

The Odisha Gazette

EXTRAORDINARY
PUBLISHED BY AUTHORITY

No. 853 CUTTACK, MONDAY, MAY 6, 2013 / BAISAKHA 16, 1935

LABOUR & EMPLOYEES STATE INSURANCE DEPARTMENT

NOTIFICATION

The 26th April 2013

No. 4015—IR-(ID)-43/2012-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 15th March 2013 in I. D. Case No. 6 of 2012 of the Presiding Officer, Labour Court, Sambalpur to whom the industrial dispute between the Management of Executive Engineer, G.P.H. Division No. II, Sambalpur and their workman Shri Nirakar Kumbhar was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE COURT OF THE PRESIDING OFFICER
LABOUR COURT, SAMBALPUR

INDUSTRIAL DISPUTE CASE NO. 6 OF 2012

Dated the 15th March 2013

Present :

Shri Srikanta Mishra, LL.M.,
Presiding Officer, Labour Court,
Sambalpur.

Between :

The Management of
Executive Engineer,
G.P.H. Division No. II, Sambalpur.

.. First Party—Management

And

Their workman,
Shri Nirakar Kumbhar,
Ex-DLR, Choukidar,
At/P.O. Khandual, P.S. Dhanupali,
Dist. Sambalpur.

.. Second Party—Workman

Appearances :

Shri A. K. Senapati, Advocate	.. For the First Party—Management
Shri S. Mishra, Advocate	.. For the Second Party—Workman

AWARD

This Award arises out of a reference made by the Government of Odisha, Labour & E.S.I. Department under the powers conferred by sub-section (5) of Section 12, read with Clause (c) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) (for short “the Act”) vide Order under Memo. No. 4926 (5), dated the 26th June 2012. The dispute involved under the schedule of reference is as follows :—

“Whether the action of the Executive Engineer, G.P.H. Division No. II, Sambalpur in terminating the services of Shri Nirakar Kumbhar, DLR-Choukidar by way of refusal of employment with effect from 1st November 2005 is legal and/or justified ? If not, what relief the workman is entitled to ?”

2. The case of the second party workman in brief as per his statement of claim is that he was engaged as Choukidar on DLR by the Assistant Engineer, General Public Health Subdivision, Sambalpur being selected in an interview and performed his job with effect from the 1st March 1994. The first party No. 6 prepared a gradation list of DLRs vide letter No. 253, Dt. 4-5-1996 to regularise DLRs in service and his name was listed in Sl. No. 14. From 1-3-1994 to 30-4-2000 the second party received payment from the first party No. 1 through hand receipt forms being approved by the first party No. 5. From 1-7-2000 to 31-10-2005 the second party worked under the first party No. 5 and received wages after signing the hand receipt forms and attendance register. It is alleged by the workman that from 1-11-2005 his wages was withheld and on 24-12-2005 when he requested the first party No. 5 to disburse wages, he stated that the workman has been removed from his service from 1-11-2005 and he has been paid his wages from 1-7-2000 to 31-10-2005 through a contractor. The second party previously filed O. A. No. 87 (s)/2000 before the Odisha Administrative Tribunal Circuit Bench, Sambalpur for regularisation of his service and the said Bench passed an Order on 25-9-2000 to consider his case by the first party. But the first party No. 4 rejected his claim on 12-8-2004 holding that he was a DLR on job contract basis. The second party also filed O.A. No. 15 (s)/2005 before the Odisha Administrative Tribunal, Bhubaneswar in its sitting at Circuit Bench, Sambalpur and vide Order, Dt. 27-8-2007 the first party was asked to retain him in service on contractual or D.L.R. post as a stop gap measure but the first party No. 1 refused to reinstate him. In the meantime, the second party filed an application before the Labour Officer, Sambalpur stating his grievances and the matter was taken up for conciliation. The D.L.O. advised him to wait till the final verdict of the O.A. Case before the Tribunal. Ultimately the Conciliation Officer-cum-Assistant Labour Officer, Sambalpur submitted a failure report on 22-3-2012 and on that basis the present reference has been made.

3. The first party No. 5 filed a written statement on behalf of the managements. In the written statement, it denied the publication of notice for engagement of DLR in the year 1994 but admitted that a gradation list was prepared and submitted before higher authorities for regularisation of the service of the workman. According to the management, regularisation would not be possible due to ban of engagement of such workers after 12-4-1993 as per a Circular of the Finance Department. It is the specific stand of the management that in view of the ban on engagement of labourers the requirement of additional hand was made through Government Registered Contractor and the applicant was one of such labourers supplied by contractors. His wages along with other labourers for the period from 1-7-2000 to 31-10-2005 have been paid to the contractor. As regards the Order passed by the Tribunal in the O.A. Case filed by the workman, it is submitted by the management that in view of the ban imposed by the Finance Department there is no scope for engagement of the second party after 30-6-2000. According to the management, the nature of duty performed by the second party was purely supervisory in nature and he did not discharge any manual work for which he can not be said to be a workman under the definition of the Industrial Disputes Act. It is also the stand of the first party that the office of the Executive Engineer, G.P.H. Division, Sambalpur being a Government Office and a part of Works Department, its functions are not analogous with trade and business and therefore it can not be said to be an Industrial establishment, with such averments the first party pray for dismissal of the claim of the second party.

