

# The Orissa Gazette



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**LABOUR & EMPLOYMENT DEPARTMENT**

**NOTIFICATION**

The 29th April 2011

No. 4162—li/1(BH)-14/2000-L.E.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 26th February 2011 in Industrial Dispute Case No. 234 of 2008 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of the Executive Engineer, N.H. Division, Baripada, Dist. Mayurbhanj and its workman Shri Choudhury Mohanta and 13 others was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 234 OF 2008

(Previously registered as I.D. Case No. 121 of 2000 in the file of the P.O.,  
Labour Court, Bhubaneswar)

Dated the 26th February 2011

*Present :*

Shri Raghubir Dash, o.s.j.s. (Sr. Branch),  
Presiding Officer,  
Industrial Tribunal,  
Bhubaneswar.

*Between :*

The Management of  
the Executive Engineer,  
N.H. Division, Baripada,  
Dist. Mayurbhanj.

.. First-party Management

And

1. Shri Choudhury Mohanta,  
S/o Shri Jitu Mohanta,  
At Bajratundi, Via Samakhunta,  
P.S. Baripada Sadar,  
Dist. Mayurbhanj, Orissa.

.. Second-party Workmen

2. Shri Syama Singh,  
S/o Late Chandra Mohan Singh,  
At Jaybilla, P.O. Samakhunta,  
P.S. Baripada Sadar,  
Dist. Mayurbhanj.
3. Shri Syama Tudu,  
S/o Fagu Tudu,  
Vill. Sehani, P.O. Katsingh,  
P.S. Kuliana, Dist. Mayurbhanj,  
Orissa.
4. Late Panda Singh, substituted by his L.Rs.  
namely, Robin Singh, Putuli Singh, Raghu  
Singh, Khudia Singh, Dimbu Singh and  
Baidhar Singh.
5. Late Meghu Hembram, S/o Hagra Hembram,  
substituted by his L.Rs., namely, Kameswar  
Hembram, Chhite Hembram, Karunakar  
Hembram, Balaram Hembram, Sunia Murmu,  
Jamuna Hembram, Radhamani Hembram,  
At Benagadia, P.O. Baiganbadia,  
Dist. Mayurbhanj.
6. Shri Laduram Marandy,  
S/o Shri Bhagabat Marandy,  
At Benagadia, P.S. Baiganbadia,  
Dist. Mayurbhanj.
7. Shri Gora Singh,  
S/o Late Hadia Singh,  
At Sibjambani, P.O. Samakhunta,  
P.S. Baripada Sadar, Dist. Mayurbhanj.
8. Mahendra Mohanta,  
At Sibjambani, P.O. Samakhunta,  
P.S. Baripada Sadar, Dist. Mayurbhanj.
9. Prafulla Singh,  
At Jaybilla, P.O. Samakhunta,  
P.S. Baripada Sadar, Dist. Mayurbhanj.
10. Shri Samay Murmu,  
S/o Late Bhadab Murmu,  
At Andhari, P.O. Baiganbadia,  
P.S. Baripada Sadar, Dist. Mayurbhanj.
11. Shri Gouramohan Singh,  
At Jaybilla, P.O. Samakhunta,  
Dist. Mayurbhanj.
12. Shri Jatia Behera,  
S/o Shri Sufal Behera,  
At Sibjambani, P.O. Samakhunta,  
P.S. Baripada Sadar, Dist. Mayurbhanj.

13. Shri Sitaram Singh, (Dead—L.Rs. not substituted)  
S/o Late Getam Singh,  
At Sibjambani, P.O. Samakhunta,  
P.S. Baripada Sadar, Dist. Mayurbhanj.
14. Shri Sukadev Singh,  
S/o Soma Singh,  
Vill. Jaybilla, P.O. Samakhunta,  
P.S. Baripada Sadar, Dist. Mayurbhanj.

*Appearances :*

Shri Shyam Sundar Kabi, . . . For the First-party Management  
Government Pleader.

