The Odisha Gazette

EXTRAORDINARY

PUBLISHED BY AUTHORITY

No. 2230 CUTTACK, WEDNESDAY, DECEMBER 11, 2019/ MARGASIRA 20 , 1941

LABOUR & E. S. I. DEPARTMENT

NOTIFICATION

The 28th November 2019

No. 7245—IR(ID)-53/2017-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award dated the 30th October, 2019 in Industrial Dispute Case No. 22/2017 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the management of the Registrar, Utkal University, At/Po: Vani Vihar, Bhubaneswar and its workman Shri Kanhu Charan Sahoo was referred to for adjudication is hereby published.

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL : BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 22 of 2017

Dated the 30th October 2019

Present :

Shri Manas Ranjan Barik, M.A.LL.B.,
Presiding Officer, Industrial Tribunal,
Bhubaneswar.

Between :

The Management of-
The Registrar, Utkal University,
At/P.O. Vani Vihar,
Bhubaneswar. . . First Party—Managements.

And

Shri Kanhu Charan Sahoo,
C/o Gobinda Sahoo,
Market Complex,
P.O. Vani Vihar, P.S. Sahidnagar,
Bhubaneswar, Dist. Khurda. . . Second Party—Workman

Appearances :

Shri Dayanidhi Nayak, Auth.Rept.	..	For the 1st party-Management
Shri Kanhu Charan Sahoo	..	For the 2nd party- Workman himself.

AWARD

Pursuant to a dispute raised by the above-named second party before the conciliation machinery and upon failure of such conciliation, the Government in the Labour & E.S.I Department have referred the following dispute for adjudication vide its Order No.IR(ID)-53/2017-7566/LESI., dated the 9th October 2017 :—

> "Whether the action of the Management of Utkal University, At/P.O. Vani Vihar, Bhubaneswar in terminating the services of the workman Shri Kanhu Charan Sahoo by way of refusal of employment with effect from the 9th January 1991 is legal and/or justified ? If not, what relief he is entitled to ?".

2. As per the claim statement, the case of the second party, in short, is that pursuant to a notification issued by the first party, the second party applied for the post of Watchman and on being selected he was appointed as a Watchman on daily wage basis vide order, dated the 11th March 1987 with a direction to work at Hostel No.3 with effect from the 5th November 1987. Thereafter he rendered continuous service under the first party being posted at different places as per periodical orders issued by the Authority and accordingly his name finds place at Sl.No.114 of the Gradation List of Class-IV employees, which was prepared on the basis of seniority for the purpose of regularisation of employees against available vacancies as and when necessary. It is the specific assertion of the second party that while continuing under the first party all of a sudden without any rhyme or reasons he was not permitted to render his duties with effect from the 9th January 1991, which amounts to termination of his service. According to him, he having rendered continuous service under the first party for more then 240 days, was entitled to the protection as envisaged under Section 25-F of the Act. But, the first party in gross violation of the said provisions has put an end to his engagement in a most arbitrary and whimsical manner. He also alleges that though in the meantime juniors to him have been regularised in services, he suffered termination of service and the first party did not pay any heed to his approaches. Moreover, he has neither been issued with any show cause nor any enquiry was ever conducted against him for any dereliction in duty/misconduct. In the aforesaid background, the second party has claimed for his reinstatement in service with full back wages and consequential benefits.

3. The first party entered contest in the case and filed its written statement. At the outset the first party has challenged the claim of the second party as not maintainable on the ground that it has no role to play in the matter of employment or non-employment of the second party as because he was working under the control and supervision of the then Security Officer, who was working in the Institution on being deputed from the Govt. of Odisha. No office order was issued in his favour either appointing him as a DLR or terminating his services, as claimed by him. The specific plea of the first party is that the second party having left the work on his own accord with effect from the 9th january 1991 without any intimation to the Controlling Officer and thereby voluntarily abandoned his job, the question of complying with the provisions of the Act dose not arise at all. Admitting about the reflection of seniority of the second party at Sl.No.114 of the Gradation List, it is stated that such

seniority of the second party was not taken into account owing to his unauthorised absence from duty. With the averments, as above, the first party has prayed for rejection of the claim of the second party.

4. A rejoinder to the written statement has been filed by the second party mostly reiterating the stand taken in the claim statement and further to the effect that the pay slips issued in his favour from time to time by the first party is clear enough that being engaged by the first party he was under its control and not under the control and supervision of the Security Officer, as alleged. Termination of his service having been effected in contravention of the provisions of the Act, he has prayed to answer the reference in his favour.