4. The second party filed a rejoinder wherein he cited certain decision of the Hon'ble Apex Court in support of his case that he is a workman and the office of first party No. 5 is an industry. According to him, the management has maintained the attendance registers for payment of wages made to labourers through contractor and since in the said register his name does not find mention he should be treated to be a workman under the management.

5. On the basis of the pleadings of the parties, the following issues have been framed for adjudication :—

ISSUES

- (i) "Whether the action of the Executive Engineer, G.P.H. Division No. II, Sambalpur in terminating the services of Shri Nirakar Kumbhar, DLR Choukidar by way of refusal of employment with effect from the 1st November 2005 is legal and/or justified ?
- (ii) If not, what relief the workman is entitled to ?"

6. The second party examined himself as sole witness and filed several documents which were marked as Ext. 1 to Ext. 19. The management examined the Executive Engineer, G.P.H. Division as sole witness and through him several documents were marked as Ext. A to Ext. G.

FINDINGS

7. *Issue No. (i)*—The second party has pleaded and adduced evidence in Court that he was appointed as a Choukidar (Watchman) in the office of the Assistant Engineer, G.P.H. Division,

Sambalpur on 1-3-1994 on the basis of an interview in response to the notice of the said office. The further case of the second party that from 1-3-1994 to 30-6-2000 he was being paid directly by the first party and that the first party Nos. 5 and 6 approved the payments made to him for the said period through hand receipt form, is also not disputed by the management. It is the specific admission of the management that during the said period the second party was continuing as daily rated worker. During course of hearing, the second party has proved a copy of letter bearing No. 253, Dt. 4-5-1996 issued by the Assistant Engineer, G.P.H. Subdivision, Sambalpur to the Executive Engineer, G.P.H. Division, Sambalpur which has been marked as Ext. 1. Along with this copy of letter, the Assistant Engineer enclosed a list of DLRs engaged under the Subdivision and requested the Executive Engineer to regularise the service of the persons enlisted. The list contains the name of 14 persons and the Serial Number of the present workman is 14. Therefore, it is crystal clear that the Assistant Engineer, G.P.H. Subdivision, Sambalpur was satisfied with the performance of the second party as a Daily Wage Labour with effect from the 1st March 1994 and he requested for his regularisation in service. The above evidence established the fact that the second party though engaged as daily wage labour, his service was continuous under the first party from 1-3-1994 to 30-6-2000.

8. Admittedly, the second party was not regularised in service on the basis of the letter marked Ext. 1. He filed O.A. No. 87 (s)/2000 before the OAT, Bhubaneswar. A copy of the Order No. 2, Dt. 25-9-2000 passed by Member (Judicial) filed by the workman marked Ext. 6 in the said case. It reveals from Ext. 6 that the Hon'ble Member, Judicial of the Tribunal, finding that the name of the applicant (second party) at Sl. No. 14 of the list of DLRs requested to be regularised, sent the paper book to the first party asking them to consider the case of the second party in the matter of regularisation of his service as per Finance Department Resolution, Dt. 15-5-1997. A copy of the said Resolution has been filed on behalf of the management and marked as Ext. B. It reveals from Ext. B that by a Resolution No. 22764, Dt. 15-5-1997, the Finance Department of Government of Odisha, framed a guideline for absorption of NMR/DLR/Job contract workers under regular establishment. By this Resolution of concerned appointing authorities were instructed to prepare separate gradation/seniority list for each category of workers, determining the length of engagement of a particular person and it was stipulated that the workers should have worked under the administrative control of the concerned department directly for a minimum period of 10 years. As per Clause 2 of the Resolution, the workers should have been engaged prior to 12-4-1993 i.e. prior to promulgation of ban on NMR/DLR/Job contract workers, etc. vide Finance Circular No. F-11-180/92-17015, Dt. 12-4-1993. The second party was engaged under the first party with effect from the 1st March 1994 and therefore, he was not a workman by the cut off date under the Finance Department Circular, Dt. 12-4-1993 and hence he could not have been regularised/absorbed in service on the basis of the Finance Department Resolution No. 22764/F., Dt. 15-5-1997.