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Shri Subrat Ku. Mishra, Advocate . . . For the Second-party Workman

AWARD

This is a reference under Section 10 of the Industrial Disputes Act, 1947 (for short, 'the Act') made by the Government of Orissa in the Labour & Employment Department vide their Order No. (BH)-14/2000-LE., dated the 29th August 2000 which was originally referred to the Presiding Officer, Labour Court, Bhubaneswar for adjudication but subsequently transferred to this Tribunal for adjudication vide Labour & Employment Department's Order No. 4138—li/21-3/2007-LE., dated the 4th April 2008. The Schedule of reference runs as follows :

"Whether the termination of service of Shri Choudhury Mohanta and 13 others, named above, by the Executive Engineer, National Highway Division, Baripada with effect from the 10th August 1983 is legal and justified ? If not, what relief the workmen are entitled to ?"

2. The reference is on the alleged illegal termination of services of 14 persons but the claim statement is filed by 13 of them. In the claim statement the second-party members have taken the stand that in January, 1976 all of them were engaged as N.M.Rs. in the establishment of the Executive Engineer, National Highway Division, Baripada and all of them continuously worked as such till 10-8-1983. Then they were transferred to join in the Project Division, Baripada on 11-8-1983. Consequent upon their transfer they submitted their joining reports on 11-8-1983 but the new establishment whereto they were transferred refused to accept their joining reports. Since then the second-party members have been running from pillar to post. Their repeated representations were never taken into consideration. Therefore, in August 1997 they raised an industrial dispute before the District Labour Officer, Mayurbhanj who took up a conciliation proceeding. The conciliation having failed the District Labour Officer recommended for a reference for adjudication. The workmen have pleaded that since the termination of their service is illegal and they have been out of employment ever since their termination they should be reinstated with full back wages.

3. The first-party Executive Engineer, National Highway Division, Baripada has taken the stand that in the year 1983 there was reorganisation of Divisions and Subdivisions of the Works Department of the Government of Orissa. Accordingly, the National Highway and Project Wings under the Works Department were bifurcated. All project works of the National Highway Division were transferred to the control of the newly created Project Divisions. The projects were transferred along with the staff engaged in the concerned project works.

So far the second-party members are concerned, it is pleaded that only three of them namely, Choudhury Mohanta, Shyam Singh and Mahendra Mohanta had been transferred from the

establishment of the first-party to the establishment of the Project Division, Baripada vide Order No. 1263-67, dated the 10th August 1983 of the Assistant Engineer, N.H. Subdivision, Baripada. After being relieved the above named three workmen should have reported for duties at the Project Division and if at all their joining reports were not accepted by the newly created Project Division then they should have reported back to the first-party immediately. But, the three workmen did never approach the first-party till the present dispute was raised before the District Labour Officer in the year 1997. Thus, their services were never terminated.

So far the rest of the second-party member are concerned, the first-party does not admit that they were ever engaged in the establishment of the first-party.

4. Following are the issues framed for adjudication of the reference :

#### ISSUES

- (i) Whether the termination of service of Shri Choudhury Mohanta and 13 others (as per list enclosed) by the Executive Engineer, National Highway Division, Baripada with effect from 10th August 1983 is legal and justified ?
- (ii) If not, what relief the workmen are entitled to ?

5. On behalf of the second-party members one of them has been examined as W. W. No. 1. Similarly, the first-party has examined the present Executive Engineer as M.W. No. 1. Both sides have exhibited some documents.

#### FINDINGS

6. *Issue No. (i)*—At the out set it may be mentioned that though in the written statement the first-party admits to have had engaged three of the second-party members, in his affidavit evidence M.W. No. 1 has stated that six of the second-party members namely, Hema Murmu, Choudhury Mohanta, Shyam Tudu, Shyam Singh, Sukadev Singh and Mahendra Mohanta were engaged as N.M.R. workers under the first-party and they were transferred to the Project Division, Baripada vide orders passed on 10-8-1983. It may be further mentioned that the name of Hema Murmu does not find place in the cause, title of the claim statement nor even in the list annexed to the schedule of reference which contains the names of the second-party members. It is submitted by the second-party but not disputed by the first-party that said Hema Murmu is also known as Meghu Hembram. The name of Meghu Hembram is there in the cause, title so also the list annexed to the schedule of reference. Let it be further stated that 13 of the second-party members have put their signatures/ L.T.Is. on the claim statement and the one who is not a signatory to the claim statement is Prafulla Singh. It further transpires that said Prafulla Singh is dead and his legal heirs have not been substituted. Similarly, one of the 13 signatories namely, Sitaram Singh is also reportedly dead and his legal heirs have not been substituted. Two of the signatories to the claim statement namely, Panda Singh and Meghu Hembram @ Hema Murmu have died during pendency of the proceeding but they have been substituted by their legal heirs.

