

I/181921/2022

Government of West Bengal
Labour Department, I. R. Branch

N.S. Buildings, 12th Floor, 1, K.S. Roy Road, Kolkata - 700001

No. Labr/ 206 / (LC-IR)/ 22015(16)/4/2022

Date : 17/03/2022

ORDER

WHEREAS an industrial dispute existed between M/sJalan Infotech Pvt. Ltd., 54/C Hazra Road, 1st Floor, Kolkata - 700019 and its workman Sri Wakil Kumar Yadav, C/o Sri Durga Bhagat (Landlord), 28/B, Kalika Place, Naskarhat, Kolkata - 700039 regarding the issues, being a matter specified in the second schedule to the Industrial Dispute Act, 1947 (14 of 1947);

AND WHEREAS the workman has filed an application under section 10(1B)(d) of the Industrial Dispute Act, 1947 (14 of 1947) to the Second Labour Court, Kolkata specified for this purpose under this Deptt.'s Notification No. 1085-IR/12L-9/95 dated 25.07.1997;

AND WHEREAS the said Second Labour Court, Kolkata has submitted to the State Government its Award dated 21.02.2022 under section 10(1B)(d) of the I.D. Act, 1947 (14 of 1947) on the said Industrial Dispute vide Memo No. 265 - L.T. dated 02.03.2022;

Now, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14 of 1947), the Governor is pleased hereby to publish the said Award as shown in the Annexure hereto.

ANNEXURE

(Attached herewith)

By order of the Governor,

sd/-
Joint Secretary

to the Government of West Bengal

No. Labr/ 206 / (15)/(LC-IR)

Date : 17/03/2022

Copy with a copy of the Award forwarded for information and necessary action to :-

1. M/s Jalan Infotech Pvt. Ltd., 54/C, Hazra Road, 1st Floor, Kolkata - 700019.
2. Sri Wakil Kumar Yadav, C/o Sri Durga Bhagat (Landlord), 28/B, Kalika Place, Naskarhat, Kolkata - 700039.
3. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The OSD & EO Labour Commissioner, W.B., New Secretariat Buildings, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata - 700001.
5. The Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.


Joint Secretary

No. Labr/ /2(2)/(LC-IR)

Date : 2022

Copy forwarded for information to :-

1. The Judge, Second Labour Court, Kolkata, with respect to his Memo No. 265 - L.T. dated 02.03.2022.

I/181921/2022

2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata – 700001.

Joint Secretary

In the matter of an application under section 10 (1B)(d) of the Industrial Disputes Act, 1947 filed by Shri Wakil Kumar Yadav, C/o. Shri Durga Bhagat (Landlord), 28/B, Kalika Place, Naskarhat, Kolkata – 700 039 against O.P. M/s. Jalan Infotech (P) Ltd., 54/C, Hazra Road, 1st Floor, Kolkata – 700 019.

Case No. 30/2011 u/s 10(1B)(d)

Before the Second Labour Court, West Bengal, Kolkata

**Present: Shri Argha Banerjee, Judge
Second Labour Court
Kolkata**

Dated: 21.02.2022.

A W A R D

This is a case under section 10 (1B)(d) of Industrial Disputes Act, 1947 filed by the applicant for his reinstatement in service along with full back wages /salaries for the period of unemployment. The case of the applicant as elucidated in the application under section 10 (1B)(d) of the Industrial Disputes Act, 1947. That the applicant had raised an industrial dispute against the Opposite Party under his representation dated 13.12.10 addressed to the Labour Commissioner, Government of West Bengal in the matter of termination of service of the said applicant by the said Opposite Party and the said dispute was not settled within 60 (sixty) days from the aforesaid date of raising the aforesaid dispute before the aforesaid authority and was pending for conciliation. That *the case* in a nutshell is: –

That the applicant above named was a motor car driver, engaged by the opposite party to drive their motor vehicle, permanently in the year 2005. That the applicant contended the fact that the opposite Party above named being a reputed concern is being engaged in various sorts of trading business and had been earning huge profit which is growing day by day owing to the skilful performance and hard labour rendered by its workmen employed under the same.

It has been contended by the applicant that though the opposite party is a well profit earner yet the same was very much exploitative to its labourers. That not only they were paid very meagre wages but also the same in spite of working hard were being deprived from many legitimate and due entitlements from the opposite party. That the opposite party as contended by the applicant had very little regards to observe the provision of industrial laws, particularly those that were being enacted for the welfare of the workmen.

