HIGH COURT OF ORISSA: CUTTACK.

O.J.C. No.6153 of 1998

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

The Management of Ganjam
North Electrical Division,
Gridco,Berhampur. ..... Petitioner

- Versus -

The Presiding Officer,
Labour Court,Jeypore and others ..... Opposite Parties.

For Petitioner : M/s. Ramanath Acharya and B.Barik.

For Opp. Parties : M/s Rajendra Kumar Bose and Rajendra Kumar Bhol (for O.Ps. 2 to 7)

PRESENT:

THE HONOURABLE SHRI JUSTICE B.K. PATEL

Date of hearing – 10.8.2010 :: Date of judgment – 31.8.2010

B.K. PATEL, J. In this writ application filed under Articles 226 and 227 of the Constitution of India the employer has assailed the legality of the award dated 27.9.1997 passed by the learned Presiding Officer, Labour Court, Jeypore (for short, 'Labour Court') in I.D.Case No.96 of 1995 holding the termination of services of the opposite parties 2 to 7-workmen to be illegal and unjustified, and directing the employer to re-engage the workmen with 50% of back wages within six months from the date of receipt of copy of the award.

2. The impugned award was passed in adjudicating the following reference under section 10(1) read with section 12(5) of the Industrial Disputes Act,1947 (for short, 'the Act'):-

> "Whether the action of the management of Ganjam North Electrical Division,OSEB, Berhampur in terminating the service of S/S Satrughan Nayak, Bali Dakhua, Simanchal Nahak, Basanta Das, Yogendra Bhola and Rama Chandra Sahu, N.M.R. workers of Polasara Electrical Section with effect from 1.10.1989 is legal and/or justified ? if not, what relief these workmen are entitled?"

3. The case of the workmen, in brief, is that they were engaged as N.M.Rs. in Polasara Electrical Section by the employer with effect from 1.1.1984, 1.8.1984, 1.2.1984, 1.9.1984, 1.8.1984 and 2.1.1984 respectively on daily rated monthly wage basis. They continuously worked under the employer till 30.9.1989

and were disengaged with effect from 1.10.1989. It has been pleaded that a settlement had been arrived at on 1.10.1986 between the employer and their workmen represented through several Unions to the effect that N.M.R. workmen who had completed 400 days of work as on 30.1.1986 would be absorbed in regular post. On being disengaged in violation of such settlement the workmen approached the Junior Engineer, Polasara Electrical Section for reengagement. They also made representations to the management. However, the workmen were not reengaged though several workmen who were junior to them were retained in service by the employer. In such circumstances, the workmen approached the District Labour Court, Berhampur who initiated conciliation proceeding which failed. It has been averred before the learned Labour Court that disengagement of the workmen amounts to retrenchment without compliance of provisions under section 25-F, 25-N and 25-G of the Act and that the workmen were entitled to be reinstated in service with full back wages.

In the written statement it was pleaded by the employer that the workmen were engaged for construction work during the periods from March,1984 to December,1987, December,1985 to December,1988, March,1986 to September,1989, April,1988 to

July,1989, June,1984 to September,1989 andJanuary,1984 to September,1989 respectively with breaks. According to the employer, opposite party no.2 had worked for 97 days in 1984, 46 days in 1985, 121 days in 1986, 155 days in 1987; opposite party no.3 had worked for 199 days in 1986, 144 days in 1987, 234 days in 1988 and 139 days in 1989; opposite party no.4 had worked for 47 days in 1986, 144 days in 1987, 234 days in 1988 and 139 days in 1989; opposite party no.5 had worked for 160 days in 1988 and 130 days in 1989; opposite party no.6 had worked for 39 days in 1984, 26 days in 1985, 121 days in 1986, 136 days in 1987, 234 days in 1988 and 139 days in 1989 whereas opposite party no.7 had worked for 124 days in 1984, 46 days in 1985, 117 days in 1986, 65 days in 1987, 234 days in 1988 and 139 days in 1989. None of them had rendered one year of continuous service prior to his disengagement. Therefore, none of the workmen was entitled to protection under section 25-F of the Act. It was also averred by the employer that no one junior to the workmen was allowed to continue in service.

On the basis of rival pleadings learned Labour Court framed the following issues for adjudication:-

(i) Is the reference maintainable in law ?