7. Before going to decide the legality of the alleged termination of service of the second-party members, it should be thrashed out as to whether the management's plea that several of the second-party members were never employed in the National Highway Division, Baripada is to be accepted. The first-party does not admit that late Panda Singh, Late Prafulla Singh, late Sitaram Singh, Shri Laduram Marandy, Shri Gora Singh, Shri Samay Murmu, Shri Gouramohan Singh and Shri Jatia Behera (second-party members) were engaged by it. In order to show that these persons

had been working under the first-party from 1976 to 1983, the certificates marked Ext. 2 series purported to have been issued by the then Junior Engineer of the N. H. Division have been relied on. These certificates have been marked with objection. It is argued by the first-party that the certificates have not been signed by Shri R. K. Behera, Junior Engineer and that those have been created by the second-party members. Relying on the decision in the management of Executive Engineer (Elect.), E.H.T. Construction Division *Vrs.* State of Orissa, 2004 (Suppl.), OLR-550, it is submitted on behalf of the second-party that burden was on the management to disprove the certificates and since the certificates are not proved to be forged ones, reliance can be placed on them. But, the facts and circumstances of the reported case are different from that of the case at hand. In the reported case the management had admitted that the workman was working as an N.M.R. but the period of his engagement was disputed by the management. The workman had proved one experience certificate issued by a Junior Engineer and countersigned by the S.D.O. It is not forthcoming whether the management had raised objection when the certificate was exhibited. But, in the case at hand that management does not admit to have ever engaged the above named persons. Though the certificates marked Ext. 2 series are purportedly issued on 24-7-1983, the second-party members had not placed it before the Conciliation Officer even though the management during conciliation denied to have employed them. That apart, though in the claim statement there is mention of a large number of documents there is no mention about the experience certificates. The experience certificates were brought on record at a belated stage for which the management must have been taken by surprise. Therefore, basing on the certificates only it is not safe to arrive at a conclusion that the above named persons were working under the first-party as N.M.Rs. more so when the dispute is found to have been raised after long delay.

8. Relying on the decision in *R. M. Yellati Vrs. Assistant Executive Engineer*, AIR 2006 (S.C.) 355 & *Director, Fisheries Terminal Vrs. Bhikubhai Meghajibhai*, AIR 2010 (S.C.) 1236 it is submitted on behalf of the second-party that for non-production of documents by the management even though it was called upon to produce them, adverse inference has to be drawn against the management. In both the reported cases the workmen were, admittedly, under the employment of the respective management but it was denied that they had completed 240 days of work in the given year. In *R. M. Yellati's case (supra)* the management could not give any explanation as to why the documents could not be produced. But, in the case at hand the management has consistently taken the plea that many of the second-party members were never employed by it. With regard to non-production of documents such as Muster Roll and Pay Slips from the year 1976 to 1983 the management has taken the plea that the documents being very old it was difficult to trace out them. It is submitted on behalf of the management that the documents called for being very old were already destroyed when the same were called for by the second-party. It is quite possible that the document have been destroyed or untraceable because of lapse of a long period. For that the second-party member are also to blame themselves because though the cause of action arose on 11-8-1983 they have raised the industrial dispute in the year 1997. The Court may raise an adverse inference on non-production of documents if the facts and circumstances of the case are in favour of raising such an inference. It is true that the management is the custodian of the documents and it failed to produce the same. At the same time it is to be remembered that there is a period prescribed for preservation of record/register and when that period is found to have expired then there may be a presumption that the documents are destroyed. In this case the management has totally denied the existence of employer-workmen relationship and therefore, the above cited decisions may not be applicable to this case.