That it is the contention of the applicant that the same is also a victim of the aforesaid unfair labour practices of the opposite party wherein no appointment letter was being issued by the opposite party thereby depriving the applicant from his legitimate entitlements from the said opposite party. That the applicant in-spite of the aforesaid



rampant unfair labour practice adopted by the opposite party had all along been very much sincere, hardworking and had left no stone unturned to satisfy the opposite party. The applicant had been rendering the best of his service, all through his tenure of employment under the opposite party.

That in spite of the diligent service rendered by the applicant, the opposite party had paid no return to the applicant for the same, and on the contrary had terminated his service w.e.f. 31.05.2009 without assigning any reason and prior notice, only by verbal order by the way of refusal of employment. That no charge-sheet was issued against the applicant nor any compensation *and/or* monetary benefit was being paid by the opposite party prior to the sudden termination of the applicant. That, the applicant had contended the fact that the monthly salary drawn by the same at the time of his termination; was Rs. 5,000/- per month.

That being highly aggrieved by the aforesaid wrongful order of termination the applicant on several occasions had approached before the opposite party personally with a verbal request to withdraw the wrongful termination order but no steps were being initiated by the opposite party in this regard. That being dissatisfied the applicant had made a written representation to the opposite party dated 10.09.2010 claiming for his immediate reinstatement in the service along with full back wages and all other consequential benefits accrued thereto. That the said letter was sent through registered post with A/D to the opposite party.

That although the opposite party had received the said letter in due course yet no response was being made in regard to the claims mentioned in the aforesaid letter; nor any initiation was taken from the opposite party to settle the aforesaid demands. That, under the said circumstances the applicant had made a representation dated 13.12.2010 before the Labour Commissioner, Govt. of West Bengal seeking intervention of the same in the instant dispute and the said authority was pleased to take up the said matter for conciliation.

That Shri P. P. Das, Assistant Labour Commissioner, Govt. of West Bengal conciliated the said dispute inter-alia convening joint conferences between the applicant and the opposite party, but no solution could be arrived at due to the non-compromising, unreasonable and adamant attitude of the opposite party. That the applicant further contended that the act of the opposite party was illegal, unjustified and arbitrary in regard to the termination of the service (of the applicant) without observing the basic principles of industrial law thereby rampantly violating the principles of natural justice. That the applicant as contended is fully unemployed and passing hard days since his termination of service from the opposite party and had failed to obtain any job and /or arrange for any other source of earning till date. The applicant has thus prayed for an Award declaring the



termination of service to be illegal in-operative and ab-initio void with a further prayer to pay back the full back wages and all other consequential benefits reliefs.

The opposite party had appeared in the present case and had filed its written statement wherein it has stated that the same is a company incorporated under the provisions of the Companies Act, 1956, and had employed the applicant above named for his services as a four-wheeler vehicle driver.

The applicant had joined the opposite party to render his services as mentioned above on and from 15th day of July, 2008 and drew salary from the opposite party since that date. The opposite party had denied and disputed the fact that the applicant had been rendering his services on and from 2005 as stated by the applicant in his written statement before this Court. That the opposite party had also denied the fact that the same had unilaterally terminated the services of the applicant and had stated that the applicant had remain absent from the work assigned to him continuously; without any notice, intimation and proper authorization from the opposite party on and from 31st day of May, 2009 which had culminated into his termination of service by way of abandonment of service.

The opposite party after waiting for a couple of months for the applicant to join the service was constrained to issue a show cause notice upon the opposite party on 4th day of June, 2009 because of the daily inconvenience caused to the same owing to the absence of the applicant and in addition to the inconvenience caused to the opposite party had to incur expenses against such unauthorized absence with no intimation as regards to any tentative date of re-joining the service by the applicant.

That the applicant had not only failed/ neglected to file a reply to the show cause issued by the opposite party but also had not attended and performed the work assigned to him. That the opposite party after waiting for a period of two months for the applicant to resume his duties or to intimate the same had considered the unjustifiable act of the applicant as abandonment of service on the part of the applicant and accordingly the service of the applicant with the opposite party was terminated with effect from 31st August, 2009.

It is contended by the opposite party that after waiting voluntarily, without prejudice, solely from a humanitarian angle, for an uncertain period for about 3 (three) months wherein the applicant without intimation, information or reply to show-cause remained absent, the services of the applicant had to be reasonably construed as abandonment of service and as such the employer (opposite party) was compelled to recruit a replacement for the applicant who was said to have been in service during the relevant point of time. The opposite party had denied and disputed the fact that the applicant had made a written representation dated 10th of September 2010 to the opposite party



demanding withdrawal of the above discussed termination and his reinstatement as alleged and the applicant is put to strict proof to the veracity, contents and service thereof.

