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## LABOUR & EMPLOYEES STATE INSURANCE DEPARTMENT

### NOTIFICATION

The 8th November 2012

No. 9232—IR-(ID)-35/2010-L & ESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 1st September 2012 in I. D. Case No. 39 of 2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of the Executive Engineer, Kendrapara Irrigation Division, Kendrapara & their workmen Shri Purusottam Mallick, Shri Bijayananda Kar & Sk. Jamiruddin was referred to for adjudication is hereby published as in the Schedule below :

### SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 39 OF 2010

Dated the 1st September 2012

*Present :*

Shri Raghubir Dash, O.S.J.S. (Sr. Branch),  
Presiding Officer,  
Industrial Tribunal,  
Bhubaneswar.

*Between :*

The Management of Executive Engineer,  
Kendrapara Irrigation Division,  
Kendrapara. .. First Party—Management

And

Its Workmen—

(1) Shri Purusottam Mallick,  
S/o Late Gouranga Mallick,  
At/P.O. Kapaleswar,  
P.-S./Dist. Kendrapara. .. Second Party—Workmen

- (2) Shri Bijayananda Kar,  
S/o Late Narsingha Charan Kar,  
At Bhagabanpur, P.O. Keshpur,  
P.-S./Dist. Kendrapara.
- (3) Sk. Jamiruddin,  
S/o Late Sk. Kabiruddin,  
At Post Office Lane,  
P.O./P.-S./Dist. Kendrapara.

*Appearances :*

Shri Kashinath Panda, .. For the First Party—Management  
Authorised Representative.

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Shri P. Mallick .. One of the Second Party—Workman.

AWARD

The Government of Odisha in their Labour & Employment Department, exercising power conferred upon them by Section 12 (5) read with Section 10 (1) (d) of the Industrial Disputes Act, 1947 (for short, the 'Act') have referred the following dispute to this Tribunal for adjudication vide their Order No. 6146—ID-35/2010-LE., dated the 26th July 2010 :—

“Whether the termination of services of Shri Purusottam Mallick, Shri Bijayananda Kar and Sk. Jamiruddin by the Executive Engineer, Kendrapara Irrigation Division with effect from the 12th March 2003 is legal and/or justified ? If not, what relief the workmen are entitled to ?”

2. The three workmen in their joint claim statement have pleaded that all of them had joined services under the Executive Engineer, Kendrapara Irrigation Division prior to Dt. 12-4-1993. They were all working on DLR basis. They used to receive their wages by signing hand receipts. They had rendered continuous and uninterrupted services till Dt. 11-3-2003. But, the first party management terminated their services with effect from the 12th March 2003 without compliance of the statutory provisions of law laid down under the Act. Even persons junior to them were retained and their services were regularised by the management ignoring the seniority of the disputant workmen. Some of the juniors are named as Nalinikanta Mahal, Hrusikesh Das, Santosh Behera, Bajia Behera and Sayed Abrara Alli. They have further pleaded that after their retrenchment they have not been in gainful employment any where. They claim that since their retrenchment is illegal and unjustified they should be reinstated in service with back wages and other service benefits.

3. The management in its written statement contends that the three disputant workmen had joined with the first party after Dt. 12-4-1993. They used to be engaged to do some intermittent maintenance work as and when available on daily wages basis. The list of DLR employees who were engaged prior to Dt. 12-4-1993 as maintained by the management does not disclose that persons who are alleged to be junior to the disputant workmen were actually junior to them. Thus, the allegation that persons junior to the disputant workmen were retained in service whereas the disputant workmen were retrenched with effect from the 12th March 2003 is not true. None of the

disputant workmen had completed one year of continuous service. As daily wage casual workers they have no right to any post. Their disengagement being automatic the claim for their reinstatement with back wages is without merit and is liable to be rejected.

In addition to the above, it is also the case of the first party that it being one of the Departments of the Government of Odisha discharging sovereign functions of the State is not an 'industry' and that the disputant workmen's claim is liable to be rejected on the ground of delay of more than six years in raising the dispute.