5. Basing on the pleadings of the parties, the following issues emerge for considerartion:-

ISSUES

(i) Whether the case is maintainable ?

(ii) Whether the second party workman voluntarily abandoned the service since 9th january 1991 ?

(iii) Whether the action of the Management of Utkal University, At/P.O. Vani Vihar, Bhubaneswar in terminating the services of the workman Shri Kanhu Charan Sahoo by way of refusal of employment with effect from the 9th January 1991 is legal and or jutified ?

(iv) If not, what relief Shri Sahoo is entitled to ?

6. In order to substantiate their respective pleas, while the second party has examined himself as W.W.1 and placed reliance on copies of documents such as office order,dated the 3rd November 1987 (Ext.1); office order,dated the 2nd January 1988 (Ext.2); office order,dated the 11th May 1989 (Ext.3); office order,dated the 27th October 1990 (Ext.4); List of daily wage employees as per seniority (Ext.5) and information obtained by him under the RTI Act (Ext.6), on behalf of the first party the Registrar of the University has been examined as M.W.1, who during his examination-in-chief has filed and proved the copy of the Orissa Universities Recruitment and Promotion of Non-Teaching Employees Rules,1991 as Ext.A.

FINDINGS

7. *Issue No.(i)*—This issue having direct bearing on the root of the instant dispute, is taken up at first for consideration. It is the positive case of the second party that he had been working as a Watchman under the first party management, i.e. M/s.Utkal University on daily wage basis, whereas it is the contrary stand of the first party that the second party was not an employee under it, rather he was working under the control and supervision of the Security Officer, who is an Officer in the rank of DSP, deputed from the State Government. Hence, it now becomes obligatory on the part of this Trinunal to see as to whether there was any relationship of employer-employee between the parties. The second party as W.W.1 has adduced evidence to the effect that after joining as a Watchman under the direct control of the Registrar, Utkal University he was issued with an office order, dated the 3rd November 1987 directing him to work at Hostel No. 3 with effect from the

5th November 1987. In view of such appointment he rendered his services to the best satisfaction of his authority till the month of January 1991. During the said period he was posted at different places of the University vide specific orders issued by the authorities though periodically. In support of his such evidence the second party has produced documents under Exts. 1 to 4. It is felt pertinent to mention here that during the admission of such documents into evidence, the first party has not raised objection in any manner. On perusal of Ext.1 it goes to show that vide the same the second party has been directed to perform his duty as Watchman in Hostel No.3 of the Utkal University. Similarly, vide Ext.3 the second party has been directed to perform his duty as Watchman in Hostel No.1 of the Utkal University. Exts1 and 3 further reveal that both the orders have been issued by the Security Officer of the Utkal University. Most interestingly the order under Ext.4 by which the second party has been directed to perform his duty as Watchman in the campus had been issued by none else than the Registrar of Utkal University. Besides, it is the categorical evidence of W.W.1 to the effect that during his employment he had received salary component from the first party University. In addition to that the Registrar, Utkal University examined as M.W.1 has adduced evidence to the effect that the second party was engaged as a DLR with effect from the 11th March 1987 and worked up to 8th January 1991 and that during that period he got his remuneration from the University. From the above discussion I do not have any semblance of doubt in my mind that there was relationship of employer-employee between the first party and the second party.

8. Further, there is no dispute regarding the fact that the second party was employed as a Watchman and thus he was a 'workman' as defined under the Act.

9. The first party further challenges the maintainability of the instant dispute on the ground that the same being a prominent educational institution of the State, is not covered under the Act. To answer such claim of the first party it is felt apposite to place reliance on Bangalore Water Supply and Sewerage Board *Vrs*. A.Rajappa [1978 Lab.I.C. 467], wherein it has been held by a majority of 7 Judges Bench of the Hon'ble Apex Court that the test is not whether the predominant number of employees are entitled to enjoy the benefits of the Act or not , but what the predominant nature of the activity is. In the case of a University or an Educational Institution, the nature of the activity is *ex hypothesi*. Education, being a service to the community,is an 'industry'. Besides, there may be any number of activities of an educational institution such as printing perss, a transport department and clerical and menial staffs etc., which may be severable from the teaching activities of the University. These poerations, viewed separately or collectively, by themselves, may be treated as an Industry. On this reasoning, the Court observed that the case of the University of Delhi was wrongly decided an education, in its institutional form is an 'industry'. Hence, in view of such authoritative observation of the Hon'ble Apex Court and considering the admitted fact that the second party was working as a Watchman under the first party on daily wage basis, I am of the humble but firm opinion that the said claim of the first party does not have any merit. The second party being a workman and the first party being an 'industry' the instant dispute is amenable to the Act.

