

I/191541/2022

Government of West Bengal  
Labour Department, I. R. Branch  
N.S. Buildings, 12<sup>th</sup> Floor  
1, K.S. Roy Road, Kolkata - 700001

No. Labr/470/...../(LC-IR)/22015(16)/458/2018

Date : 05-05-...../2022

**ORDER**

WHEREAS under the Government of West Bengal, Labour Department Order No. 1377-IR/11L-136/2014 dated. 27/10/2014 the Industrial Dispute between M/s Tirupati Colour Pens Pvt. Ltd. Nandha Banga, Guljar More, P. O. Kanganberia, P. S. Bishnupur, South 24-Parganas, PIN - 743503 and their workman Shri Goutam Naskar, Vill. Halderpukur, P. O. Nahazari, P.S. Bishnupur, South 24-Paraganas, PIN - 743377 regarding the issue mentioned in the said order, being a matter specified in the Second Schedule to the Industrial Dispute Act, 1947 (14 of 1947), was referred for adjudication to the Judge, Fourth Industrial Tribunal, West Bengal.

AND WHEREAS of the said Fourth Industrial Tribunal, West Bengal, has submitted to the State Government its award 19/04/2022 on the said Industrial Dispute vide memo no 568 – L.T. dated 25/04/2022.

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,



Joint Secretary  
to the Government of West Bengal

I/191541/2022


No. Labr/470/1(5)/(LC-IR)

Date : 05-05-2022

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

1. M/s. Tirupati Colour Pens Pvt. Ltd. Nandha Banga, Guljar More, P. O. Kanganberia, P. S. Bishnupur, South 24-Parganas, PIN - 743503.
2. Shri Goutam Naskar, Vill. Halderpukur, P. O. Nahazari, P.S. Bishnupur, South 24-Paraganas, PIN - 743377.
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B. New Secretariate Buildings, 1, K. S. Roy Road, 11<sup>th</sup> Floor, Kolkata- 700001.
- ✓ 5. The Deputy, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

No. Labr/470(2)(2)/(LC-IR)

  
Joint Secretary  
Date : 05-05-2022

Copy forwarded for information to:

1. The Judge, Fourth Industrial Tribunal, West Bengal with reference to his Memo No. 568 - L.T. dated 25/04/2022.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.

  
Joint Secretary



In the matter of an industrial dispute between M/s. Tirupati Colour Pens Pvt. Ltd., Nandha Banga, Guljar More, P.O. Kanganberia, P.S. Bishnupur,, South 24-Parganas, PIN-743503 and their workman Sri Gautam Naskar, Vill. – Halderpukur, P.O. – Nahazari, P.S. – Bishnupur, South 24-Parganas, PIN\_743377.

(Case No. VIII-99/2014 )

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BEFORE THE FOURTH INDUSTRIAL TRIBUNAL: WEST BENGAL

P R E S E N T

SMT. DURGA KHAITAN, JUDGE

FOURTH INDUSTRIAL TRIBUNAL

KOLKATA

A W A R D

In the matter of an industrial dispute between M/s. Tirupati Colour Pens Pvt. Ltd., Nandha Banga, Guljar More, P.O. Kanganberia, P.S. Bishnupur, South 24-Parganas, PIN-743503 and their workman Sri Gautam Naskar, Vill. – Halderpukur, P.O. – Nahazari, P.S. – Bishnupur, South 24-Parganas, PIN\_743377 vide G.O. No. 1377-I.R./IR/11L-136/2014 referred to this Tribunal for adjudication of the following issues.

ISSUES

- 1) Whether the refusal of employment of Sri Gautam Naskar w.e.f. 19.07.2012 is justified?
- 2) To what relief, if any, the workman entitled?

Shorn of unnecessary details the case of Sri Gautam Naskar (hereinafter referred as a workman) is that he joined as helper on 01.08.2011 and E.S.I. identity card was issued to him on 24.11.2011. He used to be paid consolidated salary of Rs. 3,500/- per month for 12 hours duty per day, 6 days of the week. It his further case that the E.P.F. contribution was deducted from October, 2011 to July, 2012. On 18.07.2012 on various issues Sri Debasis Sanati, General Secretary of the Union served a letter to the management putting forward their various demands so the management became furious and without showing any cause illegally and whimsically refused entry to many workmen including Sri Gautam Naskar and Sri Debasis Sanati in the factory on and from 19.07.2012 and the same is continuing. It is the further case of the workman that on 24.12.2012 they sent a demand justice letter to the Company but the manager Mr. Amit Pal refused to sign any received endorsement on the copy. The company never replied to the letter. Such refusal was illegal and was effected without due process of law so, he filed an application on 14.01.2013 raising an industrial dispute on 16.01.2013 before the Additional Labour Commissioner which has culminated in the instant reference.

The case of the company i.e. M/s. Tirupati Colours pens is that the instant case is misconceived, erroneous, bad in law and not maintainable. The company has denied all





material claims and allegations of Gautam Naskar. The positive case of the company is that there was never any refusal by company rather on accepting the charges and allegations Gautam Naskar stopped coming to factory and left the job on his own accord. (Ref-Para-3 at page-2 of Written Statement). The further case of the company is that the services of Gautam Naskar was terminated not by the refusal of employment rather due to misconduct committed by the applicant. In para-20 the company has stated that Gaugtam Naskar was not a helper, he was shift-head and it is false that his salary was Rs. 3500/- per month. The company has stated in para-22 of it's written statement that the applicant's services have been terminated only for the reason that the applicant did not perform his duty diligently and honestly rather (he was) very much reluctant to perform the job in the proper manner. In para-14 of their statement the company has stated that due to such behaviours of Gautam Naskar the company suffered huge monetary loss and after several warnings the applicant and the supervisor and the fellow workman all appeared before the director and made statement against Gautam Naskar so, the management terminated his service. It is the further case of the company that no letter dt. 24.12.2012 was served on the Company and that he was rightfully terminated by the management for his misconduct and non-performance of work and the question of his re-joining in his service does not arise as his service record is not good and one person is already engaged in that post. The company has also stated that The Tribunal has no jurisdiction to entertain this case.

To prove their respective cases parties adduced following evidence:-

**Applicant Gautam Naskar adduced following evidence:-**

Oral evidence-

P.W.-1 Sri Gautam Naskar.

Documentary evidence:-

Ext. 1 :- E.S.I.C. identity certificate,

Ext. 2:- E.S.I.C. identity Card

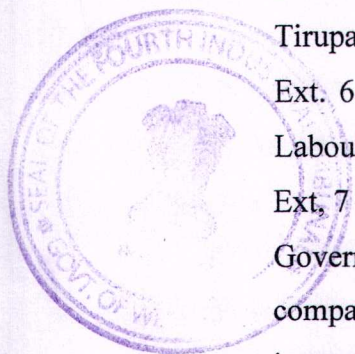
Ext. 3 :- Certificate of registration of trade union dt. 09.07.2012

Ext. 4:- EPF contribution list (two pages showing contribution of Gautam Naskar from October, 2011 till July, 2012

Ext. 5:- copy of letter dt. 24.12.2012 of Gautam Naskar addressed to The Director, Tirupati Colours Pens.

Ext. 6 :- Copy of letter dt. 14.01.2013 of Gautam Naskar addressed to the Additional Labour Commissioner, Government of West Bengal praying for reinstatement

Ext. 7 :- Letter dt. 15.04.2013 of Tirupati Colour addressed to The Labour Commissioner, Government of West Bengal informing that Gautam Naskar was a regular worker but the company had skill improvement issues with Mr. Naskar and the company tried to improve his skill by verbal instructions and training assistance but he seemed reluctant to improve himself so the company had to discontinue his services.





Ext. 8:- Letter dt. 22.08.2013 of Gautam Naskar addressed to the Additional Labour Commissioner, Government of West Bengal alleging refusal of employment and praying for reinstatement and back wages.

Ext. 9:- Letter dt. 18.07.2012 of Debasis Sanati, General Secretary, Tirupati Colour Pen Pvt. Ltd. permanent Majdoor Sangha addressed to the company informing that they have formed a trade union and had registered the same.

Ext. 10:- Letter dt. 18.07.2012 of Debasis Sanati, General Secretary, Tirupati Colour Pen Pvt. Ltd. permanent Majdoor Sangha addressed to the company informing the list of office bearer of the trade union where Gautam Naskar is stated as the vice president of the union.