4. In terms of the reference the following issues have been settled :—

#### ISSUES

- (1) Whether the termination of service of Shri Purusottam Mallick, Shri Bijayananda Kar and Sk. Jamiruddin by the Executive Engineer, Kendrapara Irrigation Division with effect from the 12th March 2003 is legal and/or justified ?
- (2) If not, what relief the workmen are entitled to ?

5. To prove their respective case, parties have adduced both oral and documentary evidence. One of the disputant workmen is examined as W.W. No 1. Similarly, the present Assistant Executive Engineer of the first party establishment is examined as M.W. No. 1. Exts. 1 to 8 have been marked on behalf of the workmen and Exts. A & B on behalf of the management.

#### FINDINGS

6. *Issue No. 1*— According to the second party, the date of joining of workman No. 1 is Dt. 12-1-1993, of workman No. 2 is Dt. 1-9-1992 and of workman No. 3 is Dt. 1-12-1992. In course of trial it has come to light that all the DLRs who were engaged on or before the cut-off date i.e. Dt. 12-4-1993 were regularised in service and those who had joined after the cut-off date were retrenched. Therefore, the cut-off date i.e. Dt. 12-4-1993 assumes importance in this case. The second party members claim that their date of engagement is prior to the cut-off date which is not admitted to by the management. Be that as it may, the present reference is not with regard to the justification of refusal of the management to regularise the services of the second party members. Therefore, it is not necessary to strive hard to find out whether the disputant workmen were engaged prior to or after the cut-off date. It is not in dispute that with effect from the 12th March 2003 they have been denied employment and that is the cause of action of the present dispute. This Tribunal is required to answer as to whether the refusal of employment with effect from the 12th March 2003 is legal and/or justified.

7. The management admits that the second party members were engaged after Dt. 12-4-1993 and that on an average they used to be engaged for 13 to 20 days in a month. It is not disputed that their services were terminated with effect from the 12th March 2003. Neither in the pleading nor in the affidavit of M.W. No. 1 the date of commencement of engagement of each of the workmen has been disclosed. However, Ext. 8, a list of DLR workers signed by the first party Executive Engineer on Dt. 13-3-2001, reflects that the dates of joining of workmen Nos. 1, 2 and 3

are Dt. 21-6-1995, 15-9-1997 and 10-1-1998 respectively. The second party members do not admit the correctness of their dates of joining as reflected in Ext. 8. However, assuming that the particulars with regard to the second party members given in Ext. 8 are correct, this Tribunal finds that they were under the employment of the first party covering a period of more than five years. Their engagement spreading over such a long span of time is not disputed by the management. However, it is alleged that each of them used to work for 13 to 20 days in a month. Despite of orders passed by this Tribunal on the prayer made by the second party the management has not produced relevant documents which could have thrown light on the number of days each of the workmen had worked every month covered by their respective period of engagement. Therefore, an adverse inference has to be drawn to the effect that each of the workmen had been engaged for more than one year of continuous service so as to be entitled to notice or notice pay and retrenchment compensation as required under Section 25-F for the Act. Admittedly, the requirement of Section 25-F of the Act has not been complied with which makes the impugned retrenchment illegal.

8. In Para. 5 of the written statement it is pleaded that after the year 2003 no work of casual nature could be made available to the casual workers and therefore, no illegality has been committed by the first party in not giving employment to the second party members. It is also pleaded that the cessation of their engagement due to non-availability of work being automatic, such action of the first party can not be termed as unjustified. Thus, the management takes the stand that with effect from the 12th March 2003 the management had no work to engage the second party members. It is neither pleaded nor established by the second party that after the retrenchment of the disputant workmen the management had engaged any other person to do work of casual nature. Therefore, it may be believed that with effect from the 12th March 2003 the management has not engaged any DLR as there was no need of such engagement. From that point of view, the disengagement may be held to be justified.