It is contended by the opposite party that the applicant had visited the opposite party sometime in April 2010 and demanded that he should be re-employed or absorbed into service under the opposite party and that when the representatives of the opposite party told applicant that another person has been recruited in his place and he should collect his final settlement dues / pay alongwith the Provident Fund transfer forms, the applicant used filthy and abusive language and had created a scene at the office of the opposite party. The applicant had thereafter threatened the opposite party with dire consequences.

That the opposite party thereafter learnt that the applicant was being gainfully employed with one Mr. Sushil Saraf who was residing at Flat 10C, 7, Bright Street, Kolkata-700 019 at a monthly salary of Rs. 6,000/- and an additional sum of Rs. 1,000/- for Sunday duty. That in such aspect the opposite party had highlighter the fact that the applicant is/was gainfully employed at a much higher salary and it can be presumed that the applicant had abandoned the services of the opposite party only for a better salary bargain and thereafter tried to misuse and abuse the labour laws of this country to extract money from the opposite party. The opposite party contended that the plan of the applicant was foiled by the opposite party maintaining their stand wherein they were willing to pay the final settlement pay to the applicant and had not succumbed to his illegal claims.

The opposite party further stated that upon receiving a letter from the Labour Commissioner directing the opposite party to make his representation, the opposite party had complied with the same and a representation on behalf of the opposite party was filed on 20th February, 2011. Thus, the Applicant above named as contended by the opposite party is not a victim and no unfair practices as claimed or otherwise has been meted out to the Applicant. That the claim of the applicant as contended by the opposite party is not only illegal, baseless, and vexatious but is malafide.

After perusal of the application filed by the applicant, the written statement filed by the opposite party and other materials on the record the following issues were being framed: -

ISSUES

- 1) Whether the applicant is a workman and permanent employee under the O.P. Company in terms of Industrial Disputes Act, 1947?
- 2) Whether the termination of service of the applicant by the O.P Company is justified?



- 3) Whether the applicant had abandoned his service and worked for other employers?
- 4) To what other relief/reliefs if any, to which the applicant is entitled as per law and equity?

EVIDENCE ON RECORD

In order to prove the case the applicant had adduced himself as the only witness in the instant case. Documents were marked in the following manner: -

Exhibits on behalf of the applicant

Sl. No. 1 (Exhibit 1) – A letter written by the applicant against wrongful termination of service of Shri Wakil Kumar Yadav dated 10.09.10.

Sl. No. 2 (Exhibit 2) – A letter to the Labour Commissioner mentioning wrongful termination of Shri Wakil Kumar Yadav dated 13.12.2010.

Sl. No. 3 (Exhibit 3) – A letter to the Assistant Labour Commissioner from M/s. Jalan Infotech (P) Ltd. Dated 20.02.2011.

Sl. No. 4 (Exhibit 4) – A letter written by Shri Wakil Kumar Yadav dated 29.04.11 to the Assistant Labour Commissioner against his wrongful termination.

Sl. No. 5 (Exhibit 5) – Notice issued by Assistant Labour Commissioner to the Company for attending to join conference dated 31.05.11.

Sl. No. 6 (Exhibit 6) – Letter written by the applicant to the Conciliation Officer on 11.08.11 for issuing a certificate.

Sl. No. 7 (Exhibit 7) – Letter sent by the OP to the applicant dated 04.06.09 for his unauthorised absentee.

The opposite party on the other hand had adduced one Deb Prasad Roy s/o Late Jitendranath Roy as sole witness on its behalf. That documents from the side of the opposite party was marked in the following manner: -



Exhibits on behalf of the O.P.

Sl. No. 1 (Exhibit A) – A copy under certificate of posting to Shri Wakil Kumar Yadav from O.P. dated 31.08.09;

Sl. No. 2 (Exhibit A/1) – A copy under certificate of posting to Shri Wakil Kumar Yadav through Bowbazar P.O. from O.P. dated 04.06.09;

Sl. No. 3 (Exhibit B) – A copy of EDF of Shri Wakil Kumar Yadav;

Sl. No. 4 (Exhibit C) – A letter to the Asst. Labour Commissioner from M/s. Jalan Infotech (P) Ltd. Dated 20.02.11;

Sl. No. 5 (Exhibit D) – A copy of M/s. Jalan Infotech Pvt. Ltd. about the pay structure of Shri Wakil Kumar Yadav;




EVIDENCE OF THE WITNESSES

Now the evidence on the record is taken up for discussion.