**The company Tirupati Colour Pens Pvt. Ltd. adduced following evidence:-**

Oral evidence

O.P.W.-1 :- Sri Nitin Kanodia

O.P.W.-2 :- Sri Amit Paul

PO.P.W.-3 Sri Tarun Mistry

Documentary evidence:-

Ext. A :- Letter dt. 13.04.2012 by Sri Amit Paul to the supervisor extrusion unit informing that the quality of production has deteriorated and the same is being rejected so steps may be taken on the responsible employee.

Ext. B:- Letter dt. 20.04.2012 by Sri Tarun Mistry addressed to the factory manager informing that the workman responsible for production i.e. Gautam Naskar has refused the allegation and that Tarun Mistry has cautioned Gautam Naskar that in case of recurrence the company will dismiss him.

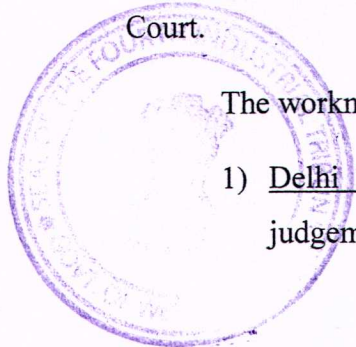
Ext. C:- Letter dt. 24.05.2012 to the supervisor extrusion unit stating that the production was rejected and the supervisor must discuss the matter with Amit Paul along with the responsible workman,

Ext. D:- Letter dt. 04.06.2012 of Tarun Mistry addressed to the factory manager with 'heading report of enquiry' stating that he asked Gautam Naskar but he behaved badly so he has decided to discuss the matter on the next day with the factory manager.

In addition to their respective evidence parties relied on various decisions of Hon'ble Court.

The workman referred to following decision of Hon'ble Courts:-

- 1) Delhi Transport Corporation Vs. Krishna Bahal (Ref. 2020 1 CLR 611) :- This judgement is about validity of domestic enquiry where Hon'ble Court has pleased to





hold that once the enquiry stood vitiated on account of petitioner's failure to supply relevant document to respondents petitioner was granted adequate opportunity to prove respondent's misconduct which he failed to avail, Tribunal was justified in holding that petitioner has failed to lead any evidence to prove respondent's misconduct

- 2) Management, Tamil Nadu State Transport Corporation vs. Presiding Officer, labour Court, Trichi (Ref: 2020 1 CLR 250) where Hon'ble Court was pleased to hold that in case of a domestic enquiry the management has failed to prove the misconduct in terms of the standing orders punishment ought to be set aside.
- 3) Godrej and Boyce Manufacturing Company Ltd. Vs. Rabindra Shanta Shama (Ref: 2019 1 CLR 582) – Workman discharged from service for alleged misconduct, company is directed to reinstate with full back wages.
- 4) Rajendra Prasad Shaw Vs. State of Bihar (Ref: 2019 1 CLR 226) – about validity of disciplinary enquiry.
- 5) Vinod Rabjibai Rajpur Vs. State of Gujarat (Ref: 2020 II CLR 199) – this about relief of reinstatement with continuity in service and resultant benefits.

The Company referred to following decision of Hon'ble Courts :-

- 1) Sindhu Resettlement Vs. Industrial Tribunal (Ref: AIR 1968 SC 529) – Before raising industrial dispute with Labour Commissioner the workman ought to raise the dispute with the management.
- 2) The Delhi Cloth And General Mills Vs. The Workman (Ref: AIR 1967 SC 469) – Tribunal must confine adjudication to the points of dispute referred.
- 3) Subir Guhathakurata Vs. Jhonson & Jhonson (Ref: 2006 (4) CHN 459) – onus of proof lies upon the applicant.
- 4) Rajasthan State Ganganagar S. Mills Ltd. Vs. State of Rajasthan (Ref: 2004 (3) LLJ 832) – onus of proof that applicant worked for 240 days lies on workman.
- 5) Manger RBI Bangalore Vs. S. Mani (Ref: 2005 (2) LLJ 258) – workman has to prove the he worked for 240 days by pleading and by proof
- 6) The Range Forest Officer Vs. S.T. Hadimoni (Ref: 2002 (1) LLJ 1055) – the Tribunal ought to come to logical conclusion that the workman had in fact worked for 240 days.
- 7) Harris Engineers v Vs. Government of NIC Delhi (Ref: 2002 (3) LLJ 510) – Where no enquiry is held by employer the Tribunal has to give an opportunity to the parties adduce to evidence and the employer can adduced evidence for the first time justifying his action.
- 8) Motipur Sugar Factory Pvt. Ltd. (Ref: 1965 (2) LLJ 162)- When the employer failed to make an enquiry before dismissal it is open to him to justify the action before Tribunal by leading all relevant evidence



- 9) Kanpur Electric Supply Vs. Shamim Mirja (Ref: 2008 (14) Scale 604) – Entitlement of reinstatement does not necessarily mean payment of full or partial back wages.
- 10) Kendriya Vidyalay Sangathan Vs. S.C. Sharma (Ref: 2005 (1) Scale 317) – To be entitled to back wages the employee has to show that he was not gainfully employed.
- 11) North-East Karnataka Transport Corporation Vs. M. Nagangouda (Ref: 2007 (10) SCC 765) – Gainful employment would include self-employment.
- 12) Swadesi Cotton Mills Vs. Labour Court (Ref: 2013 (136) FLR 379) – in absence of any pleading that he was not gainfully employed no back wages to be awarded.

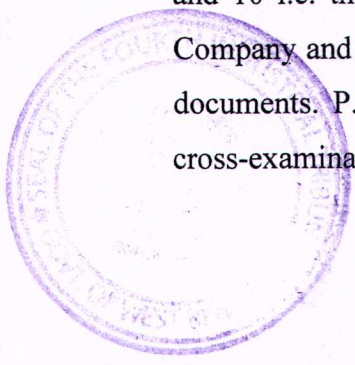
### **Decision with reasons**

Both issues are taken up together for convenience of discussion.

P.W.-1 Sri Gautam Naskar corroborated his case on oath during his examination in chief and proved 10 documents including Ext. 1:- E.S.I.C. identity certificate, Ext. 2:- E.S.I.C. identity Card, Ext. 3 :- Certificate of registration of trade union dt. 09.07.2012, Ext. 4:- EPF contribution list (two pages showing contribution of Gautam Naskar from October, 2011 till July, 2012, Ext. 5:- copy of letter dt. 24.12.2012 of Gautam Naskar addressed to The Director, Tirupati Colours Pens, Ext. 6 :- Copy of letter dt. 14.01.2013 of Gautam Naskar addressed to the Additional Labour Commissioner, Government of West Bengal praying for reinstatement, Ext. 7 :- Letter dt. 15.04.2013 of Tirupati Colour addressed to The Labour Commissioner, Government of West Bengal informing that Gautam Naskar was a regular worker but the company had skill improvement issues with Mr. Naskar and the company tried to improve his skill by verbal instructions and training assistance but he seemed reluctant to improve himself so the company had to discontinue his services, Ext. 8:- Letter dt. 22.08.2013 of Gautam Naskar addressed to the Additional Labour Commissioner, Government of West Bengal alleging refusal of employment and praying for reinstatement and back wages, Ext. 9:- Letter dt. 18.07.2012 of Debasis Sanati, General Secretary, Tirupati Colour Pen Pvt. Ltd. permanent Majdoor Sangha addressed to the company informing that they have formed a trade union and had registered the same and Ext. 10:- Letter dt. 18.07.2012 of Debasis Sanati, General Secretary, Tirupati Colour Pen Pvt. Ltd. permanent Majdoor Sangha addressed to the company informing the list of office bearer of the trade union where Gautam Naskar is stated as the vice president of the union.

He prayed for reinstatement with full back wages.