9. However, the alleged contravention of the provisions contained in Section 25-G of the Act may be examined carefully. It is the specific case of the second party members that persons junior to them were retained in employment, while their services were terminated abruptly with effect from the 12th March 2003. They have named some of the juniors as Nalinikanta Mahal, Hrusikesh Das, Santosh Behera, Bajia Behera and Sayed Abrara Alli. In the list of DLR workers marked Ext. 8 names of these so-called juniors find place. However, the entries in Ext. 8 reflect that all the so-called juniors had joined with the first party establishment prior to Dt. 12-4-1993. The second party members claim that though they had joined prior to the so-called juniors, but while preparing the gradation list the management had mentioned wrong dates of their joining. As already stated, Ext. 8 reflects that the second party members had joined after Dt. 12-4-1993, but the dates of their joining as reflected in Ext. 8 have been disputed by them. To support their case they rely on the Experience Certificates marked Exts. 1 to 1/2 said to have been issued by the Junior Engineer, Kendrapara Irrigation Section, Kendrapara. They also rely on Ext. 2 a letter Dt. 17-2-2003 signed by the Assistant Executive Engineer, Kendrapara Irrigation Subdivision addressed to the Executive Engineer. It reflects that a request was made for correction of the dates of joining of some of the DLRs basing on certificates in support of their engagement as DLRs. The enclosure to Ext. 2

contains names of the DLRs including the second party members whose dates of joining were sought to be corrected. The Executive Engineer in turn wrote a letter to the Superintending Engineer, Eastern Circle, Cuttack (marked Ext. 3) forwarding the letter of the Assistant Executive Engineer for necessary action. Relying on these documents it is argued on behalf of the second party that the correct dates of joining of the workmen are as reflected in the Experience Certificates marked Ext. 1 series. However, Ext. B, which is a letter from the Superintending Engineer, Eastern Circle, Cuttack in reply to Ext. 3, reflects that the Superintending Engineer made further query and in reply thereto the Assistant Executive Engineer submitted his reply marked Ext. C stating therein that on verification of records such as Cash Book and Measurement Book no materials in support of correction of the dates of joining of the concerned DLRs could be traced out. Thus, it is found that the management has not acted upon the Experience Certificates (Ext. 1 series) said to have been issued by the Junior Engineer, Kendrapara Irrigation Section, Kendrapara.

10. The Experience Certificates relied on by the workmen are disputed documents. After following official procedure the Authority is shown to have not acted upon those Experience Certificates. The person granting the Experience Certificates has not faced the test of cross-examination. It is rightly argued that the Certificates were not issued observing official procedure. Ext. D, a representation made by one of the second party members namely, Bijayananda Kar, before accrual of the cause of action, reflects that the said workmen joined as a DLR in the month of March 1994. There is nothing to disbelieve what is stated in Ext. D. Therefore, Ext. D falsifies the facts certified in Ext. 1/1, the Experience Certificate issued in favour of said Bijayananda Kar. Ext. D reflects that Bijayananda Kar is a Graduate and that he was retrenched in the month of October 1997. Within a period of about five months from that retrenchment he made the application for his re-engagement. Therefore, it cannot be believed that he was under any *bona fide* mistake while mentioning in Ext. D the month and year of his initial appointment. Presuming that the disputant workman, namely, Bijayananda Kar has correctly given the month and year of his initial engagement in his representation marked Ext. D, it is held that the Experience Certificate, Ext. 1/1 issued in his favour stating the date of his joining as Dt. 1-9-1992 is false. As already stated, the Experience Certificates (Ext. 1 series) are not found to have been issued observing the official procedure. It does not bear any issue number with date. Such Certificates can be created any time if some unscrupulous person wants to help some one. It is quite possible that the Certificates were issued after the disputant workmen were removed from employment on the ground that they had joined after the cut off date i.e. Dt. 12-4-1993. It is neither in the pleadings of the parties nor in their evidence but it is reflected in the Conciliation failure report that as per the instructions contained in Finance Department. Office Memorandum No. 17815, Dt. 12-4-1993 and D.O. Letter No. 15716, Dt. 5-6-1993 of the Water Resource Department the DLR workers who were engaged prior to the Dt. 12-4-1993 were eligible for regularisation in service whereas those joining after Dt. 12-4-1993 were to be retrenched. It appears, the management on the basis of the said Office Memorandum and D.O. Letter refused employment to the second party members. It is after their retrenchment they had approached the Hon'ble High Court for regularisation of their services. There is no authenticated document showing the date of initial engagement of any of the second party members. The initial burden lies on the workmen to prove their respective date of initial engagement. They try