From the substantive evidence of the **P.W. 1 Wakil Kumar Jadav** s/o B.P. Jadav it is clear that the same used to work in M/s. Jalan Infotech and used to drive the vehicle of the O.P. Company and got salary @ Rs. 5,000/- (five thousand only) per month. The amount was paid to him in cash and thereafter he used to put his signature upon some paper. He was appointed by the O.P. Company at the beginning of 2005 and the company had not issued any appointment letter to him in that effect. He used to put his signature upon some documents upon his arrival in the Office of the Opposite Party. The witness used to drive five types of cars namely Honda City, Santro, Tata Indigo, Accent and pickup van of the company. He had demanded the issuance of an appointment letter by the opposite party but the company remained silent to that effect. He had no document to show that he had joined the Opposite Party Company in the year 2005. The witness used to get his salary in cash and after receiving his salary he used to put his signature upon some documents. His service was terminated by the company on and from 31/05/2009 and no compensation was paid to him by the Opposite Party in this regard. He had on several occasions requested the opposite party to reinstate him, but the same had not allowed him to join his duty. The company had not issued any notice to him regarding his termination from service. He had sent a letter (exhibit – 1) to the opposite part on 10/09/2010 and had asked for reinstatement and was not reinstated in the service. Thus, finding no other alternative the same had sent a letter (exhibit – 2) to The Labour Commissioner and the opposite party had also send a letter (exhibit – 3) to the Labour Commissioner to which this witness had given a reply which was marked as exhibit – 4. The Labour Commissioner had called for a joint meeting

vide the exhibit – 5 and when the dispute was not settled then the witness had preferred an application (exhibit – 6) before the Labour Commissioner. The witness had identified his signature upon the provident fund form which was marked as exhibit A/1 and also the Employee's Pension Form which was marked as exhibit B/1 and had further admitted the fact that the same had furnished his bank details to the opposite party after joining. He was given his salary in cash and claimed to produce his pass book if required. He admitted the fact that he was residing at 6, Chowringhee Terrace and at present he was residing at 28B, Kalika Place, Naskarhat, Kolkata: 39. He had left the house at Chowringhee Terrace in the year 2010. He was absent on the last date because of his illness and was unemployed since 2009. He had admitted his signature upon the Exhibit A/1 and B/1 but had no knowledge about the contents of the said documents. He had also not received the Exhibit – C, Exhibit – 7 and Exhibit – 8 from the Opposite Party. The witness knew no person called Sushil Saraf and neither knew any company under the name and style M/s N.D. Tubes Impex Pvt. Ltd. The witness had admitted the fact that the same was not acquainted with English language and can only put his signature in English. He neither could read nor was able to write in English apart from putting his signature.



From the substantive evidence of the **O.P.W 1 Deb Prasad Roy** s/o Late Jitendranath Roy (who being the representative of the Opposite Party) it is clear that the Opposing Party had employed the applicant above named for his services as a four-wheeler vehicle driver. The applicant had joined the Opposing Party to render his services only on 15th July, 2008. The applicant was employed for a gross salary of Rs. 3,705/- per month which is clear from the exhibit - D. It is denied and disputed by the witness that the Opposing Party unilaterally terminated the services of the applicant and it is stated that the applicant in an unauthorized manner had continuously remained absent from work without any notice or intimation to the Opposing Party on and from 31st May, 2009. That the said un-authorised absence had culminated into termination by way of abandonment of service. The Opposite Party after waiting for a couple of months for the applicant to join work was constrained to issue a show-cause notice dated 4th June, 2009 to the applicant. The office copy of the said show cause notice dated 4th June, 2009 along with the certificate of posting showing was marked as Exhibit 7 and A and A/1 respectively. However, no other documents were produced by the witness to substantiate the fact that the exhibits A and A/1 contained the documents as claimed. That despite the same the applicant failed and neglected to either reply to the show-cause issued; nor had attended the work. The Opposing Party after waiting for over 2 months for the applicant to either join work or contact the Opposing Party considered the unjustifiable act of the applicant as abandonment of service on the part of the applicant and accordingly his service with the opposite party was terminated with effect from 31st August, 2009. The office copy of the said termination letter dated 31st August, 2009 along with the certificate of posting evidencing its delivery are exhibited herewith and marked as Exhibit 8. However no other documents were produced by the