During cross-examination he deposed in positive that he joined the factory on 01.08.2011 and that his contribution to the E.S.I. scheme was started three months after his joining in the service. He deposed that no appointment letter was given to him. P.W.-1 admitted that on Ext. 9 and 10 i.e. the letters sent to the Company by their Union, there is no receiving seal of the Company and that he cannot produce any document to show that the company received this two documents. P.W.-1 denied that he started working from the month of October 2011. During cross-examination P.W.-1 further deposed in positive that excepting Hari Das Dutta Gupta other





office bearers of the Majdoor Sangha were the employees of the company and that at present (i.e. the date of deposition 28.03.2019) Kishore Gon, Ajay Chakraborty, Minto Mollick and Sujit Tung are not working in the company. P.W.-1 deposed in positive that he has heard that due to the pressure created by the management of the company they left their service. During cross-examination he deposed that he went to the police station to lodge G.D. that the company did not allow him to enter the factory but police refused to record it. He admitted that he did not do any work in the company on 19.07.2012. He deposed that on 19.07.2012 he was asked not to come to the company. With a reference to Ext. 5 & 6 i.e. his stated letter addressed to the company he deposed that he served the originals by hand to the security guard of the factory. P.W.-1 deposed that he does not have any document to show that prior to 19.07.2012 he worked in the factory for 240 days.

On 28.05.2019 during his further cross-examination he deposed in positive that, 'We gave letter to the management of the company demanding our dues and identified Ext. 5 as copy of that letter. He admitted that he did not give any letter to company demanding allowances during continuation of his service. He admitted that before 24.12.2012 he did not give any letter to the management stating that his service has been illegally terminated. He deposed that he became a permanent employee after three months of his joining and the document of provident fund and E.S.I. show that his service was permanent. He deposed in positive that he is claiming back wages from 19.07.2012 and that he does not have any claim for the period before 19.07.2012. JP.W.-1 admitted that the remark column of the Ext. 4 shows that the date of leaving service as 30.06.2012 and he does not have any document to show P.F. contribution for the period from 01.07.2012 to 18.07.2012. He denied that he left service on 30.06.2012. P.W.-1 deposed in positive during cross-examination that when he along with Sri Debasis Sanati, Kishore Gon and others went to give the letter regarding formation of their union the management became furious and that the management terminated the services of himself and Debasis Sanati only. He denied the suggestion that he accepted the allegations put by the company against him as true and left his service. He denied that he was not a permanent employee of the company or that he did not work 240 days before 19.07.2012. He deposed that there are six members of his family and he occasionally worked as helper of a mason and sometime deposits electric bills of other or carries gas cylinder from the distributors to the customers and he has been maintaining his family.

The first witness of the company O.P.W.-1 Sri Nitin Kanodia corroborated his written statement in his affidavit-in-chief where it is stated that Gautam Naskar was not a helper, he was shift-head and proved copies of letter of factory manager Amit Paul to Supervisor Tarun Mistry and replies of Tarun Mistry to Amit Paul (Ext., A to D).

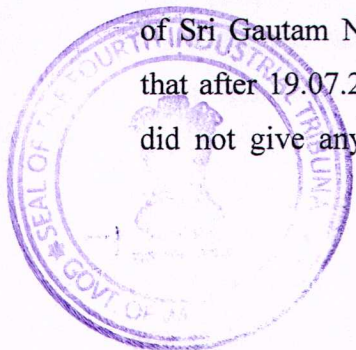
During cross-examination he deposed that the company used to give appointment letters to the permanent employees and that all entries regarding ingress and egress are noted in the register and he can bring that register. He deposed that he cannot say whether D.A. is paid separately or not without seeing the wage register and that the details of the wages are mentioned in the wage register. O.P.W.-1 deposed that Gautam Naskar used to put signature in the



concerned register. O.P.W.-1 deposed he can produce the wage register before the Tribunal. O.P.W.-1 deposed that he did not file document to show that monetary loss was sustained by the company for the works of Gautam Naskar. He deposed that notice was given to Gautam Naskar about the loss caused to the company for his work but he (O.P.W.-1) does not have any office copy of the said letter. He deposed that he does not have any copy of warning letter to show that he warned Gautam Naskar. O.P.W.-1 deposed that due to monetary loss sustained by the company and substandard production he terminated the services of Gautam Naskar. O.P.W.-1 deposed that he did not give any chargesheet to Gautam Naskar and no domestic enquiry was conducted. He deposed that a preliminary enquiry was conducted and the letter between Sri Amit Paul and Sri Tarun Mistry show preliminary enquiry. He deposed that he terminated the services of Sri Gautam Naskar in the month of June, 2012. O.P.W.-1 deposed that he gave letter to the Labour Commissioner intimating him the reason of termination of Sri Gautam Naskar but he could not recollect whether any letter regarding termination of service of Sri Gautam Naskar was given to him or not. He deposed that he has not filed any document to show that Sri Gautam Naskar was working as a shift head. O.P.W.-1 deposed that no pay slip was issued to Gautam Naskar. He denied suggestions to the contrary.

The next witness examined by the company was O.P.W.-2 Sri Amit Paul the factory manager of Tirupati Colour Pen Pvt. Ltd. He knows the workman and deposed that Gautam Naskar was working as a supervisor in their company and that he was employed on temporary basis. O.P.W.-2 identified his signature as Ext. A and Ext. C and deposed that as the quality of the company deteriorated, he instructed Tarun Mistry, a man of management to look into the matter. He deposed that Ext. B is the reply of Tarun Mistry and that he issued another letter (Ext. C) to Tarun Mistry. O.P.W.-2 the factory manager deposed that, "Sri Gautam Naskar abandoned his service at his own will".

During cross-examination he deposed that he is working since 2008 as a permanent employee in this company and he got appointment letter. He deposed that initially an employee is employed in the company orally and after satisfactory performance of service employees are made permanent. O.P.W.-2 deposed that P.F. and E.S.I facilities were provided before making the service of employee permanent and that no such standing order of this company is there. O.P.W.-2 deposed that the supervisor looks into the quality of product and the helper used to pack finished products. The machine operator operates the machine and looks into the quality of product and the helper used to put raw material in the machine. O.P.W.-2 deposed that in the year 2012 the salary of a helper was Rs. 3000/- to 3500/- per month and the salary of a supervisor was Rs. 4500/- to 5000/- and he could not recollect the salary of Gautam Naskar. O.P.W.-2 deposed that, "We did not give any letter to Sri Gautam Naskar about his unsatisfactory work". He deposed that no chargesheet was filed against Gautam Naskar, no domestic enquiry was held and no dismissal letter was issued. O.P.W.-2 admitted that the service of Sri Gautam Naskar was terminated without following procedure of law. O.P.W.-2 deposed that after 19.07.2012 Gautam Naskar did not come to company and after 19.07.2012 O.P.W.-2 did not give any letter to Gautam Naskar for joining his duty. He deposed that there is no





appointment letter of Gautam Naskar and that a letter regarding improper work of Gautam Naskar was issued to him but he refused to accept it. He deposed that no preliminary enquiry was conducted against Sri Gautam Naskar. O.P.W.-2 deposed that Gautam Naskar was working under Tarun Mistry and Tarun Mistry was head of production and maintenance department.

The third witness examined by the company is O.P.W.-3 Tarun Mistry. He deposed that he is working as a supervisor of this factory and also dealing with the maintenance of machines and he is authorised to deposed in this case. He deposed that Gautam Naskar was working as a supervisor and quality controller. He identified Ext. A to D and deposed that he received Ext. A and C and signed Ext. B and D. Sri Tarun Mistry deposed that Sri Gautam Naskar abandoned his job voluntarily and that Sri Naskar worked in the company till the month of June.

During cross-examination O.P.W.-3 deposed that he joined in the company in the month of July / August 2008 for a salary of Rs. 6,000/- per month and he did not get any joining letter. He deposed that his present salary was Rs. 16,000/- per month and that in 2012 his salary was more than Rs. 6000/- per month. O.P.W.-3 deposed that he used to get salary slip from the company and that joining letter was not given to anyone. O.P.W.-3 deposed that his enrolment in P.F. was made after one year of joining the service.

O.P.W.-3 deposed that a separate register of quality check is maintained in the factory and entries regarding quantity of rejected good is found in that register. O.P.W.-3 deposed that Gautam Naskar used to work under him. O.P.W.-3 deposed that Gautam Naskar used to prepare report sheets and occasionally used to give report sheets to O.P.W.-3. O.P.W.-3 deposed that he used to intimate the matter of rejected goods to the manager and the manager used to take necessary steps. O.P.W.-3 deposed that on 2/ 3 occasions he cautioned Gautam Naskar for his bad work but no written intimation was given to Gautam Naskar. He deposed that Ext. B and D were not written in his hand writing and he cannot say the name of the scribe of this letter.

