ORISSA HIGH COURT : CUTTACK

ORIGINAL JURISDICTION CASE NO. 217 OF 1999

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Executive Engineer, Electrical,
Jajpur Road Electrical Division,
Jajpur Road. ..... Petitioner

-Versus-

Presiding Officer, Industrial
Tribunal, Bhubaneswar
and others ..... Opp. Parties

For Petitioner : M/s. B.K.Nayak, J.K.Khuntia & S.S.Patra.

For Opp. Parties : M/s. M.R.Panda, M.K.Nayak, S.P.Swain & Madhumita .Panda. (For O.Ps.No. 2 to 5)

Decided on 09.04. 2009.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J. This writ petition has been filed by the management against the award dated 25.9.1998 passed in I.D. Case No. 1 of 1996 by the Presiding Officer, Industrial Tribunal, Bhubaneswar.

2**.** The opp. Parties 2 to 5 – workmen claimed that while working under the management – petitioner as casual labourers since the year 1978, they were disengaged from

10.6.1994 by verbal orders of the management – petitioner in violation of section 25-F of the Industrial Disputes Act, 1947 (for short, ' the Act'). The workmen approached the learned Labour Court against their dis-engagement/termination. Conciliation having failed, after receipt of the failure report, the State Government made the following reference to the Industrial Tribunal for adjudication:-

> "Whether the retrenchment of (1) Abhaya Kumar Das, (2) Gobardhan Routray, (3) Balaram Swain (4) Kanduri Charan Mallik, Casual Labour Roll (CLR) by the Executive Engineer, Jajpur Road Electrical Division, Jajpur Road with effect from 10.6.94 is legal and/or justified ? If not, to what benefit they are entitled ?

After receipt of the notice, the management – petitioner as well as the workmen filed their respective statement/claim in the said reference case, which was registered as I.D. Case No. 1 of 1996.

3. The case of the management – petitioner before the Tribunal was that the workmen in question were mainly engaged in construction sites whenever such occasion arose during different period and none of them completed 240 days of work in a calendar year. According to the management – petitioner, as the engagement of the workmen was intermittent, no notice was required for termination of their service on completion of the work and in view of the casual nature of their engagement, they were treated as casual workers. Hence, it was pleaded by the

management – petitioner that disengagement on completion of work in which the workmen were engaged would not automatically bring the case within the purview of "retrenchment" in view of the temporary nature of their engagement.

4. The claim of the workmen before the learned Tribunal was that they were initially working as NMR employees in 1973 and were subsequently re-designated as CLRs before they were denied engagement with effect from 10.6.1994. Giving further details, the workmen pleaded that they were engaged by the Executive Engineer, Jagatsighpur, which subsequently merged with Jajpur Road Electrical Division. They were adjusted in Mangalpur section. While asserting continuous employment from 1973 to 1994, despite change of placements, the workmen pleaded that they were being paid Rs. 150/- per month until they were thrown out of employment. The learned Tribunal while proceeding to answer the reference, the workmen examined themselves as witnesses and also produced documentary evidence. The management – petitioner, however, declined to adduce any evidence.

5. On appreciating the materials produced before the learned Tribunal, the Tribunal has held as follows:-

> "7. The second party-management cross-examined the W.W. Nos. 1 to 4 claiming their continuous engagement until termination of their services but without any success. The plea of the management that

the engagement of the workmen was sporadic and intermittent is negatived in the certificates issued by the concerned J.Es., as discussed above, under whose direct supervision they were working under the second party – management. The plea of the management that none of the workmen worked after 1985 is negatived in Exts.1, 2/2, 2/4, 3/2 & 3/4 which go a long way to demolish the case of the second party-management. The management has not made any effort to establish its stand that none of the workmen concerned were engaged after 1985. The aggrieved workmen have produced certificates regarding their engagements from the persons supervising their work. The management has not made any effort to question the authenticity of the documents far less the correctness of the statements borne out therein. No rebuttal evidence is forthcoming on behalf of the management though they have availed adequate opportunity. It is in the evidence of the workmen that wages were paid to them in a form supplied by the Division Office. The bald stand of intermittent engagement of the workmen for certain periods falls through and the management has not been able to discharge the onus of disproving the claim of the workmen that they were in continuous employment though they were styled sometimes as N.M.R. workers and sometimes as casual labourers. The version of the management having been disproved to a substantial measure by documentary evidence of unimpeachable character procured from persons representing the management in the field level, namely, the Junior Engineers, there is no hesitation to hold that the management has failed to prove that the workmen were not engaged beyond 1985, and that, their engagement was intermittent not qualifying the workmen to notice of retrenchment and retrenchment compensation as envisaged u/s.25-F of the Industrial Disputes Act.