witness to show that the same was being served upon the applicant and neither there was any endorsement to such effect. In the circumstances after waiting voluntarily for an uncertain period of about 3 months wherein the applicant without information, intimation or reply to the show cause notice remained absent, the services of the applicant had to be reasonably construed as abandonment of service and the Opposing Party was compelled to appoint another driver in place of the applicant. The applicant visited the Opposing Party sometime in April, 2010 and demanded that he should be re-employed by the Opposing Party. When the Opposite Party told him that another person has been recruited in his place, the applicant used filthy abuses and intimidated the employees of the Opposite Party with dire consequences. The Opposite Party thereafter learnt that the applicant was gainfully employed with one Mr. Sushil Saraf of 7, Bright Street, Flat No. 10C, Kolkata-700 019 for a monthly salary of Rs. 6,000/- and an additional sum of Rs. 1,000/- for Sunday duty. As such it is clear that the applicant is gainfully employed at a much higher salary and it is obvious that he abandoned the services of the Opposing Party wilfully for a better salary bargain and the instant application is merely a misuse and abuse of the labour laws of this country to extract money from the Opposing Party. The witness further stated that upon receiving a letter from the Labour Commissioner directing the Opposite party to make its representation, the Opposing Party complied with the same and had filed a representation on 20th February, 2011 stating the truth of the matter. The office copy is the said letter dated 20th February, 2011 is exhibited herewith and marked as Exhibit C. In the course of the instant proceedings the Opposite Party has also filed a copy of the provident fund claim form being Form 19 duly signed by the applicant as well as the director of the Opposing Party Company. It is evident from the said claim form that the applicant was employed from 15th July, 2008 till 20th May, 2009 and the signature of the applicant thereon is a clear admission by the applicant of this fact. A copy of the said form was marked as exhibit B. In the column 6 and Form 10C(EPS) of the exhibit B it was seen that the workman had resigned from service however no documents were produced to substantiate such claim. The witness also submitted the fact that in the instant proceeding, the applicant had purposely failed and refused to produce his bank passbook which would make clear the fact of his current employment and further makes it clearer about his sinister motives and actions.

DECISION WITH REASONS

Issue No. 1 : Whether the applicant is a workman and permanent employee under the O.P. Company in terms of the Industrial Disputes Act, 1947 ?

This issue is taken up alone for brevity of discussion and taking decision. The first aspect that is to be considered is whether this applicant comes under the purview of the term "Workman" under the Industrial Disputes Act. Section 2(s) provides the definition as to who will be deemed to be a workman under the Industrial Disputes Act.



".....2(s) 5" workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature...."

In the present situation it is seen that there had been no denial from the side of the opposite party that this applicant was appointed as a driver and as such it is admitted by the parties that this applicant had been rendering his skilled labour towards the opposite party. Thus, it can be clearly said that this applicant was a workman under the opposite party Company.

In order to prove the fact that whether the applicant was a permanent employee under the O.P Company the fact that is to be considered is the tenure of the applicant in the company from the day of his employment to the day of his termination in service. Section 25B of the Industrial Disputes Act states that *".....a workman is said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;*

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer--

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;....."

In the present situation it is seen that the applicant as stated by the opposite party and from the exhibits – B and D that the present applicant had joined the service of the O.P Company on and from 15.07.2008 and had continued his service till 28.05.2009. Thus, this applicant had rendered his services for a period of approximately 317 days. Though there has been an allegation from the opposite party that this applicant used to take unauthorised leave yet such fact has not been substantiated.



Thus, it is proved that the present applicant was a workman who was working permanently under the opposite party Company. Accordingly this issue is decided in favour of the applicant.

Issue No. 2: Whether the termination of service of the applicant by the O.P Company is justified?