**Ld. Counsel for the Company argued that:-**

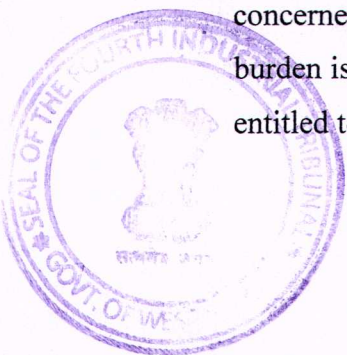
- 1) Ld. Counsel for the Company argued that the reference was made to this Tribunal on 27.10.2014 and issues framed were, “ i) whether the refusal of employment of Sri Gautam Naskar w.e.f 19.07.2012 is justified? ii) To what relief, if any, the workman is entitled?” and the Tribunal has to adjudicate on these issues. Ld. Counsel argued that during the adjudication the Tribunal cannot modify the dates or particulars as stated in the reference. In this connection Ld. Counsel referred to decision of Hon’ble Supreme Court in Delhi Cloth and General Mills Company Ltd. Vs. workman AIR 1967 SC 469 where Hon’ble Court has pleased to hold that, “The Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other word the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto”.



- 2) In Ext., 5, the letter of workman it is found that he worked on 19.07.2012 and he was prevented from entering in the workplace on the next date i.e. 20.07.2012. So, there was no refusal on 19.07.2012. Thus, the issue framed is erroneous and the Tribunal cannot adjudicate on it.
- 3) Ld. Counsel for the Company argued that the workman Sri Gautam Naskar did not complete 240 days service and as he has not worked for more than 240 days he cannot be considered workman as U/s. 2A of the I.D. Act, Ld. Counsel argued that the burden to show that he worked for 240 days preceding his termination is on the workman and referred to various decision of Hon'ble Court in this connection:-
  - a) Rajasthan State Ganganagar S Mills Ltd. Vs. State of Rajasthan and Another 2004 3 LLJ 832 – Hon'ble Court held that the burden to prove that the workman worked for 240 days during 12 months preceding alleged date of termination is on the workman.
  - b) Manager, RBI Bangalore Vs. S. Mani 2005 (2) IJ 258 – Hon'ble Supreme Court held that the workman had to prove the contention that he worked for 240 days prior to this termination in one calendar year not only by way of pleading but also by way of proof.
  - c) In The Range Forest Officer Vs. S. T. Hadimoni 2002(1) LLJ 1053 Hon'ble Supreme Court held that the Tribunal ought to come to a logical conclusion that the workman had in fact worked for 240 days in a year.

Ext. 4 i.e. the document proved by the workman shows that he received salary for the period from September, 2011 till June, 2012 and in his cross-examination he admitted that there are no dues payable by the Company to him thus, the workman was to prove that he worked for 240 days in a year preceding his termination but the workman has failed to do it so, he cannot be treated as workman for the purpose of I.D. Act, argued Ld. Counsel for the Company.

- 4) Ld. Counsel for the Company argued that to be entitled to receive any compensation, back wages etc. the workman has to prove that he was not working for gain or was unemployed all through the period since his stated termination by the Company but during his cross-examination this workman admitted that he is engaged in some other profession. So, he is not entitled to any back wages. In this connection Ld. Counsel referred to decision of Hon'ble Apex Court in *Kendriya Vidyalaya Sangathan and Another Vs. S. C. Sharma 2005(1) Scale 317* where Hon'ble Court was pleased to hold that, "When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him". As this workman has admitted of being otherwise employed, he is not entitled to any back wages, argued Ld. Counsel for Company.





Thus Gautam Naskar is not entitled to any relief as prayed for and the issues referred may be adjudicated in the negative argued Ld. Counsel for Company.

**Ld. Counsel for workman argued that :-**

- 1) The workman is not a very literate person so, the date from which he was refused to enter is mentioned by him as the date when he was informed of the refusal and that date is 19.07.2012. Ld. Counsel argued that Ext. 5 i.e. the letter written by the workman to the Company on 24.12.2012 shows that he has clearly mentioned that on 19.07.2012 the management told him not to come to work. So, the issue is correctly framed and there is no anomaly.
- 2) Ld. Counsel for workman argued that so far as argument of Ld. Counsel of Company. that Goutam Naskar had not worked for 240 days is concerned, the workman has all through stated and deposed that he joined in the Company on 01.08.2011 and was stopped on 19.07.2012. So, the total days of service were 353 days. Therefore, the argument of Company is not based on truth.
- 3) Ld. Counsel for workman argued that the total period of engagement of Goutam Naskar i.e. from 01.08.2011 till 19.07.2012 is no where disputed by the Company in their pleadings and this is a period of 353 day. During this period whether Gautam Naskar actually attended office for 240 days or not could be proved only by production of attendance register but although Company's witness admitted that they have the attendance register and he will produce the same but the Company never produced the document and as the Company was admittedly in possession of the same, non-production of the document will lead to adverse presumption against the Company.
- 4) Ld. Counsel for workman further argued that while arguing about the total period of work rendered by Goutam Naskar by Ld. Counsel for Company referred to E.S.I. contribution but during cross-examination Gautam Naskar categorially deposed in positive that his contribution to E.S.I. scheme was started after three months of his joining of his service. OPW-3 has deposed that his contribution to ESI started after one year pf his joining, so this is common practice of Company.
- 5) Ld. Counsel for workman argued that Ext. 1 i.e. the E.S.I. identity card clearly shows the date of appointment of Gautam Naskar as 01.08.2011 where as the company during his cross-examination asked him whether he has any document to show that he worked in the factory for the month of August and September, 2011 and suggested that he started working from October, 2011 but this is not the case of the Company in there written statement and such suggestion only goes on to show the mala fide on the part of the Company.



Thus, the workman is entitled to reinstatement and all the back wages and consequential relief argued the Ld. Counsel for the workman.

**On going through the order of reference, pleadings of both parties, oral and documentary evidence on record and judgements referred it is found that:-**

The two issues framed are – (a) Whether the refusal of employment of Sri Gautam Naskar with effect from 19.07.2012 is justified?

(b) To what relief, if any, the workman is entitled?

1) So far as the argument of Ld. Counsel for Company that there was no refusal of employment and that there was no refusal for employment on 19.7.12 is concerned:-

a) It is admitted by Company that Gautam Naskar had been a regular worker of the Company (Ref-Ex-7) and it is further admitted that he is no longer working with this Company.

b) The workman has alleged that the company refused employment to him on 19.7.2012. He corroborated it on oath in his affidavit in chief and in his letter to the company dated 24.12.12 and to Labour commissioner dated 14.1.13. (Ex-5 &6).

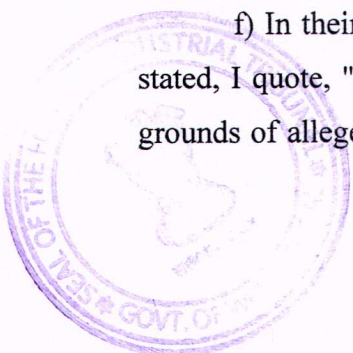
c) In this regard Company has made various vacillating statements in their pleading and evidence. In last line of Para-3 at page-2 of Written Statement the Company has pleaded that there was never any refusal by company rather on accepting the charges and allegations Gautam Naskar stopped coming to factory and left the job on his own accord.

However, no date of stated 'voluntarily leaving the job by Mr. Naskar' is given by the Company in the four corners of their pleadings or oral and/or documentary evidence.

d) The further case of the company in their Written Statement is that the services of Gautam Naskar was terminated due to misconduct committed by the applicant. (Ref-Para 14,15 and 16 of Written Statement of Company). However, no date of any such dismissal is given by the company in it's Written Statement.

e) Thus Company's further case in their Written Statement is that the company did not refuse employment to Gautam Naskar on 19.7.2012 instead the company "dismissed him from service for his misconduct". The same statement is reiterated on oath by Company's witness Director O.PW-1 Nitin Kanodia in his affidavit in chief. However, no date of any such dismissal is given by the company in it's pleadings or in it's oral or documentary evidence. OPW-1 deposed during cross-examination that it was in June 2012(still NO date).

f) In their reply to the Labour Commissioner dated 15.04.2013 (Exhibit-7) the company stated, I quote, "allegation of Mr. Gautam Naskar that he has been refused employment on the grounds of alleged union activities is hereby denied. We had skill improvement issues with Mr.