8. On the basis of the consistent evidence available on record which is otherwise not discredited in any manner, I am led to disbelieve the version of the management that the engagement of the workmen was intermittent and that they were never engaged beyond 1985. The documentary evidence lends support to the oral claim of the workmen that they were in continuous employment exceeding 240 days in one calendar year and in the premises, I am led to believe that the termination effectuated by verbal orders of refusal of employment was in contravention of the provisions of section 25-F of the Industrial Disputes Act. Non-production of material documents and non-examination of any witness on behalf of the management not only

> tells upon the credibility of the version but also permits this Tribunal to draw an adverse inference that had the documents been produced they would have gone counter to the version of intermittent engagement falling short of 240 days immediately preceding the action of termination which amounted to retrenchment. The termination of the services of the workmen being admittedly without notice and compensation is void."

The learned Tribunal, on the above findings, passed the impugned award answering the two issues framed, in favour of the workmen and directed to reinstate them on payment of half of the back wages.

6. Mr. B.K.Nayak, learned counsel for the management – petitioner strenuously urged that the workmen cannot be held to have been retrenched as per the definition of "retrenchment" given in section 2 (oo) of the Act, as it comes under the exception as defined in section 2 (oo) (bb).

7. On perusal of the impugned award, it is seen that the learned Presiding Officer of the Industrial Tribunal taking into consideration the evidence produced by the workmen arrived at the findings of fact as quoted above. However, the question as to whether the removal/dis-engagement of the workmen amounts to retrenchment or not, as has been raised before this Court have not been raised before the learned Tribunal, for which the same has not been dealt with in the award.

8. Section - 2 (oo) (bb) of the Act reads as follows:-

> "2. **Definitions:** - In this Act, unless there is anything repugnant in the subject or context,-

xx xx xx

> [(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include-
>
> (a) & (b) xx xx xx
>
> (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]
>
> xx xx xx"

The contingency as provided under section 2 (oo) (bb) of the Act, unless proved by production of evidence by a party cannot be inferred. It is an admitted position that the management – petitioner has not adduced any evidence. The onus lay on the management – petitioner to bring the case of the workmen under the exception as provided in section 2 (oo) (bb) of the Act by producing materials in support of the same. There is nothing on record to show that the engagement of the workmen was a contractual one and such engagement was not renewed so as to bring the case under the purview of section 2 (oo) (bb) of the Act. The said contention of Mr. B.K. Nayak, learned counsel for the management – petitioner needs no consideration.

9. It is a well settled principle of law that this Court should not exercise its supervisory power under Article 227 of the

Constitution of India and interfere with an order, if it is possible to form two opinions on the materials available on record and the Tribunal/authority/court below has formed one opinion. It is also well settled that the power under Article 227 of the Constitution is not available to be exercised for indulging in re-appreciation or re-evaluation of evidence like a court of appeal. (See AIR 2004 SC 3892: ***Ranjeet Singh v. Ravi Prakash).*** The scope of interference with findings of fact of the lower Tribunal is limited, while exercising jurisdiction under Article 226 of the Constitution in a writ of certiorari. Such findings can only be interfered with, if gross illegality or perversity is shown on the face of the order of the Tribunal below. The management – petitioner has failed to show any perversity or illegality in the impugned award. The impugned award is based on findings of facts which have been arrived at by the learned Tribunal after analyzing the materials on record. This Court, therefore, having found no error in such findings, is not inclined to interfere with the same.

10. In the result, the writ petition, being devoid of merit, is dismissed. No costs.

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M.M. Das, J.

Orissa High Court, Cuttack.
April 9th , 2009/Biswal.