This issue is taken up separately for convenience of discussion and taking decision as those issues are inter linked with each other. From the substantive evidences of both the applicant and the respondent it is seen that

- a) The applicant had joined the opposite party company in the year 2005 and had been engaged as a driver in the said concern. The applicant had not been provided with any letter of appointment. That apart from verbal statements no proper evidence was produced by the applicant to show the fact that an appointment letter was issued in favour of the applicant upon his joining and the fact that the applicant was working with the same since the year 2005. The burden to prove the fact that the applicant has been working with the opposite party since 2005 is upon the applicant. However, in the present case apart from verbal evidence no other document has been produced by the applicant to show that the same had been working with the opposite party since 2005. Thus, it cannot be said that this applicant has been rendering his service towards the opposite party since the year 2005. On the other hand from the exhibit B and D produced by the Opposite Party it is clear that this applicant had joined the service on 15/07/2008 and had continued till 28/05/2009. A
- b) That it has been stated by the applicant in his substantive evidence and admitted by the opposite party that the applicant was engaged as a driver in the concern and used to drive many vehicles. The applicant was drawing a gross salary of Rs. 3,705/- from the opposite party and such fact is clear from the exhibit D. The applicant though had disputed such fact that the same was getting a gross salary of Rs. 3,705/- per month from the opposite party yet had failed to produce any documents which tends to substantiate the fact that the same was receiving a salary of Rs. 5,000/- per month from the opposite party. As discussed earlier the obligation to prove the fact that the applicant drew a monthly salary of Rs. 5,000/- per month is upon the applicant and in the present scenario the applicant has failed to substantiate such fact. On the other hand the exhibit D tends to show that the applicant was receiving a salary of Rs. 3,705/- per month. Thus, it can be concluded that the applicant was getting a salary of Rs. 3,705/- per month.
- c) The fact that is now to be considered is whether the termination of the applicant from the service by the opposite party was justified and whether such termination was being done without observing the rules for dismissal. That fact that is also to be considered is that whether the applicant had voluntarily abstain himself from attending the work assigned to him by the opposite party; resulting his termination from the service. From the exhibit 1 it is clear that the applicant was refrained to perform his service by the opposite party since the month of May, 2009. In that regard the opposite party had sent the exhibits 7 and 8 which tend to show that the applicant was given a notice of show-cause by the opposite party prior to issuance of exhibit – 8 which is prior to his termination. The opposite party had contended the fact that the same had sent the exhibit – 7 under Certificate of Posting and had produced the respective documents which were marked as exhibit – A and A/1. However, such documents were being objected to by the applicant and from such



documents it cannot be said that the exhibit 7 and 8 were sent vide the exhibits A and A/1.

- d) The fact that is to be considered in this regard is that the exhibit 7 and 8 were being produced by the applicant and thus it can be presumed that the opposite party had given a show cause notice to the applicant on 04/06/2009 which the applicant had failed to comply and accordingly the exhibit - 8 was being issued on 31/08/2009. In accordance to section 25 of the Industrial Disputes Act the following conditions are to be fulfilled prior to termination of service.

25F. Conditions precedent to retrenchment of workmen:- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette].

In the present circumstances the notice was given to the applicant on 04/06/2009 vide exhibit 7 and subsequently the applicant was terminated on 31/08/2009 which is about eighty eight (88) days from the date of notice. Thus, it can be said that the stipulated period of one month was being duly complied by the opposite party Company.

The fact that is taken into consideration is whether the termination of service of the applicant was justified. In such aspect the exhibit 7 produced by the applicant clearly shows that the applicant was directed to file his show-cause and the same had failed to file resulting in his termination. The applicant had not disputed the issue raised by the opposite party in the exhibit 7; neither the applicant had sent any specific denial in regard to the allegation brought by the Opposite Party. It is a settled principle of Law that a fact which is not expressly denied is deemed to have been admitted.

However, it is clearly stated in the section 25F(b) that prior to retrenchment of a workman the same is to be paid compensation which shall be equivalent to fifteen days average pay for every completed year of continuous service or any part thereof in excess of six months. In the present situation the exhibit 8 does not mention about the fact that prior to retrenchment of the applicant he was given compensation as envisaged under the act. Under such circumstances keeping in view the spirit of section 25F(b) I am of the opinion that prior to retrenchment of the applicant the opposite party ought to have given the compensation which the same had failed and accordingly such aspect is a condition precedent to retrenchment. Thus, the termination of service of the applicant becomes unjustified and inoperative. Accordingly this issue is decided in favour of applicant.



Issue No.3: Whether the applicant had abandoned his service and worked for other employers?