Naskar. He had been a regular worker however a lot of materials were rejected due to his negligence in the first phase of our production cycle itself; later we also came to know that much of our finished products were also rejected, which were produced during his shift schedule. Through our verbal instructions & training assistance we tried to improve his skill; however, he seemed reluctant to improve himself and also meet the production benchmark. Thereafter we had to discontinue his services with us."

g) No date of stated 'discontinuation of service' is given by the Company in the four corners of their Pleadings or evidence.

h) So, the company in it's pursuit of disproving the claim of Gautam Naskar, that he was refused employment, has given various fluctuating and contradictory statements in their pleadings as well as evidence. Once the Company said that he left the job at his own accord and stopped coming voluntarily, at another place it said his service was terminated due to misconduct. Before the Labour commissioner the Company said that the services of Mr. Naskar were discontinued as he had skill development issues.

i) Fact is always singular and the multiple and fluctuating versions of a Company on how and when Gautam Naskar's job was gone clearly shows that they have not come to the Tribunal with clean hands. The Company failed to prove that there was never any refusal by company.

j) So far as the date of Refusal is concerned, Ld. Counsel for Company argued that in the Order of reference the date of Refusal is stated to be 19.07.2012 but in his letter dated 24.12.12(Exhibit-5) he has stated that he went to work on 19.7.12 and he was told not to come from next day, so the date of refusal would be 20.7.12 and NOT 19.7.12. It was further argued that the Tribunal cannot go beyond the Issues framed in the reference and there was no refusal on 19.7.12 so issues are erroneous and Tribunal cannot adjudicate on it.

k) So far as the argument of Company that date of alleged refusal is wrongly mentioned in the reference is concerned, in his affidavit in chief Gautam Naskar has stated on oath that they served the letter of Union formation to Company on 18.7.12 and from 19.7.12 they were refused entry in the company/factory. During his cross-examination he denied Company's suggestion to him that he did not go to the factory on 19.7.12 and deposed that he does not have any document to show that he went to factory on 19.7.12. He further deposed in positive that on 19.7.12 he was asked not to come to factory. So all through their cross-examination the company has suggested that he did not enter the Company/factory on 19.7.12.

l) So far as the argument of Company that date of alleged refusal is wrongly mentioned in the reference is concerned, during cross-examination of Gautam Naskar the Company itself suggested to Gautam Naskar that, "he did not do any work in the Company on 19.07.2012". So, the company itself suggested that Gautam Naskar did not do any work in the Company on 19.07.2012 and he admitted this suggestion. So now Company cannot argue that Gautam Naskar worked on 19.7.2012 or that the date of alleged refusal was 20.07.2012 and not 19.07.12 or that the date mentioned in the Issue is erroneous.



m) In his letter to the Additional Labour Commissioner dated 14.01.2013(Ex-6) Gautam Naskar has stated that on 18.7.12 they gave the letter of union formation to Company and from next date they were refused to come. So, there is no anomaly as regards the date of refusal being 19.7.2012.

n) So far as Company's referring to Exhibit-5( Ext. 5:- copy of letter dt. 24.12.2012 of Gautam Naskar addressed to The Director, Tirupati Colours Pens ) is concerned the Company has all along argued that no such letter was issued by Gautam Naskar to the company and that it is a manufactured document. A party cannot base its argument on a document the existence of which is completely denied by it. So, Company's argument that Gautam Naskar worked on 19.7.2012 or that the date of alleged refusal was 20.07.2012 and not 19.07.12 or that the date mentioned in the Issue is erroneous is not found sustainable in law.

2) So far as argument put forward by Ld. Counsel for Company that the workman has not proved any record to establish that the workman completed continuous service of 240 days in the preceding year is concerned, it is found that:-

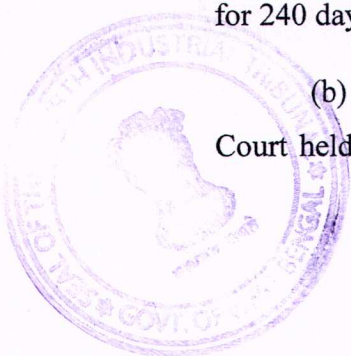
(i) In their Written Statement the Company has nowhere pleaded that Gautam Naskar did not complete 240 days continuous service or that he took long leaves or any such other plea. The Hon'ble Supreme Court, the Hon'ble Court has been pleased to observe that *"According to ....learned senior counsel appearing for the appellant-Company, there are no pleadings either on the issue of ..... before the Tribunal. The law, on this point, is well-settled in a catena of cases. This Court, in its recent judgement in the case of Bondar Singh v. Nihal Singh 2003 (4) SCC 161, held as under: "It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into"( Ref-2004 (II) LLJ-327 relevant paragraph no. 27).*

(ii) Section 25B of the I.D. Act lays down that the workman shall have to prove that during a period of twelve calendar months preceding the alleged date of termination of service he has actually worked under the employer for not less than 240 days and in case of six months, he shall have to prove that during a period of six calendar months preceding the alleged date of termination of service he has actually worked under the employer for not less than 120 days.

iii) Ld. Counsel for company argued that the burden to show that work for 240 days preceding his termination is on the workman and referred to various decision of Hon'ble Court in this connection:-

(a) *Rajasthan State Ganganagar S Mills Ltd. Vs. State of Rajasthan and Another* 2004 3 LLJ 832 – Hon'ble Court held that the burden to prove that the workman worked for 240 days during 12 months preceding alleged date of termination is on the workman.

(b) *Manager, RBI Bangalore Vs. S. Mani* 2005 (2) llj 258 – Hon'ble Supreme Court held that the workman had to prove the contention that he worked for 240 days





prior to this termination in one calendar year not only by way of pleading but also by way of proof.

(c ) The Range Forest Officer Vs. .S. T. Hadimoni 2002(1) LLJ 1053 *Hon'ble Supreme Court held that the Tribunal ought to come to a logical conclusion that the workman had in fact worked for 240 days in a year.*

*Let us now evaluate evidence to find out how far the workman could prove that he had in fact worked for 240 days in a year/120 days in six months.*

iv) *Ld. Counsel for workman argued that so far as argument of Ld. Counsel of Company that Goutam Naskar had not worked for 240 days is concerned, the workman has all through stated and deposed that his joined in the Company on 01.08.2011 and was stopped from attending work on 19.07.2012. So, the total days of service were 353 days. Therefore, the argument of Company is not based on truth and the total period of engagement of Goutam Naskar i.e. from 01.08.2011 till 19.07.2012 is no where disputed by the Company and this is a period of 353 day.*

v) It is not the case of company that Gautam Naskar was a daily wage earner or a contract labour; In their reply to the Labour Commissioner dated 15.04.2013 (Exhibit-7) the company stated, I quote, " Mr. Naskar had been a regular worker".

vi) Although the Company has admitted before the Labour Commissioner (Exhibit-7) and in their pleadings and evidence that Gautam Naskar was a regular employee of their company strangely they are completely silent about the date of his appointment.

(vii) In his affidavit in chief OPW-1 the Director of the Company Mr. Nitin kanodia deposed on oath that "Gautam Naskar approached the management with folded hands for a job drawing the sympathy on account of his family members..being moved by such approach and also on humanitarian grounds I have engaged Gautam Naskar in the factory for doing some unskilled work.." but he is completely silent about the date or even the month of such employment of Gautam Naskar. So the Tribunal has no choice but to rely on the deposition of PW-1 and Exhibit-1, the ESI contribution certificate proved by PW-1 which gives date of appointment as 01.08.2011.

(viii) So far as tenure of service is concerned Gautam Naskar could not produce any appointment or joining letter. OPW-1 the Director of the Company Mr. Nitin kanodia deposed on oath that they give appointment letters to permanent employees whereas OPW-2 the Factory Manager of the Company Mr. Amit Paul deposed on oath that 'initially employees were employed orally' and OPW-3 Sri Tarun Mistry deposed during his cross-examination that, " No joining letter was given to anyone". So, the deposition of OPW-1 is contradicted by his witnesses OPW-2 & 3 and such statements explain why no appointment letter/joining letter could be produced by Gautam Naskar.