10. The next pertinent point raised by the first party challenging the maintainability of the instant dispute is on the ground of inordinate delay in raising the dispute by the second party. Admittedly, the instant reference was made by the State Government to this Tribunal for adjudication of the existing industrial dispute. There is nothing available on record as to how the first party is prejudiced by the dispute being raised after a substantial delay by the second party. Nowhere it has been

pleaded by the first party that the documents regarding the employment of the second party under it have been lost or unavailable with it. Rather, the document obtained by the second party under the RTI Act and marked Ext.6 without any objection being raised from the first party, discloses the number of days the second party has performed his duties under the first party from the year 1987 to 1991. Hence, the same establishes the fact that the documents connected with the employment of the second party are still available with the first party. At this juncture, it is felt pertinent to place reliance on Avon Services Production Agencies (Pvt.) Ltd. *Vrs.* Industrial Tribunal, Haryana and other [1978- II LLN 503], where after interpreting the phrases at any time rendered in Section 10(1) of the Act, it has been held as follows:

> "Section 10(1) enables the appropriate Government to make reference of an industrial dispute which exists or is apprehended at any time to one of the authorities mentioned in the section. How and in what manner or through what machinery the Government is appraised of the dispute is hardly relevant. The only requirement for taking action under Section 10(1) is that there must be some material before the Government which will enable the appropriate Government to form an opinion that an industrial dispute exists or apprehended. This is an administrative function of the Government as the expression is understood in contradistinction to judicial or quasi judicial function. Therefore, it is implicit from the above case that in case of delay in raising the industrial dispute, the appropriate Government under Section 10(1) of the act has the power, to make reference to either Labour Court or Industrial Tribunal, if it is of the opinion that any industrial dispute exists or is apprehended at any time, between the workman and the employer."

Further, in Sapan Kumar Pandit *Vrs.* U.P.State Electricity Board and others [(2001) SCC 222] it is held by the Hon'ble Apex Court as under :

> " There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval it is reasonably possible to conclude in a particular case that the dispute ceased to exist after sometime. But when the dispute remained alive though not galvanised by the workman or the union on account of other justified reasons, it does not cause the dispute to wane into total eclipse. In this case when the Government has chosen to refer the dispute for adjudication under Section 4(k) of the U.P.Act, the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudicating authorities while moulding the reliefs. That is a different matter altogether. The High Court has obviously gone wrong in axing down the order of reference made by the Government for adjudication. Let the adjudicatory process reach its legal culmination."

Besides, in Ajaib Singh *Vrs.* The Sirhind Co-operative Marketing *cum* Processing Service Society Ltd. and another [(1999) 6 SCC 82] it has been held as follows:-

> " It follows, therefore, that the provisions of Article 137 of the schedule of Limitation Act,1963 are not applicable to the proceeding under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and

not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the Tribunal, Labour Court or Board, dealing with the case can appropriately mould the relief by declaring to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal."

11. Hence, when the aforestated pronouncements of the Hon'ble Apex Court have unequivocally laid down the principle of law that on the ground of delay the reference made by the Government cannot and should not be discarded and that in appropriate case the Tribunal can mould the relief for the self same reason, I am of the view that the instant reference cannot be held to be not maintainable on the ground of delay. Accordingly, the challenge of the first party on the maintainability of the instant dispute on the ground of delay does not merit consideration.

Hence, from the discussions made hereinabove, I am of the considered view that the instant dispute is maintainable and accordingly the said issue is answered in favour of the second party.