The fact that is now to be considered is whether the applicant had abandoned his service and had been working for gain with other employers. From the substantive evidence of the applicant and the opposite party it is clear that:-

a) The applicant had been working for the opposite party as a driver on and from 15/07/2008 till 28/05/2009 which is evident from the exhibit B. The same as alleged by the opposite party had abandoned his service in regard to which the exhibit 7 was issued and accordingly for non-compliance of the exhibit 7 the exhibit 8 was being issued against the applicant.

b) It is seen from the exhibit B page one (1), page three (3) serial no. 6 (in both the pages) and page six (6) that the reason for leaving the service of the opposite party by the applicant as noted therein is "Resigned from the service". The opposite party in his substantive evidence had failed to state as to why such remark was being noted in the exhibit B and had failed to produce any document to substantiate the fact that the applicant had retired from the service.

c) It is also seen and taken into consideration from the exhibit C along with the exhibit 7 and 8 that the opposite party had alleged the fact that this applicant had abandoned the service. That, both the documents exhibit B and exhibit C were exhibited from the side of the opposite party and are contradictory and inconsistent to the facts stated by the opposite party and cannot be relied or acted upon.

d) No evidence has been adduced by the opposite party to prove the fact that the applicant was working for some other employer. Apart from verbal evidence of the opposite party to the fact that the applicant was working for some other concern no document has been furnished by the opposite party to prove such fact. Thus, it can be presumed that the document which could be produced and is not produced, if produced would be unfavourable to the persons who with holds the same. In the present situation the opposite party has stated in his substantive evidence that the applicant had been working for one Mr.Sushil Saraf and had in his possession one letter from the said Mr. Sushil Saraf. However, the same was never produced before this Court to establish the fact that the applicant was employed with some other person.

Thus, keeping in view the above facts and circumstances I am of the opinion that

- i) That this applicant was being employed by the Opposite Party on and from 15.07.2008 and had been rendering his service as a driver of the said concern. The fact that this applicant was employed since 2005 with the opposite party could not be established by the same and hence is not taken into consideration.
- ii) That the applicant had performed his duties towards the opposite and had driven several vehicles of the opposite party Company till May, 2009.
- iii) That in May, 2009 the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.
- iv) Though it has been contended by the opposite party that the exhibit 7 and 8 were being sent to the applicant yet the same had failed to comply with the



conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.

- v) It is also seen that the exhibit B and C which were produced by the opposite party are contradictory to each other and hence cannot be relied upon. Thus, the reason for retrenchment of service of the applicant could not be justified by the opposite party.
- vi) No evidence were adduced from the side of the opposite party to clarify such inconsistency and since the applicant and the opposite party are in a fiduciary relationship where the opposite party being the employer is able to control the will of the applicant had initiated steps as stated by the same to delay the serving of exhibit 1 upon the Opposite party and had also obtained his signature upon the exhibit B.
- vii) The applicant was not working for gain for other employer in any other concern. Accordingly, this issue is decided in favour of the applicant.

4) Issue No. 4: - To what other relief/reliefs if any, to which the applicant is entitled as per law and equity?

From the discussions made herein above the following points are taken into consideration prior to granting relief to the applicant: -

- a) That this applicant was being employed by the Opposite Party Company on and from 15.07.2008 and had been rendering his service as a driver of the said concern.
- b) That the applicant had performed his duties towards the opposite and had driven several vehicles of the opposite party Company till May, 2009.
- c) That in May, 2009 the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.
- d) That the Opposite Party Company had failed to comply with the conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.
- e) The reason for retrenchment of service of the applicant by the Opposite party Company could not be properly justified by the same.
- f) The applicant was not working for gain for other employer in any other concern.

In this context the Hon'ble Apex Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., reported in (2013) 10 SCC 324 was of the opinion that

- i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.
- ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee / workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.
- iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the



adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

Thus, keeping in view the above discussions I am of the opinion that this applicant used to get a salary of Rs. 3,705/- per month from the opposite party at the time when he was dismissed. That the applicant was not working with any other concern and had to wait for a prolonged period for conclusion of this instant application. Thus, keeping in mind the present market conditions it will be highly justified to pass an award of full back wages along with other consequential benefits if any to the applicant from the day his service was terminated (31/05/2009). Accordingly the applicant is entitled to get full back wages along with all other consequential benefits (if any) from 01/06/2009.



ARGUMENTS MADE BY THE PARTIES

Ld. Advocate for the applicant during his course of argument relying upon the following decisions took an attempt to convince this court to hold that the applicant was retrenched from the service without following the guidelines laid down in the Industrial Laws and hence unjustified; was never employed with any other employer and had not abandoned the present opposite party.