(ix) OPW-2 the Factory Manager of the Company Mr. Amit Paul deposed on oath that , "after satisfactory performance of service of employee is made permanent and PF



and ESI were provided". OPW-3 Sri Tarun Mistry deposed during his cross-examination that, "After one year of joining the service my enrolment in PF was made". These statements of Company's witnesses prove that ESI and PF enrolment is not done on date of joining and that it is done after satisfactory service is put by a employee for considerable period of time. And this statement of O.P.W.-3 corroborates statement of Gautam Naskar made in his written statement that he got E.S.I. enrolment after three months of joining.

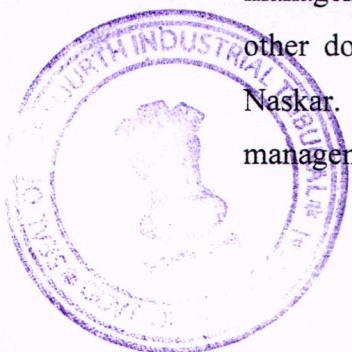
(x) OPW-1 the Director of the Company Mr. Nitin kanodia deposed on oath that he terminated the service of Gautam Naskar in June 2012, although again it is beyond pleadings and cannot be taken into consideration in view of judgement of Hon'ble Apex Court in *Bondar Singh v. Nihal Singh 2003 (4) SCC 161*. However even if this statement is taken to be true there is no evidence of non completion of 240 days of continuous service.

(xi) Gautam Naskar has proved the ESI identity document wherefrom it is found that his date of appointment is 1.8.2011 and that he was paid monthly salary. Company did not challenge the veracity of this document.

(xii) The ESI subscription shows that he was working till June 2012 and as per the issues referred in the dispute he was refused entry on 19.7.2012. So, documents sufficiently prove that he was working from 01.08.2011 continuously till 18th July 2012. No pleading of company is there and no evidence is adduced by Company to controvert these documents.

(xiii) In their pleadings the Company is completely silent as regards the date on which the services of Gautam Naskar were allegedly terminated but OPW-1, the Director of the Company deposed that his services were terminated in June 2012. Even if this statement, which is completely out of pleadings, is taken into consideration Gautam Naskar has served continuously from 01.08.2011 till 30.06.2012. So even from this calculation he has rendered more than 240 day's continuous service in eleven months preceding his refusal.

(xiv) As per the settled law the workman has to discharge the burden of proof of continuous service of 240 days. So far as number of days actually served is concerned The Management witness deposed during cross-examination that the Company has the attendance register of Gautam Naskar and he will produce the same. By such cross-examination and by producing Exhibit 1 and 2 as discussed above, the initial burden of workman to prove actually service for 240 days stands discharged. As the management failed to plead to the contrary or produce the attendance register or any other document showing the contrary it has failed to disprove the claim of Gautam Naskar. Thus an adverse inference is liable to be drawn against the management. The workman has discharged his initial onus of proof and the





same shifted to the management. The management failed to discharge the onus so shifted as it did not produce the record sought, thereby attracting the adverse inference.

(xv) In the case of *Manager Reserve Bank of India vs. S. Mani (2005) 5 SCC 100* it has been held that the presumption as to adverse inference for non - production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. As per principle laid down U/S-106 of Evidence Act as the attendance register is under possession of company and they have special knowledge of the same so the non-production of attendance register will lead to adverse inference against the company. Absolutely no explanation whatsoever is given by the Company as to why they did not produce the attendance register although their witness has admitted that they have the attendance register in their possession;

(xvi) In *Manager Reserve Bank of India vs. S. Mani (2005) 5 SCC 100* it has been held initial burden of proof to show 240 days of continuous service is upon the workman. Guided by the law laid down in *Manager Reserve Bank of India vs. S. Mani (2005) 5 SCC 100* it is found that as Workman has adduced above discussed positive oral and documentary evidence of his continuous service of 353 days and thus discharged his initial burden of proof to show 240 days of actual service and management has failed to plead the contrary or produce the original record, case for drawing adverse inference against the management is made out.

(xvii) Therefore the workman has discharged his primary onus to prove his service from 01.08.2011 till 18.07.2012 and the Company simply denied the same and failed to rebut the same by producing any documentary evidence whatsoever.

Thus evidence and materials on record sufficiently establish that Gautam Naskar worked in the Company continuously for more than 350 days and rendered actual service for above 240 days preceding the date of termination of his service by way of refusal of employment .

(3) So far as nature of duty of Gautam Naskar is concerned:-

(a) In their written statement the company has stated that "Gautam Naskar was not a helper, he was shift-head". The Company has not pleaded that Gautam Naskar was employed or worked under the Company in a managerial or administrative capacity

(b) In his affidavit in chief OPW-1 the Director of the Company Mr. Nitin kanodia deposed on oath that "Gautam Naskar approached the management with folded hands for a job drawing the sympathy on account of his family members. Being moved by such approach and also on humanitarian grounds I have engaged Gautam Naskar in the factory for doing some unskilled work."



(c) In their written argument the company has stated that, "The management being moved by such approach and also on humanitarian ground engaged the applicant in the factory for doing some unskilled work." So, the admitted nature of work performed by Gautam Naskar proves that he was a workman.

(d) While analysing the evidence on record as regards the nature of duty of Gautam Naskar it is apparent that the Company has not come before Tribunal with clean hands-

(i) OPW-1 the Director of the Company deposed that Gautam Naskar was not a helper, he was shift-head;

(ii) O.P W-2 the Managar of the Company deposed that Gautam Naskar was working as a supervisor;

(iii) O.P W-3 the Supervisor of the Company deposed that Gautam Naskar was working as a supervisor and quality controller;

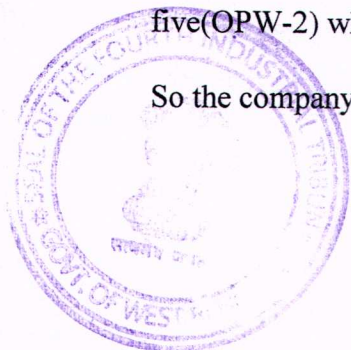
(iv) O.P W-2 the Factory Managar of the Company deposed that in 2012 the salary of a helper was Rs.3,000/- to 3,500/-. and O.P W-3 the Supervisor of the Company deposed that he joined as Supervisor in 2008 for a salary of Rs. 6,000/- Per month. The Company has pleaded that it is false that Gautam Naskar's salary was Rs. 3,500/- per month but again Company is completely silent about what was the salary of Gautam Naskar in 2011/ 2012. By reading the pleading and deposition of Gautam Naskar together with that of the Director, Factory Manager and Supervisor (OPW-1,2&3) it is crystal clear that Gautam Naskar was working as a helper.

(v) OPW-1 the Director of the Company deposed that they keep salary/wages register where every employee signs when salary is disbursed and he will produce said register but no such register was produced by Company. The Company consciously suppressed the salary register. It is clear that such denial/negation of statement of Gautam Naskar as regards his salary by the company is nothing but mere denial.

(vi) It appears that by the Industrial Disputes (Amendment) Act, 2010 (24 of 2010), in sub clause (iv) of clause (s) of Section (2) of the Industrial Disputes Act, words 'one thousand six hundred rupees' have been substituted by the words 'ten thousand rupees' w.e.f. 15.09.2010 after amendment of the sub clause (iv) of clause (s) of Section (2) of the Industrial Disputes Act i.e. on and from 15.09.2010. In this case Gautam Naskar was appointed on 01.08.2011 at a monthly salary of Rs. 3,500/- which was, at that time, less than the ceiling prescribed in sub clause (iv) of clause (s) of Section (2) of Industrial Disputes Act. Therefore, it can be said without any hesitation that from 01.08.2011 Gautam Naskar was a workman as defined in Section 2 (s) of the I.D. Act.

(vii) Company's witnesses even contradicted themselves when they answered how many helpers were working under Mr. Naskar (assuming he was a supervisor) one said four or five(OPW-2) whereas the other witness said 20-25(OPW-3).

So the company could not prove that Gautam Naskar was working as a supervisor.





Thus the Company neither pleaded nor could it prove that by the nature of duty of Gautam Naskar cannot be treated as Workman.

(4) So far as Company's case that the services of Gautam Naskar were terminated because of his misconduct is concerned:-

(a) As discussed above it is found from evidence and materials on record that Gautam Naskar was working as a helper and NOT as a supervisor. OPW-2 the Factory Manager of the Company Mr. Amit Paul deposed on oath that "it is the duty of Supervisor to maintain quality of the product and helper used to pack finished products".