9. In the case at hand the management has admitted the employment of some of the workmen not on the basis of old registers like Muster Roll, Pay Slips or Attendance Register but merely on the basis of transfer orders which are marked Ext. 1 and Ext. B. Both the exhibits reflect that copies thereof were sent to the persons concerned. Ext. 1 and Ext. B reflect that the two orders were passed on 10-8-1983 on the basis of the order of the Chief Engineer, N.H. & P., Orissa vide Order No. 29299, dated the 25th July 1983. These two orders support the case of both the parties that on 10-8-1983 six of the second-party members were transferred and relieved from the establishment of the first-party on 10-8-1983 to enable them to join in the Project Division, Baripada. In the claim statement it is stated that all the second-party members were transferred to the Project Division, Baripada vide Memo. No. 1263/67, dated the 10th June 1983. They have exhibited the said order as Ext. 1 wherein the names of only four second-party members find place. In his evidence W.W. No. 1 says that the four of the second-party members were transferred under a written order and the rest were orally directed to report in the new establishment. Since Exts. 1 and B reflect that copy of the order was sent to the persons concerned the second-party members whose relationship with the first-party has been denied could have produced the order of transfer to prove that they were also transferred to the Project Division, Baripada. It cannot be believed that some of the workmen were transferred under written orders but the rest were transferred under oral instruction. Since it is not disputed that a new Division was created and employees were transferred from the old management to the new management it cannot be believed that some of the employees could have been transferred orally. These are also the facts and circumstances which discourages this Tribunal to accept the experience certificates and to raise an adverse inference on non-production of documents.

Having assessed the materials placed before this Tribunal along with the attending facts and circumstances it is to be concluded that the second-party members namely, Late Panda Singh, Late Prafulla Singh, Late Sitaram Singh, Shri Laduram Marandi, Shri Gora Singh, Shri Samay Murmu, Shri Gouramohan Singh and Shri Jatia Behera were never under the employment of the first-party.

10. So far the other second-party members are concerned, the first-party takes the plea that their services were never terminated by the first-party and therefore, this reference is not maintainable. On behalf of the second-party it is submitted that the very transfer of the second-party members amounted to refusal of employment the moment their joining reports were not accepted by the Project Division, Baripada. In reply, it is argued by the first-party that since the order of transfer is valid, the second-party members cannot claim any relief against the first-party and that if at all there has been any refusal of employment, then the cause of action arises against the Executive Engineer, Project Division, Baripada who has not been impleaded as a party to the dispute. It is also submitted on behalf of the first-party that if the new management to which the workmen were transferred refused to accept their joining reports they could have intimated to the first-party immediately after such refusal but their long silence gives rise to a presumption that they had abandoned their job. On behalf of the second-party it is argued that the order of transfer itself is illegal in as much as Section 9-A of the Act has not been complied with. In my considered view Section 9-A of the Act is not applicable to this case in as much as the order of transfer does not bring about any change in the conditions of service applicable to a workman in respect of any matter specified in the IVth Schedule of the Act. No industrial dispute was raised challenging the order of transfer. The conciliation failure report does not reflect that the workmen had challenged

the order of transfer. Their simple case is that when they submitted their joining reports in the new Division the same were not accepted. Under such circumstances the order of transfer cannot be said to illegal.

