differently especially when a reference is made to the evidence of management. During course of proceeding MW.1 deposed in no uncertain terms that he was authorized to depose by the Management. So taking into account the evidence, a Medical Superintendent of the 1st party hospital, who happens to be an author of Ext.A and Ext.C, can be considered to be a competent person to answer all material questions connected with the present dispute, hence the authority of MW. No. 1 cannot be a called in question here. Once the objected documents were not asked for supply, not specifically pleaded in his statement of claim and these documents have been prepared and existed prior to the raising of dispute and relied on all through the caucus of conciliation proceeding, the objection over the documents of management in the later stage is found to be impromptu. In view of above analysis, the objection over these documents made in Rejoinder and during adjudication of proceeding does not hold much water to take any contrary view over the documentary evidence and the same can be read as evidence.

11. It was specifically urged by the counsel appearing for the 1st party-management that the disputant was not sincere and not discharging his duty properly for which he was warned by the management, failed to establish that the management had assured him to pay Rs. 18,000 per month towards salary at the time of appointment so also the demand of bribe Rs. 70,000 by the management. Thus, the action of the management in terminating service of the workman with effect form the 18th July 2018 was legal and justified. On the contrary, the counsel for the 2nd party made a counter argument that there was requirement of Laboratory Technician (L.T.) post and he was rendering independent service but not under probation. No detail enquiry was made by the Management prior to termination relating to the allegation made by the HOD, Transfusion & Medicine Department, Sum Hospital; Ext.D suggested future appointment of one L.T. by removing workman Mr. Behera. The workman worked continuously from the 1st February 2018 to 17th July 2018 and the termination was made without giving any notice, explanation and enquiry of alleged misconduct, hence the principle of natural justice had not been followed. So, the workman illegally terminated from his job as such is entitled to the reliefs made in the statement claim.

11.1. Having considered the submission of parties and their supportive evidence, it revealed from the pleading of MW.1 and Ext.A that the service of 2nd party stated to be on probation for one

year and subject to rules and regulations of the 1st party organization. In view of the above, it would be worthy of noting that the probation is mostly a performance related affairs of an establishment and can be no way relatable with termination of job until and unless there is no express provision of confirmation of service. Speaking to this aspect MW.1 stated that the job of 2nd party was independent in nature and not subject to probation under anyone. On careful reading of Ext.A, Ext.C and evidence of MW.1, if the 2nd party was treated to be a probationer then sole liability of the alleged negligence could not be fixed on the second party considering dependency of service, therefore, the theory of probation as advance by the 1st party proved to be a weak link and could not be established in the present case. It is stipulated in Ext.A that the employer reserves the right to terminate the service without notice as per particular circumstance contained therein. Surprising enough the 2nd party put a serious question to MW.1 who answered in paragraph No. 23 of his cross-examination that the 2nd party was not submitting timely blood cross-matching report of various patients which gets corroborated with the reason of termination. Once this fact was stumbled upon by authority of 1st party in ordinary course of duty of the 2nd party, it is considered to be no less than a negligence of duty in so far as the nature of activities carried on by 1st party hospital thereby the stipulation clause mentioned in Ext.A gets attracted to rescind the contract of employment, if any.

11.2. On the other hand, it appears from the pleading of 2nd party and evidence of WW.No.1 that there were derisive circumstances of demand of bribe and less payment of wages. Even if WW No.1 adduced in his examination-in-chief in the line of its pleading yet no credence can be given over the alleged extraneous circumstances as deposed by the witness without having any supportive materials on record, as such the same are not proved and adjudged the aspects beyond the scope of reference. Coming to the legality of action of the Management, MW.No.1 admitted in cross-examination that he had not made any detail enquiry after receiving the complaint against the second party workman and he did not have any direct knowledge regarding the report submitted by Dr.Pati. By putting these questions to M.W.No.1, the 2nd party somehow or the other admitted to the existence of preponderance circumstance against him, therefore, the chance of manufacturing any document in consideration of this Tribunal appears to be far- fetched. But it does not necessarily follow that the action of the first party regarded to be right.

11.3. It was argued by the counsel appearing for the 2nd party that neither any notice was served nor did any explanation call for thereby violated the principle of natural justice. On the other hand, learned counsel appearing for the first party withstood the submission on the ground that the 2nd party was a probationer, negligent in its duty and he had not completed 240 days work under the Management, therefore, it was not obliged to comply any statutory compliance. In view of above, the Tribunal is of considered opinion that it is settled principle of law reported in Dinesh Bhai Dhundabhai Patel *Vrs.* State of Gujurat (Civil Appeal No.11518 of 2020-Gujurat High Court) that the employer is not allowed to hire and fire even if the employee, may be *ad hoc* or probationer, and his services cannot be given a go-bye by one stroke of pen on the ground of misconduct by casting stigma, without holding a regular inquiry in accordance with the principles of natural justice. The view of the Gujurat High Court is based on the observation of the Hon'ble Apex Court in the case of Union of India *Vrs.* Madhusudan Prasad —(2004) SCC 43. In a reported case of M/s Scooters India Ltd. *Vrs.* M.Mohammed Yakub and another the Hon'ble Apex Court held that there could not be any automatic termination even if there is clear violation of any terms and conditions. The principles of natural justice shall have to be followed in all circumstances.