to discharge the onus by placing reliance on the Experience Certificates which are found to be unreliable. Official documents such as Ext. 8 and Exts. B to D disprove the second party's claim on the initial date of engagement. Under such circumstances, it is not possible on the part of this Tribunal to conclude that the disputant workmen Nos. 1 to 3 had joined on Dt. 12-1-1993, 1-9-1992 and 1-12-1992, respectively.

Thus, the second party has not placed sufficient materials to support its contention that the disputant workmen are senior to the above named so-called juniors. Consequently, violation of Section 25-G of the Act is not established. Therefore, on the ground that juniors were retained while seniors were retrenched from employment the impugned retrenchment cannot be said to be justified.

Issue No. 1 is answered accordingly.

11. As to the management's plea that it is not an 'industry' the management has not adduced any evidence. There is no material to support the contention that being a Department of the State Government it exercises sovereign power. On the other hand, the Hon'ble Supreme Court have held in AIR 1988 (SC) 1182 (*Des Raj Vrs. State of Punjab & Ors.*) that the main functions of the Irrigation Department when subjected to the dominant nature test clearly come within the ambit of 'industry'. The first party being in the Irrigation Department is, therefore, not excluded from the definition of 'industry'.

So far the plea of delay is concerned, the Act does not prescribe any time limit in the matter of raising an industrial dispute. That apart, it is seen that after their retrenchment the second party members had moved different forums to putforth their grievances. Therefore, their claim cannot be denied on the ground of unreasonable delay.

12. *Issue No. 2*— Had it been concluded that the second party members were senior to Nalinikanta Mahal, Hrusikesh Das and some others who are still under the employment of the first party this Tribunal would have extended the relief of reinstatement. On the other hand, the management has shown that after Dt. 12-3-2003 no DLR has been engaged in its establishment, implying thereby that the management cannot provide work to the disputant workmen if they are directed to be reinstated. That apart, the Hon'ble Supreme Court in *Ashok Kumar Sharma Vrs. Oberoi Flight Services*, AIR 2010 (SC) 502 have observed as follows :—

“It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of the employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation, even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.”

In *Jagbir Singh Vrs. Haryana State Agriculture Marketing Board*, AIR (SC) 3004, it is held that the award of reinstatement with full back wages in favour of daily wagers is improper and that

instead of such relief compensation should be awarded. In the same decision the Hon'ble Supreme Court have distinguished between a daily wager who does not hold a post and a permanent employee.

The disputant workmen were working on DLR basis. They did not hold any post. Though the Tribunal with the available materials is under compulsion to presume that the disputant workmen had been engaged by the first party for a period covering five years or more, it is not made clear whether they used to be engaged either intermittently or continuously during the entire span of their employment. Under such circumstances, the Tribunal finds it just and appropriate to award compensation to the disputant workmen in lieu of the relief of reinstatement with back wages.

Considering the nature of their employment and length of engagement, each of the disputant workmen is found entitled to get compensation of Rs. 50,000 (Rupees fifty thousand) only.

The reference is answered accordingly. Management to implement the Award within a period of two months of the date of its publication in the Official Gazette.

Dictated and corrected by me.

RAGHUBIR DASH  
1-9-2012  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

RAGHUBIR DASH  
1-9-2012  
Presiding Officer  
Industrial Tribunal  
Bhubaneswar

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By order of the Governor  
J. DALANAYAK  
Under-Secretary to Government