(b) Exhibit 1 and 2 show that Gautam Naskar was enrolled for PF and ESI Schemes.

(c) OPW-2 the Factory Manager of the Company Mr. Amit Paul deposed on oath that, "after satisfactory performance of service of employee is made permanent and PF and ESI were provided". So, it is admitted that his services were satisfactory. And as he was engaged as unskilled helper it was not his duty to maintain quality of product.

(d) O.P. W-3, Tarun Mistry who is referred as a "man of management" by O.P.W-2 in his examination in chief, deposed that Gautam Naskar used to work under him. And O.P.W-3 is a supervisor. One supervisor cannot work under another supervisor. So, it is clear that Gautam Naskar was not a supervisor.

(e) O.P.W-3 deposed that a separate register of quality check is maintained in the factory and entries regarding quantity of rejected good is found in that register. No such register of goods rejected on account of alleged skill improvement issues of Mr. Naskar was produced by the Company before Tribunal. Again the Company consciously suppressed stated register of rejected goods.

(f) It is the further case of the Company as found from their written statement that the Management issued, "several warnings to the applicant" but to no effect. No document of any such previous warning was produced or proved during evidence. No evidence of alleged, "huge monetary loss" suffered by company is adduced by the Company.

(g) O.P.W.-3 deposed that no written intimation was given to Gautam Naskar for his alleged bad work. He deposed that Ext. B and D were not written in his hand writing and he cannot say the name of the scribe of this letter.

(h) So far as procedure followed for alleged 'Termination' is concerned- OPW-1 the Director of the Company deposed that, "NO domestic enquiry was conducted. A preliminary enquiry was conducted". He filed four letters, two written by OPW-2 to OPW-3 and two written by OPW-3 to OPW-2. No written communication addressed to Gautam Naskar was produced or proved by Company. Admittedly no chargesheet was given and no written communication to Gautam Naskar was made about the alleged allegations or about the alleged findings or about alleged termination/dismissal.

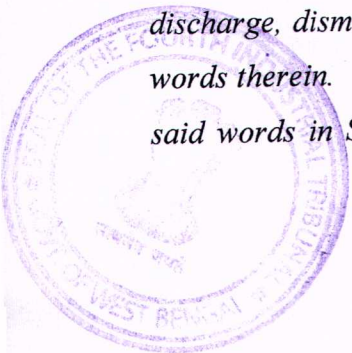


(i) OPW-2 the Factory Manager of the Company Mr. Amit Paul deposed on oath that, "NO chargesheet was filed against Gautam Naskar, No domestic enquiry was conducted"& that, " NO preliminary enquiry was conducted". He has admitted that, "It is true that service of Gautam Naskar was terminated without following the procedure of law". So the witness of company has contradicted the claim of Director of Company that preliminary enquiry was held for alleged misconduct of Gautam Naskar. And company's witness O.P.W.-2 Amit Paul deposed that, "No preliminary enquiry was conducted against Sri Gautam Naskar", thus the statement made in the written statement of the company that co-workers of Gautam Naskar was interrogated about his alleged misconduct is also proved to be a false statement by Company's witness himself.

(j) It is clear that no due process of law was followed by the company in dismissal, termination or refusal to Gautam Naskar. Company's witness has deposed that the company does not have any 'standing order'. In the event of a company not having any standing order the model standing order as given in schedule-I of The Industrial Employment (Standing Orders) Act, 1946 shall apply and the model standing order lays down the procedure of termination of employment and disciplinary action for misconduct but no such procedure was followed in this case by the Company.

(k) From the evidence and materials on record it is crystal clear that service of Mr. Gautam Naskar was terminated without giving any notice to him therefore it is found that the service of Mr. Naskar was terminated without following the principles of natural justice and fair play. Even his alleged termination /dismissal was not communicated to him in writing by the company. All these facts, materials and evidence on record further consolidate to probability of refusal as stated by Mr. Naskar.

(l) Section 2-A of the Industrial Disputes Act as amended by the W.B. Act 33 of 1989. In 2009 LAB. I.C. page, 3198 Hon'ble Calcutta High Court has pleased to hold that *"Though the words 'refusal by an employer to continue to employ' have been used in Section 2 (1) of the said Act to connote lock-out, the words 'refuses employment' and 'refusal of employment' in section 2A of the Act in the context of the purpose for which they were incorporated therein by the Amendment Act of West Bengal have an entirely different meaning. Section 2A broadly deals with the right of an individual workman to raise an industrial dispute concerning his discharge / dismissal / retrenchment from service or if the employer refuses his employment or otherwise terminates his service irrespective of the fact that no other workman or union of workmen are party to the dispute. To understand what the words 'refuses employment' and 'refusal of employment' in Section 2A connote, the doctrine noscitur a sociis provides true and proper guidance. The words discharge, dismiss, retrench are modes by which service of an employee may be terminated. Section 2A also uses the expression 'otherwise terminates'. When the words 'refuses employment' and 'refusal of employment' have been grouped together with discharge, dismiss, retrench and termination in Section 2A, each word draws colour from other words therein. This is the principle of noscitur a sociis. This Court, accordingly, holds that the said words in Section 2A of the Act ought not to be understood in the light of Section 2 (1)*





thereof, for, the context does not require it to be so understood and it would be inconsistent with the object of the statute." Hon'ble Court has held that as the Company refused to employ the workman with an intention to terminate his service he has legal right to seek remedy under the I.D. Act. Thus Mr. Gautam Naskar is found entitled to get any remedy under I.D. Act.

(m) From the evidence and materials on record it has become crystal clear that service of Gautam Naskar was terminated without giving any notice to him and he was refused/his services were terminated without following the principles of natural justice and fair play. Hon'ble Apex Court has pleased to hold that *"It is thus well settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In D.T.C. v. D.T.C. Mazdoor Congress Hon'ble Constitution Bench, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside."* (Ref- 1993, SCC (L&S), page-723 para-14). In the case before this Tribunal no notice whatsoever was given to Gautam Naskar or no pay in lieu thereof was given and no enquiry was held.

(n) It has already been held that Gautam Naskar was appointed by the Company on 01.08.2011 and he worked there for at least for 240 days during a period of eleven calendar months preceding the date of termination of his service and that he is a workman as defined in Section 2 (s) of the I.D. Act. In the present case it is clear that principles of natural justice and fair play have been grossly violated by the Company. and it is found that that the refusal of employment of Mr. Gautam Naskar, workman on and from 19.07.2012 by the employer M/s. Tirupati Colours Pens is not justified.

(5) Ld. Counsel for Company referred to the judgement of Hon'ble Supreme Court in *Workman of Motipur Sugar Factory Pvt. Ltd. Vs. Motipur Sugar Factory Pvt. Ltd.* (Ref- 1965 0 AIR (SC) 1803) and argued that the Tribunal must allow the Company to prove the charges against the workman afresh.

(a) So far as referred judgement is concerned in referred Case the Company issued a notice to the 119 workmen individually on 15.12.1960 asking them to respond by 4 p.m. on 17.12.1960 with the rider that in absence of compliance the workmen shall stand discharged from service without further notice with effect from 18.12.1960.

In that case Hon'ble Court found that the notice served on the individual workmen was "a charge" by the Company telling the workmen concerned that they were guilty of certain act (relevant para-10 of referred Judgement). Hon'ble Court held that in view of the notice the workman concerned knew that there was a charge against them and they were discharged from



service from 18th December 1960 because of that charge, and under this back drop Hon'ble Court held that it was open to the employer to justify the action before the Tribunal by leading all relevant evidence.

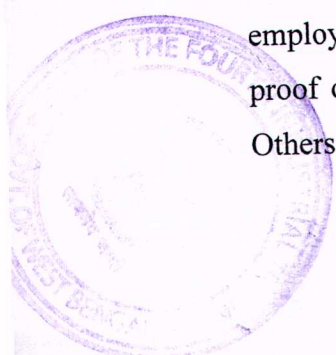
(b) In the case before this Tribunal no notice was served on Gautam Naskar in this regard, no charge was framed and no charge-sheet was issued as found from the Evidence and materials on record. All the witnesses of Company have admitted that no notice or charge-sheet or charge was given/ communicated to Gautam Naskar and no written communication whatsoever in this regard was made. Accordingly, the referred cases is distinguishable from the case before this Tribunal and in absence of any allegation or notice or charge prior to any date of his refusal / dismissal without any enquiry preliminary or domestic and no evidence being adduced by the Company even prima facie show the Gautam Naskar was at all in a position to produce any bad quality product or cause any financial loss to the Company there was no scope for this Tribunal to initiate any further enquiry.