11.4. Nonetheless, these principles are very much determinative factor as and when the facts and circumstances of punitive termination of service as a measure of punishment inflicted by

way of disciplinary action or an employee of permanent nature of service. On close examination of documentary and oral evidence of the Management, it does not appeal to common sense to believe a permanent nature of service of the 2nd party for the obvious reason that Ext.A clearly stipulated clause when the service is terminable without notice and the 1st party reserves a right to terminate the service without notice in case of loss of confidence, inefficiency detrimental to the image and interests of its organization. No documentary evidence has been filed before the Tribunal by either party to the dispute to show that the services of the 2nd party had ever been confirmed under the 1st party-management or permanent nature of service. On the contrary, the documentary evidence proved that employer entitled to bring an employment to an end after expiry of two years period by giving notice. However, it is the case of the 1st party that during his employment, the employee was warned in the month of May 2018 for negligence of duty as the Blood Bank is a sensitive area and Ext.C clearly disclosed that services of Shri Biswanath Behera is terminated forth with in view of his gross negligence in duty, loss of confidence and deeds detrimental to the image and interest of institution IMS & Sum Hospital, Siksha O Anusndhan. It does not expressly indicate that the termination of services for any particular other misconduct of the employee. Once stipulated supervening circumstance mentioned in Ext.A takes place, there is no occasion to believe any illegal exercise of right on the part of employer to put an end of employer and employee relationship. Considering the nature of action, neither it can be said the action of employer to be of punitive nor a stigmatic rather it is case of termination simplicitor in terms of Ext.A. The above findings is very much supported from a reported judgment of Birla VXL Ltd. *Vrs.* State of Punjab & others reported in AIR 1999 SC 561). In such circumstance, it is not expected to follow the procedure of any domestic enquiry, as such the impugned termination does not smack of any violation of natural justice.

12. Now an atypical question that falls for adjudication that whether the 2nd party is entitled to any statuary notice and compliance of 25-F of the Act. Admittedly, there is no compliance of 25-F of the Act at the time of termination. It was stoutly argued by the counsel appearing for the 1st party that the 2nd party had not completed 240 days of continuous services within twelve calendar months preceding to the date of his termination, therefore, the management is not under obligation to comply the provisions of ID Act at the time of termination. In support of the argument, the pleading and evidence of W.W.No.1 go to show that he joined on the 1st February 2018 and terminated on the 17th July 2018. In this scenario, whether he is entitled to receive any one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or paid notice pay in lieu of such notice and retrenchment compensation.

12.1. In this view of matter, the counsel empathetically urged that had the workman not illegally terminated from his services, he would have been continued in service and when the termination of workman by itself illegal, there is no question of applicability of 25-B of the Act. No authoritative principle or provision of law was relied on by the counsel for the 2nd party to substantiate the argument. On the contrary, it was consistent case of the 1st party-management that the second party had not been worked 240 days in previous calendar months. On careful consideration of the evidence and submission of the parties, the Tribunal is of opinion that the Section 25-F of the Act is mandatory and burden of proof of continuous 240 days service lies on the employee but not on the employer. In case of Chief Engineer, Ranjit Sagar Dam & Anr. *Vrs.* Sham Lal, 2006 III LLJ 326. It has been held in Mohan Lal *Vrs.* Management of M/s. Bharat Electronics Ltd reported in 1981 SCR (3) 518 that the workman should be in service for a period of one year. If he is in service for a period of one year and that if that service is continuous service within the meaning of sub-section (1) his

case would be governed by sub-section (1) and his case need not be covered by sub-section (2). sub-section (2) envisages a situation not governed by sub-section (1) and sub-section (2) provides for a fiction to treat a workman in continuous service for a period of one year despite of the fact that he has not rendered uninterrupted service for a period of one year but he has rendered service for a period of 240 days during the period of 12 calendar months continuing backwards and just preceding the relevant date being the date of retrenchment.

12.2. In the instant case, the disputant employee failed to prove that he worked for 240 days during a period of twelve calendar months preceding the date with reference to which calculation is to be made as per the requirement of 25-B of the Act. Nor did he produce any evidence with regard to nature of his job to arrive at a conclusion that he worked for 240 days in preceding year. Thus, non-issuance of notice, non-payment of notice pay and retrenchment compensation to a workman in lieu of notice who has not worked for 240 days will not render his termination illegal. (Reliance can be placed on a reported judgment of Essen Deinki *Vrs.* Rajiv Kumar, 2003 LLR 113. On failure to discharge of burden, the Tribunal is not in a position to hold the termination service of 2nd party is illegal and unjustified. Alternatively, it proved that the action of the 1st party-Management in terminating the services of the 2nd party is legal and justified. In consequence thereof, the issue No.1 goes against the 2nd party. On failure to prove the issue No.1 in favour of the 2nd party, it is needless to answer the issue No.2 to be failed.

13. The net result of above discussion is that the 2nd party is entitled to no relief. The reference is answered accordingly as per the observation made above.

Dictated and corrected by me.

HIRANMAYA BISOI
14-03-2023
Presiding Officer
Industrial Tribunal, Bhubaneswar.

HIRANMAYA BISOI
14-03-2023
Presiding Officer
Industrial Tribunal, Bhubaneswar.

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[ No. 3436—LESI-IR -ID-0037/2023-LESI.]

By order of the Governor

NITIRANJAN SEN

Additional Secretary to Government

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Printed and Published by the Director, Directorate of Printing, Stationery and Publication, Odisha, Cuttack-10
Ex. Gaz. 23—173+9