12. *Issue Nos.(ii) and (iii)*—Both the issues being corelated, are taken up simultaneously for the sake of brevity and just decision of the instant dispute. In the instant case, when it is the positive assertion of the second party that his services have been terminated by the first party with effect from 9th January 1991, it is the categorical case of the first party that the second party has abandoned his service with effect from 8th January 1991. Whereas, it is the settled proposition of law that abandonment, presages, as a *sine qua non*, the animus to abandon. *Sans animus,* there can be no abandonment. Willingness to work and voluntary abandonment are strange bedfellows, which cannot cohabit together. Abandonment is a positive act, deliberately and mindfully done, in the awareness and acceptance of the consequences that ensue. Being a positive act, law always casts the onus, to prove the factum of abandonment by the employee, on the person asserting the fact. In view of such settled proposition of law, it is now to be seen from the materials available on record as to how far the first party has discharged its said burder by leading cogent, clear and trustworthy evidence.

13. Though M.W.1 has stated to the effect that the second party was an absconder as he had left his services with effect from the 8th January 1991 without intimation to the Controlling Officer and to the University, but not a single document has been produced before this Tribunal evidencing that any notice had been issued to the second party calling upon him to resume his duties. Besides, there is not a single scrap of paper available on record to the effect that the second party has abandoned his services with effect from the 8th January 1991. On the contrary, during his examination W.W.1 has stated that he was working continuously since the date of his joining till 9th January 1991 when his services were terminated by the management without any rhyme and reason. Further, the authorities have never served any notice nor also provided any opportunity of hearing before his termination from services. He was orally denied to work as a Watchman. More importantly, during the cross-examination of W.W.1 though he has admitted that he had not been issued with any written order from the University terminating his service, but at that time he has categorically explained that on the relevant date when he went to perform his duty, he was prohibited to do so. That apart, on examining the evidence adduced by W.W.1 it emerges that the first party has miserably failed to shake his veracity on this aspect of his case. From the above discussion, I am of the view that it is not a case of abandonment of service by the second party, rather it is a case of refusal of employment of the second party amounting to retrenchment as defined under Section 2(oo) of the Act.

14. W.W.1 has adduced further evidence to the effect that he has served continuously for a period of 240 days preceding the date of his termination. The statement regarding his engagement has been obtained under the RTI Act which quite unambiguously establishes the said fact. On analysis of Ext.6, it reveals that the second party has worked for a period of more than 240 days preceding the date of his termination, i.e. 9th January 1991. In the instant case, indisputably the provision of Sec.25-F has not been followed while terminating the services of the second party. Hence, the action of the first party in terminating the service of the second party by way of refusal of employment with effect from 9th January 1991 is neither legal nor justified.

Issue Nos.(ii) and (iii) are answered accordingly in favour of the second party.

15. *Issue No.(iv)*—Admittedly, the second party had been employed under the first party on daily wage basis. Further, there is sufficient material to the effect that he was under employment of the first party for a period of about four years. The fact which cannot be ignored is that there is a substantial delay in raising the instant dispute. At this juncture, it is felt apt to reiterate the settled proposition of law that in case of violation of provisions of Sec.25-F, order of reinstatement can be passed in exceptional cases and the normal rule is to award compensation in place of reinstatement. Reference in this regard may be made to the judgments of the Hon'ble Apex Court in the case of State of M.P. and others *Vrs.* Lalit Kumar Verma[(2007) 1 SCC 575]; Utaranchal Forest Development Corporation *Vrs.* M.C.Joshi [(2007) 9 SCC 353]; Sitaram and others *Vrs.* Motilal Nehru Farmers Training Institute [(2008) 5 SCC 75]. Further, the aforesaid view has also been reiterated by our Hon'ble High Court in the case of Executive Engineer, Badanala Irrigation Division, Kenduguda *Vrs.* Ratnakar Sahoo and another [2011 (Supp.1) OLR 556]. Hence, in view of said settled proposition of law coupled with the facts and circumstances of the case, it is felt proper to award compensation amount of Rs.50,000 (Rupees fifty thousand only) to the second party instead of his reinstatement and back wages. Accordingly, the first party is directed to pay a lump sum compensation of Rs.50,000 to the second party within a period of two months of the date of publication of the Award in the Official Gazette.

Issue No.(iv) is answered accordingly.

Dictated and corrected by me.

MANAS RANJAN BARIK
30.10.2019
Presiding Officer
Industrial Tribunal
Bhubaneswar

MANAS RANJAN BARIK
30.10.2019
Presiding Officer
Industrial Tribunal
Bhubaneswar

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By order of the Governor
SANTOSH KUMAR MOHANTY
Under-Secretary to Government

Printed and published by the Director, Directorate of Printing, Stationery and Publication, Odisha, Cuttack-10
Ex. Gaz.1561—173+11