1991(63) Riaz Ahmed v. M.I. Mohd. of Bom. (Bom. H.C.) (BOMBAY HIGH COURT)
B. N. SRIKRISHNA, J. Writ Petition No. 5043 of 1985 August 23, 1991 Between
RIAZ AHMED and MUNIR ISMAIL MOHAMMED OF BOMBAY and another the Hon'ble Apex Court was of the opinion that "...Even if the story of voluntary abandonment of service by workman put by employer is accepted – It was incumbent upon the employer to hold an enquiry – Before treating the service as terminated on this ground – In absence of such an enquiry by the employer the termination of service cannot be held legal and valid.

In the current scenario it is seen from the materials on the record that the applicant was removed from the service without holding a proper enquiry. The opposite party had not raised this issue that the same had conducted such enquiry.

(DELHI HIGH COURT) K.S. BHAT, J. C.W.P. No. 1684 of 1991 February 14, 1994
Between MUNICIPAL CORPORATION OF DELHI and SHRI SUKHVIR SINGH
and others the Hon'ble Court was of the opinion that "... Once it is held that the employment of workman was not for a specific period – The denial of employment to the workmen by Corporation shall have to be only according to law – If he had abandoned the employment – That could have been a ground for holding an enquiry and passing appropriate order...."

2013 LAB I.C. 4249 (SUPREME COURT) (From: Bombay) * G.S. SINGHVI AND V. GOPALA GOWDA, JJ. The Hon'ble Court was of the opinion that in the case where there is a Wrongful Termination of service reinstatements with back wages is the rule – However, while granting back wages Courts/Tribunals has to keep in view consideration

like length in service, nature of misconduct, financial condition of employees – In the case where it is seen that termination of service is an outcome of victimization or is done in gross violation of statutes the employee is entitled to full back wages.

In the current scenario it is seen from the material on the record that though this applicant was in appointment for a period of 317 days yet his termination was done without following the Industrial Laws on the Country and hence the same is entitled to get the full back wages

In Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., reported in (2013) 10 SCC 324. the Hon'ble Court was of the opinion that "..... If after a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, workman whose service has been illegally terminated would be entitled to full wages except to the extent he was gainfully employed during the enforced idleness.

The propositions which can be culled out from the aforementioned judgements are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee / workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv. The cases in which the Labour Court / Industrial Tribunal exercises power under Section 11A of the Industrial exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee /workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court / Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v. The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and / or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages.

This court now carefully goes through the decisions held by the Hon'ble Courts in AIR 1992 Supreme Court 573 (C.E.S.C Ltd. Vs. Subhash Chandra Bose & Others), 1978



SCR (3) 1073 (Hussain Bhai Vs. Alath Factory Thozhilali Union, Kojhikode & Others), 2004) 1 Supreme Court cases 126 (Ram Singh & Others Vs. Union Territory, Chandigarh & Others).

The Hon'ble Courts were pleased to give emphasis on many factors in determining the relationship of employer and employee. According to those referred decisions, it can be mentioned clearly that

"in determining the relationship of employer and employee, no doubt "control" is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole "tests of control". An integrated approach is needed. "Integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remain apart from and independent of it. The other factors which may be relevant are – who has the power to select and dismiss, to pay remuneration, deduct insurance contribution, organize the work, supply tools and materials and what are the "mutual obligations" between them".

Thus, keeping in view the above discussions and the Principles laid down by The Hon'ble Apex Court it can be clearly said that: -

- g) That this applicant was being employed by the Opposite Party Company on and from 15.07.2008 and had been rendering his service as a driver of the said concern.
- h) That the applicant had performed his duties towards the opposite and had driven several vehicles of the opposite party Company till May, 2009.
- i) That in May, 2009 the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.
- j) That the Opposite Party Company had failed to comply with the conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.
- k) The reason for retrenchment of service of the applicant by the Opposite party Company could not be properly justified by the same.
- l) The applicant was not working for gain for other employer in any other concern.

Hence, it is

ORDERED

The application under Section 10(1B)(d) of the Industrial Disputes Act, 1947 be and the same is thus allowed on contest without costs. The Opposite party was not justified in dismissing the applicant and is thus, directed to cause reinstatement of the applicant **Sri Wakil Kumar Yadav** at once. The applicant shall receive full back wages for the period from 01/06/2009 till the present date (@ Rs. 3,705/- per month) along with all other consequential benefits if any. The O.P is directed to comply with the Award.



This is my award.

Let the copies of this award be sent to the concerned authority of the Government of West Bengal.

Dictated & Corrected by me

Sd/ —
Judge

Second Labour Court

Sd/ —
(Argha Banerjee)

Judge
Second Labour Court
21.02.2022