9. The management has specifically taken a plea that they considered the case of the second party in accordance with the Circular and rejected his representation vide their letter No. 1428,

Dt. 12-8-2004. Copies of the said letter have been marked as Ext. 7 and Ext. D. It reveals from the Ext. D that the Superintending Engineer, PH (R. & B.) Circle having been directed by the Hon'ble OAT, Bhubaneswar, considered the prayer of the workman in accordance with the Finance Department Resolution No. 22764, Dt. 15-5-1997 and rejected his prayer as the said Resolution prohibits the consideration of the matters regarding D.L.Rs. engaged after 12-4-1993. A copy of the said letter was communicated to the Government Advocate, OAT, Bhubaneswar and Executive Engineer, G.P.H. Division, Sambalpur for their information. It reveals from the evidence on record that the workman, thereafter, filed O.A. No. 15 (s)/2005 before the Hon'ble Administrative Tribunal, Odisha. The Hon'ble Tribunal disposed of the O.A. vide their Order No. 14, Dt. 27-8-2007 and copies of the said Order have been marked Ext. 8 and Ext. E. It reveals from the Order of the Hon'ble Tribunal that the workman prayed for direction to the first party to regularise him in service in the post of Choukidar but after hearing on merit the Tribunal found that there was no scope for appointment of any D.L.R. employes like the present workman appointed after the ban period and hence his engagement cannot be construed to be an engagement in a civil post in a regular manner. The Hon'ble Tribunal found that it was not possible to give any direction upon the Respondents for regularising the service of the workman. However, the Hon'ble Tribunal considering the 7 years service of the workman as a Choukidar kept the matter open to the management to consider the prayer of the present second party for engagement in any contractual or D.L.R. post as a stop gap measure especially keeping in view that at that stage it would not be possible for him to take up any Government Service in a regular manner. The applicant (second party) was also authorised to make appropriate representation to the authority concerned along with a copy of the order pursuant to the observation of the Hon'ble Tribunal, the second party made a representation on Dt. 25-9-2007 to the Executive Engineer, G.P.H. Division, Sambalpur with a prayer to continue him in service and the representation of the second party was finally rejected by the Under-Secretary to Government, Works Department, Government of Odisha. The said order was also communicated to the workman which would reveal from the copy of the Memo. No. 20133-W., Dt. 20-11-2007 marked Ext. E.

10. It reveals from the own pleading of the workman that from 1-7-2000 to 31-10-2005 he was working under the first party No. 5 and was receiving his wages after signing the hand receipt form and attendance register. Though he claims that for the said period he was directly working under the first party, it is the case of the first party that for the said period he was working as a labourer on payment of daily wages being supplied by Registered contractors and that he was not working under them after 30-6-2000. When the Finance Department imposed a ban for regularisation of the D.L.Rs. who were engaged after 12-4-1993, the management could not have engaged him directly and even if, it is believed that he received his daily wages from the management during the period from 1-7-2000 to 31-10-2005 then also he cannot be said to be a regular employee under the management. He being a daily wage labourer cannot of aim continuance in service particularly in

view of the ban imposed by the Finance Department of the Government of Odisha. It is true that the Hon'ble Administrative Tribunal made an observation that the second party could have been engaged in any contractual or any D.L.R. post on stop gap measure but the management cannot be said to have been under any obligation to absorb the second party or regularise his service. It was open to them either to engage him in any contractual or any D.L.R. post as a stop gap measure specially keeping in view that the workman cannot take up any Government service in regular manner.

11. It further reveals from the evidence on record that since the workman was not given any further engagement by the management, he filed O.A. No. 3(s)/2008 before the Hon'ble Administrative Tribunal, Odisha and the said case was disposed of by Order No. 13, Dt. 21-12-2009, a copy of the said Order has been marked as Ext. 11. This Order reveals that the Hon'ble Tribunal observed that it has no legal authority to direct the management to engage the second party but at the same time held that the authorities are at liberty to consider re-engagement of the applicant (second party) in pursuance of Order, Dt. 27-8-2007 in O.A. No. 15 (s)/2005 particularly as the ban on engagement has since been lifted by the Government. After disposal of the O.A. No. 3(s)/2008 the second party filed an application before the Secretary, Finance Department of Government of Odisha, Bhubaneswar praying to direct his authorities for reinstatement in service. A copy of his above letter, Dt. 15-3-2010 has been marked as Ext. 12. There is no evidence on record as to whether the application of the workman, Dt. 25-3-2010 was considered by the concerned authority.