(ii) Whether the second party-workmen are in continuous employment for one year under the first party-management as per section 25-B of the I.D. Act ?

(iii) Whether the refusal of employment to the second party-workmen by the first party-management w.e.f. 1.10.1989 amounts to retrenchment as defined under section 2(oo) of the I.D.Act.

(iv) Whether the first party-management has followed the principles of 'last come, first go' while refusing employment to the second party-workman w.e.f. 1.10.1989 ?

(v) Whether the first party-management is required to comply section 25-F of the I.D. Act before refusing engagement to the second party-workmen ?

(vi) Whether the action of the management of G.N.E.D.,O.S.E.B.,Berhampur in terminating the services of S/S Satrughan Nayak, Bali Dakhua, Simanchal Nahak, Basanta Das, Yogendra Bhola and Rama Chandra Sahu, N.M.R. workers of Polasara Electrical Section with effect from 1.10.1989 is legal and/or justified ?

(vii) Whether the second partyworkmen are entitled to reinstatement with back wages ?

(viii) To what relief the workmen are entitled ?

In order to substantiate their claim the workmen examined themselves as W.W.Nos. 1 to 6 respectively and also relied upon documents marked Exts. A to C. No witness was examined on behalf of the workmen. However, muster rolls marked Exts.1 to 6 were admitted into evidence on behalf of the employer.

In adjudicating issue no.(i) it was held by the learned Labour Court that there was no inordinate delay in raising the dispute. In answering issue no.(ii) it was held that each of the workmen having been engaged for more than 240 days during the period of 12 calendar months preceding the date of disengagement, were in continuous engagement for a period of one year as provided under section 25-B of the Act. In answering issue no.(iii) it was held by the learned Labour Court that the employer had failed to prove that employment of any of the workman was contractual and that disengagement of the workmen amounted to retrenchment as defined under section 2(oo) of the Act. In answering issue no.(iv) it was observed by the learned Labour Court that materials did not indicate that the employer had violated principles of “last come first go” while

refusing employment to the workmen. In the back ground of such findings, in answering issue nos.(v) and (vi), it was held that while refusing employment to the workman, employer had violated provision under section 25-F of the Act for which they were entitled to be reinstated with 50% of back wages.

4. In assailing the impugned award it was contended by the learned counsel for the petitioner that dispute having been raised before the learned Labour Court in the year 1996 only on the assertion that the workmen were refused employment w.e.f. 1.10.1989, the learned Labour Court should not have entertained the dispute on the ground of inordinate and unexplained delay. In this context, reliance was placed on the decision of this Court in **Ajit Narayan Bhanja Deo –vrs.- Union of India and others**: 2002–I-LLJ 226. It was further submitted that materials on record including admission made by the workmen indicate that the workmen were engaged in construction work. It was argued that such admission on the part of the workmen goes to show that the engagement of the workmen was contractual in nature. On completion of construction work, contracts for employment with the workmen automatically expired. Moreover, there was no basis for the learned Labour Court to arrive at the finding that any of the workmen

had completed 240 days of service prior to their disengagement. Learned Labour Court has acted upon unsubstantiated and vague statements of the workmen ignoring documentary evidence Exts.1 to 6 produced on behalf of the employer. In support of his contentions reliance was placed by the learned counsel for the petitioner on the decisions in **Krishna Bhagya Jala Nigam Limited –vrs.- Mohammed Rafi**: (2009) 2 SCC (L&S) 646, **Yellatti R.M. –vrs.- Assistant Executive Engineer**:2006-I-LLJ 194, **Range Forest Officer –vrs.- S.T. Hadimani**:2002-I-LLJ 211, **Haryana Urban Development Authority –vrs.- Om Pal**: (2007)2 SCC (L&S)255, **District Red Cross Society –vrs.- Babita Arora and others**: (2007) 2 SCC (L&S) 631, **Kishore Chandra Samal –vrs.- Orissa State Cashew Development Corporation Ltd., Dhenkanal**: 2006 SCC (L&S) 241, **Morinda Co. Op. Sugar Mill Ltd. –vrs. Ram Kishan and others etc**.: 1996-I-LLJ 970, **Bhogpur Cooperative Sugar Mills Ltd. –vrs.- Harmesh Kumar**: (2008) 2 SCC (L&S) 128, **Rajastan Lalit Kala Academy –vrs.- Radhey Shyam**: (2009) 1 SCC (L&S) 287, **Project Director, IDCWD Project, Jeypore –vrs.- Sri Kailash Chandra Jena**: 2008 (Supp.-I) OLR-405, **Dredging Corporation of India Ltd. –vrs.- Presiding Officer, Central Government Industrial Tribunal-Cum-Labour Court, Bhubaneswar and another**: 2008 (Supp.-I) OLR-695, **Batala**