(6) Ld. Counsel for the Company referred to judgement of Hon'ble Court as reported in Sindhu Resettlement Corporation Ltd. vs. Industrial Tribunal of Gujrat (1968 (1) LLJ 834) where Hon'ble Court has held that if no dispute at all was raised by the respondent by the management any request sent by the Government would only be a demand by them and an industrial dispute between them and their employer ..... a mere demand to a Government without a dispute being raised by the workman with their employer cannot become an industrial dispute." Ld. Counsel argued that in the case before this Tribunal no dispute was raised by the workman with the management so it cannot be treated as an industrial dispute.

(a) So far as this argument is concerned in the referred case the workman sent a request to government and the Government made a reference to the Industrial Tribunal directly and there was no involvement of any conciliation officer during the process. The case before this Tribunal is distinguishable on two fronts :-

(b) The workman has proved a letter dt. 24.12.2012 addressed to the Company where he has demanded his reinstatement and during his cross-examination by the Company he has categorically deposed that he handed over the letter to the guards at the main gate of the factory who refused to sign any received endorsement on his copy of the letter.

(c) After the workman raised issue with the Government, the Government referred the matter to the conciliation officer and the Company responded to the conciliation process vide their letter dt. 15.04.2013 addressed to the Labour Commissioner. So, conciliation process was held before the matter being referred to the Tribunal. Hon'ble High Court, Calcutta has held that, "The very fact that the workman insisted for reinstatement in service through the conciliation officer and the employer did not agree to take him back in course of conciliation proceeding in sufficient proof of a demand being raised which resulted in its refusal" (Jagadamba Motors and Others Vs. State of West Bengal and Others (2009) (4) Calcutta High Court notes CHN





page-67). Thus, the judgement referred by Company is factually distinguishable with the instant case.

(7) So far as the entitlement of the workman Gautam Naskar consequent to unjustified termination of his service is concerned :-

(a) Ld. Counsel for the Company argued that to be entitled to receive any compensation, back wages etc. the workman has to prove that he was not working for gain or was unemployed all through the period since his stated termination by the Company but during his cross-examination this workman admitted that he is engaged in some other profession, So, he is not entitled to any back wages. In this connection Ld. Counsel referred to decision of Hon'ble Apex Court in *Kendriya Vidyalaya Sangathan and Another Vs. S. C. Sharma* 2005(1) Scale 317 where a two-judge bench of Hon'ble Supreme Court was pleased to hold that, "When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him". As this workman has admitted of being otherwise employed, he is not entitled to any back wages, argued Ld. Counsel for Company.

(b) Ld. Counsel for workman referred to *Vinod Rabjibai Rajpur Vs, State of Gujarat* (Ref: 2020 II CLR 199) – where Hon'ble Court has pleased to upheld relief of reinstatement with continuity of service and full back wages and argued that Gautam Naskar is entitled to reinstatement with continuity of service and full back wages .

(C) So far as evidence is concerned PW-1 the workman prayed for reinstatement with full back wages in his affidavit in chief. During his cross-examination he deposed that there are six members of his family and he occasionally worked as helper of a mason and sometime deposits electric bills of others or carries gas cylinder from the distributors to the customers and he has been maintaining his family.

(d) Ld. Counsel for Company referred to decision of Hon'ble Supreme Court in *Kendriya Vidyalaya Sangathan And ... vs S.C. Sharma* on 11 January, 2005 to argue that as the workman is gainfully employed he is not entitled to back wages but Hon'ble Supreme Court of India has recently clarified the legal position on payment of back wages to an employee whose services are wrongfully terminated. In the case of *Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors.* the bench comprising Justice DY Chandrachud and Justice Indira Banerjee relied on precedents laid by the Supreme Court, to hold that an employee whose services are found to have been wrongfully terminated, will be entitled to receive full back wages (Ref-Civil Appeal No. 6188 of 2019, dated 21<sup>st</sup> August, 2019).

(e) In *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* (Ref- (2013) 10 SCC 324 ) Hon'ble Court held that, "'...In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule...". The aforesaid rule is subject to the rider that the adjudicating authority/courts may take into consideration "...the length of service of the employee/workman, the nature of misconduct, if any, found proved

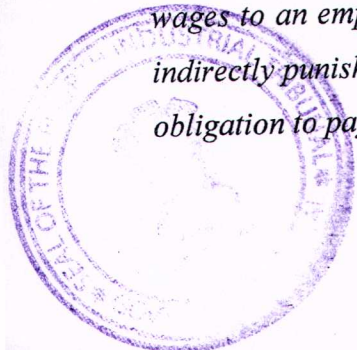


against the employee/workman, the financial condition of the employer and similar other factors...". It further held that, "...If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments...". The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned, by relieving the employer of the obligation to pay back wages.

(f) *Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court* (Ref- (1980) 4 SCC 443), a three-judge bench of Hon'ble Supreme Court stated that, "...Plain common-sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too...". It further held that only in exceptional circumstances the court may exercise its discretion to deny the relief of full back wages, for example: when it would place an impossible burden on the employer.

(g) In *Hindustan Tin Works (P) Ltd v Employees* ( Ref- (1979) 2 SCC 80) it has been held by a three-judge bench of the Hon'ble Supreme Court that "...Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure."

(h) In *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya* (supra ) Hon'ble Court held that,.. "The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."





In sub paragraph nos. (i) (ii) & (iii) of paragraph no. 33 of said ruling the Hon'ble Apex Court has been pleased to observe further 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 a 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."*

(I) In the case before this Tribunal, it appears that Gautam Naskar has clearly stated in his deposition that he is unemployed since termination of his service and passing days with great difficulties and somehow maintaining his family by helping people pay their electricity bills or bringing cooking gas cylinders. Such one-off odd work cannot be termed as gainful employment by any stretch of imagination. Thus, the employee has deposed on oath during cross-examination that he was not gainfully employed and the onus shifted to the employer. The employer failed to plead or prove that the employee was gainfully employed and was getting the same or substantially similar emolument. None of the Company's witnesses have deposed that Gautam Naskar is gainfully employed. They have not stated anything about any employment of Gautam Naskar after 19.07.2012. There is nothing in the evidence and materials on record to show that Gautam Naskar is gainfully employed. Accordingly, it is found that the workman Gautam Naskar is not gainfully employed since the date of refusal of his service.

Under such facts and circumstances in view of evidence and materials on record regard being had to the judgements referred by Ld. Counsels for both sides it is found that the workman Gautam Naskar is entitled to be reinstated in his service with a full back-wages. It is clear that the workman Gautam Naskar has worked under the Company from 01.08.2011 to 18.07.2012. Considering the absolutely baseless allegations, lack of any charges against the workman, falsity and utter lack of transparency on the part of Company, sheer disregard to any due process of law



and dismissal without any sort of any enquiry , no alternative source of sustenance available to Gautam Naskar, the poor financial condition of Gautam Naskar as found from deposition of OPW-1, The Director of the Company, "Gautam Naskar approached the management with folded hands for a job drawing the sympathy on account of his family members. Being moved by such approach and also on humanitarian grounds I have engaged Gautam Naskar in the factory for doing some unskilled work". it is held that that total back-wages should be awarded to the workman Gautam Naskar

Both issues are adjudicated accordingly.

Hence, it is

**Ordered**

that workman Mr. Gautam Naskar be reinstated in his service under the Company within 60 days of this day. He will also get full back-wages for the period since 19.7.2012 till reinstatement of the service.

M/s. Tirupati Colour Pens Pvt. Ltd. is directed to reinstate the workman Mr. Gautam Naskar in the service and pay full back-wages to him within 60 days of this day.

Let a copy of this award be sent to The Principal Secretary to the Government of West Bengal, Labour Department, N.S. Buildings, 1, Kiran Sankar Roy Road, Kolkata-700001.

Dictated & Corrected by me,

Sd/-  
Dwiga Khaitan  
Judge

Sd/-  
Dwiga Khaitan

Judge  
Fourth Industrial Tribunal  
Kolkata  
19.04.2022  
Judge



Fourth Industrial Tribunal, Kolkata