12. The present reference has been made on the basis of a complaint petition filed by the second party before the Deputy Labour Commissioner, Sambalpur on 21-7-2010. The question before this Court is whether the refusal of the employment of the second party by the first party with effect from 1-11-2005 is legal or justified. In view of the discussions made earlier, it is crystal clear that the second party was a D.L.R. under the first party from 1-3-1994 to 30-6-2000. He claims that from 1-7-2000 to 31-10-2005, he continued to work directly under the first party but it is the case of the first party that during the said period he was working for them as a labourer being supplied by Government contractor. When it is not disputed that the second party continuously worked for first party from the date of his joining, i.e. 1-3-1994, it is for the first party to establish the fact that for the particular period (1-7-2000 to 31-10-2005) he was working for then being supplied by any contractor. The only witness examined on behalf of the management is an Executive Engineer, G.P.H. Division, Sambalpur who took charge on 2-8-2008. Therefore, he has no direct knowledge as to whether the second party was directly engaged by the management or he was supplied by any contractor. The management has not filed any document to indicate that the second party worked for the relevant period under the control of any contractor. It is the claim of the workman that he received wages from the first party under hand receipts. During course of hearing, he has proved copy of one hand receipt which was marked Ext. 2. This document shows that the second party was paid wages for the period from 1-6-2000 to 30-6-2000 i.e. @ Rs. 40 per day for 26 days. The workman has not filed any other hand receipts in support of his claim that after 1-7-2000 he continued to receive payment

directly from the first party. The workman relies upon copies of attendance registers obtained by him under the provisions of Fight to Information Act which are marked as Ext. 10 series. He deposed that the said register contains the signature of the workman engaged like him in the office. On perusal of the Ext. 10 series I find, the second party has not been shown to be an employee in the register maintained for the year 2000-2004 and he has not signed on the attendance register. A close scrutiny of the oral and documentary evidence on record inclines me to hold that there is no convincing evidence to conclude that the second party was working as Watchman under the direct control of the first party from 1-7-2000 to 31-10-2005. Admittedly, from 1-11-2005 the second party has not worked for the first party. Though he claims that he was removed from service from 1-11-2005 he did not approach the Labour Forum till 21-7-2010 on which day he, for the first time made a complaint before the DLC after losing his hope for regularisation of his service by preferring 3 applications before the Hon'ble Administrative Tribunal, Odisha. The management witness during cross-examination has deposed that the second party was receiving his daily wages from the contractor who engaged him from 1-7-2000 to 31-10-2005. He further deposed that since the management was paying the wages of the workman to the contractor, they did not maintain any record regarding payment of wages to the individual workman. The second party relying upon the copy of attendance registers marked Ext. 10 to Ext. 10/4, submitted that had he been working under contractor, his name would have been mentioned in the attendance register but since he was being paid directly by the management, his name is not shown in the attendance register, prepared for the workers working under the control of the contractor. On perusal of the Ext. 10 series, I find, the same refer to the attendance of some workman in the month of August 2000, September 2000, February 2004 and July 2004. It is not known, why the second party has not produced copy of the attendance sheets of other months during the period from 1-7-2000 to 31-10-2005. In such circumstances, it might be a fact that during the months for which the attendance sheets are filed, he did not work for the management. There being no direct evidence regarding the employment of the second party by the first party for the period from 1-7-2000 to 31-10-2005. It cannot be said that his service was terminated illegally with effect from 1-11-2005. It reveals from the record that the service of the second party under the first party was terminated on 30-6-2000 and for subsequent period, i.e. 31-10-2005 he was not a workman directly under the first party.

13. In view of the discussions made above, I am constrained to hold that the second party was not a workman under the first party by 31-10-2005 and therefore, the question of his refusal of employment by the first party with effect from the 1st November 2005 does not arise. The first party during the conciliation process before the Assistant Labour Commissioner took a positive stand that from 1-7-2000 to 31-10-2005 the second party was working through the contractor and the question of non-payment of wages together with removal of the workman from service with effect from 1-11-2005 by the employer does not arise. The Conciliation Officer gave no opinion as to whether the second party was actually removed from service with effect from the 1st November

2005 and whether prior to said date, he was working under the first party. In the above circumstances, the issue cannot be answered either way.

14. *Issue No. (ii)*—While discussing under issue No. (i), I have already held that the second party was not a workman under the first party during the period from 1-7-2000 to 31-10-2005 and he was not refused employment with effect from the 1st November 2005 as claimed by him. Therefore, he is not entitled to any relief in the frame of present proceeding.

In view of the determination of the issues in the manner aforesaid, the following Award is passed.

AWARD

The reference is answered on contest without cost against the second party workman. It is held that the Executive Engineer, G.P.H. Division No. II, Sambalpur did not terminate the services of Shri Nirakar Kumbhar (second party) by way of refusal of employment with effect from the 1st November 2005. Therefore, the question of its legality or justness does not arise. The second party workman is not entitled to any relief in the frame of present proceeding.

Dictated and corrected by me.

SRIKANTA MISHRA
15-3-2013
Presiding Officer
Labour Court
Sambalpur

SRIKANTA MISHRA
15-3-2013
Presiding Officer
Labour Court
Sambalpur

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