11. Admittedly, the management of the Project Division, Baripada did not accept the joining reports of the second-party members namely, Hema Murmu, Choudhury Mohanta, Shyam Tudu, Shyam Singh, Sukadev Singh and Mahendra Mohanta. Such refusal amounts to refusal of employment. It brings about termination of services. It is the case of the workmen that after such refusal they had repeatedly approached the first-party to get relief but no favourable action was taken. The management has denied that after the workmen were relieved to join in the new establishment they had ever approached the first-party on the alleged refusal. It is true that there is no documentary evidence showing the workmen to have approached the first-party immediately after their joining reports were not accepted but it is not believable that they had never approached the first-party in that regard. They are all illiterate/semi-literate people belonging to tribal areas. Therefore, it is quite presumable that they did not make any written representation to put forth their grievance. Since the new establishment refused to accept their joining reports the first-party as model employer ought to have taken steps to see that the affected workmen were employed in the new establishment and if at all there was any difficulty on the part of the new establishment to accept them, then the first-party ought to have continued them in their establishment till they were validly retrenched. It is true that the second-party has failed to plead and prove that till February 1991 they had made any representation in writing and that their written representations, Dt. 2-2-1991, 6-5-1992, 15-3-1993, 6-1-1994, 10-5-1995 and 22-4-1996 (as pleaded in the claim statement) were actually received by the first-party. But, it is difficult to accept the management's plea that till the dispute was raised before the District Labour Officer, Mayurbhanj the affected workmen had slept over the matter because admittedly they had worked continuously under the first-party from 1976 till their transfer in 1983 and their transfer to the new establishment did not occasion any substantial change of their service conditions. Even if they were transferred they would have worked in the same town with the same terms and conditions. So, it is not believable that as because they were transferred they lost interest in their job and abandoned it.

12. There is force in the contention that the Executive Engineer, Project Division, Baripada ought to have been impleaded as a party. But, in the facts and circumstances this reference can be adjudicated in the absence of the new management. As already observed, there is a presumption that the workmen had approached the first-party alleging refusal of employment by the new management but the first-party did not pay any heed presumably taking the stand that they had already been relieved. This amounts to refusal of employment even on the part of the first-party and it is in violation of Section 25-F of the Act.

In the result, it is held that the termination of services of the second-party members namely, Choudhury Mohanta, Shyam Singh, Shyam Tudu, Mahendra Mohanta, Sukadev Singh and Late Meghu Hembram @ Hema Murmu with effect from the 10th August 1983 is illegal and not justified.

13. *Issue No. (ii)*—The workmen failed to raise the dispute immediately after the denial of employment. So far the relief of back wages is concerned, the management cannot be allowed to suffer for such latches on the part of the workmen. It cannot be compelled to pay wages to the workmen for the period during which they apparently contributed nothing. So far the relief of reinstatement is concerned, the following facts and circumstances are to be taken into consideration. The second-party has not impleaded the Executive Engineer, Project Division, Baripada as a party.

The relief of reinstatement could have been properly granted as against this absentee party. About 28 years have elapsed since the illegal retrenchment of the workmen. Two of the workmen have died in the mean while. There is no evidence as to what is the present age of the rest four workmen whose retrenchment is held illegal. It is also not possible to presume that the first-party has vacancy to adjust the workmen whom it had transferred 28 years back on the ground that the project works in which they were engaged were transferred to the newly created Division. In *Jagbir Singh Vrs. Haryana State Agriculture Marketing Board & another*, AIR 2009 (S.C.) 3004, it is observed that the award of reinstatement with full back wages, particularly in respect of daily wagers has not been found to be proper and instead, compensation is to be awarded. In the said Judgment the Hon'ble Supreme Court have distinguished between a daily wager who does not hold a post and a permanent employee. Therefore, this Tribunal is in favour of awarding compensation to the workmen in lieu of their reinstatement and back wages. Considering that the workmen had rendered continuous service for a period of more than seven years and they were refused employment without any valid reason for which they have been running from pillars to post for past 27 years it is considered just and appropriate to award compensation of Rs. 1,00,000 (Rupees one lakh) only to each of the workman namely, (1) Choudhury Mohanta, (2) Shyam Singh, (3) Shyam Tudu, (4) Mahendra Mohanta, (5) Sukadev Singh and (6) the legal heirs of deceased Meghu Hembram @ Hema Murmu S/o Hagara Hembram. Since the first-party turned a deaf ear to the approaches made by these workmen when they were refused employment in the newly created Division, it is liable to pay the compensation under this Award and as such, it is directed to comply with the Award within a period of two months of the date of publication of the same in the Official Gazette.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH  
26-02-2011  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

RAGHUBIR DASH  
26-02-2011  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

By order of the Governor  
P. K. PANDA  
Under-Secretary to Government