Co-operative Sugar Mills Ltd. –vrs.-Sowaran Singh: 2006-I-LLJ 60, **Municipal Council, Samrala –vrs.- Raj Kumar**: 2006 SCC (L&S) 473 and **Anil Bapurao Kanase –vrs.- Krishna Sahakari Sakhar Karkhana Ltd. & another**: 1998-I- LLJ 343.

5. In reply, it was contended by the learned counsel for the workmen that the workmen kept on approaching the authorities for their reengagement till submission of complaint before the District Labour Officer in the year 1992. The failure report submitted by the District Labour Officer goes to show that demand for reinstatement of the workmen was made by the Workers' Union as early as in the year 1990. In such circumstances, there is no scope to hold that delay in raising the dispute was either inordinate or unexplained. It was further contended that the employer has placed no material on record to indicate that the employment of the workmen was contractual in nature. No doubt, the workmen were engaged in construction works. That does not at all mean that employment was contractual in nature. All the workmen had been engaged for years together as N.M.R. on daily wage basis. Their assertion to have worked for more than 240 days has not been controverted by the employer. All the six workmen deposed before the learned Labour Court that they had worked for more than 240 days in a year. In such circumstances, it

was for the employer to prove by adducingcogent evidence that the workmen did not complete 240 days service during the requisite period to constitute continuous service. It was strenuously contended that the employer produced Exts.1 to 6 which are muster rolls for the periods from 1.11.1988 to 30.4.1989 only. Not only the employer has suppressed muster rolls for remaining periods during which the workmen claimed to have worked but also muster rolls produced by the employer contradict the averments made in the written statement to the effect that workman Satrughna Nayak was not engaged during the years 1989 and 1990. Learned counsel for the workmen placed reliance on the decision in **Director, Fisheries Terminal Division – vrs. Bhikubhai Meghajibhai Chavda**: 2010 AIR SCW 542.

6. No period of limitation has been prescribed for reference of dispute by the Government for adjudication. However, delay in raising the dispute should not be inordinate and unexplained. Admittedly, workmen were disengaged from employment with effect from 1.10.1989 and the dispute was referred for reference to the Labour Court in the year 1995. However, it is evident from the pleadings in the statement of claim and the contents of failure report submitted by District Labour Officer that workmen had approached the Junior Engineer and submitted representations to the Executive

Engineer, Superintending Engineer and the Member (Administration) Secretary of OSEB for reemployment and, thereafter, Charter of demands were submitted by their union on 17.12.90 and 17.8.1991. Conciliation proceeding appears to have been initiated on 13.9.1993. Therefore, there is no scope to hold that there was any delay or laches on the part of the workmen so as to render their claim stale. Under the facts and circumstances of the case delay stands well explained..

7. All the workmen deposed before the Labour Court that they worked through out the year except on holidays. Admittedly, they were engaged in construction works. Muster rolls Exts. 1 to 6 indicate that all the six workmen rendered continuous services from 1.11.88 to 30.4.1989. It appears from the Exts. 6, 5 and 4 that the workmen worked for 30 days each in the months from November 1988, December 1988 and January 1989. No document has been filed to show that any contract of employment had been entered into between the employer and the workmen. Employer has also not chosen to adduce oral evidence. Therefore, none of the circumstances comes to the aid of the employer to take resort to provision under Section 2 (oo)(bb) of the Act for denial of retrenchment benefits to the workmen on the ground that termination of their services occurred as

a result of non-renewal of the contract ofemployment on its expiry or termination of contract in accordance with stipulation contained therein.

8. Positive assertion of the workmen before the Labour Court was that they were working through out the year except on holidays. Employer refuted the assertion by taking the stand that none of the workmen worked for more than 240 days in a year so as to claim that they were in continuous services within the meaning of Section 25-B of the Act. Placing reliance on decisions of the Hon'ble Supreme Court referred to above, it was contended by the learned counsel for the petitioner that onus lies on the aggrieved workmen to discharge the burden of proof as to completion of 240 days of continuous work in a year. However, learned counsel for the workmen has rightly placed reliance on the decision of the Hon'ble Supreme Court in **Director, Fisheries Terminal Division –vrs. Bhikubhai Meghajibhai Chavda** *(supra)* to urge that in cases of termination of services of daily-waged workmen it is for the employer to rebut assertion of continuous service made by the workman in court. Applying the principles laid down in **R.M.Yellatty v. Assistant Executive Engineer(supra),** it was observed in **Director, Fisheries Terminal Division –vrs. Bhikubhai Meghajibhai Chavda** *(supra):*

> "the evidence produced by the appellants has not been consistent. The appellants claim that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this court pointed out in the above case that he 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. It is the contention of the appellant that the services of the respondent were terminated in 1988. The witness produced by the appellant stated that the respondent stopped coming to work from February, 1988. The documentary evidence produced by the appellant is contradictory to this fact as it shows that the respondent was working during February, 1989 also. It has also been observed by the High Court that the muster roll for 1986-87 was not completely produced. The appellants have inexplicably failed to produce the complete records and muster rolls from 1985 to 1991, in spite of the direction issued by the Labour Court to produce the same. In fact there has been practically no challenge to the deposition of the respondent during cross-examination."

9. In the present case also the workmen are daily-wage earners. No letter was issued for their appointment or termination. Pay slips were also not issued to them. Employer has pleaded that opposite party no. 2 was engaged during different periods between 1984 and December 1987; opposite party no. 3 was engaged during different periods between 1985 and December, 1988; opposite party no. 4 was engaged during different periods between 1986 and September, 1989; opposite party no. 5 was engaged during different

periods between 1988 and July, 1989;opposite party no. 6 was engaged during different periods between 1984 and September, 1989; and opposite party no. 7 was engaged during different periods between 1984 and September, 1989. However, employer has chosen to produce in court muster rolls for the periods from November, 1988 to April, 1989 only. Though it was pleaded that opposite party no. 2 was working till December 1987, it appears from Exts. 1 to 6 that Satrughan Nayak had continuously worked during the periods from 1.11.1988 to 30.4.1989. Therefore, on the face of it employer's assertion made in the written statement is contrary to the entries made in the muster rolls. As was in **Director, Fisheries Terminal Division –vrs. Bhikubhai Meghajibhai Chavda** *(supra),* the employer has inexplicably failed to produce the complete records and muster rolls. Though each of the workmen deposed that he was working continuously through out the year, there was practically no challenge to such assertion in course of cross- examination. Not even any suggestion was made that they did not render continuous service. It is not disputed that workmen's services were terminated without complying with the provision under Section 25-F of the Act. Therefore, there is absolutely no scope to interfere with the finding of the learned Labour Court that termination of services of the workmen

was not legal and justified.

10. While exercising supervisory jurisdiction, this Court is not to act as an appellate Court. This limitation necessarily means that finding of fact reached by the tribunal after appreciation of evidence cannot be reopened or questioned in the writ proceedings and only an error of law which is apparent on the face of the record can be corrected by a writ Court, but not an error of fact, however grave it may appear to be. The finding of fact recorded by the Tribunal can be interfered with by a writ Court only if the High Court is satisfied that the Labour Court had erroneously not considered or refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error or law which could be corrected by a writ of Certiorari as has been held by the Supreme Court in the Case of ***Syed Yakoob v. K.S. Radhakrishnan and others :*** AIR 1964 Supreme Court 477. In this connection decisions in ***Sri Saroj Kumar Mohapatra -vs.- Presiding Officer Labour Court, Jeypore and another*** : 2006 (Supp-II) OLR 740 and ***Mohammed Yusuf –vs.- Faij Mohammad and others*** : (2009) 3 SCC 513 may also be referred to.

11. On analysis of the impugned award keeping in view the facts and circumstances of the case, and the scope and ambit of power of the court to interfere with the finding of facts recorded by the Labour Court in exercise of writ jurisdiction, there appears no infirmity in the impugned award warranting interference.

Therefore, the writ application is dismissed.

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B.K. Patel, J.

Orissa High Court, Cuttack,
Dated the 31st August,,2010/Palai