

1/28461/2019

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

No. Labr/ 173. /(LC-IR)

Date : 14.12.19

ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. 1580-IR/IR/10L-21/2014 dated 24/12/2014 the Industrial Dispute between M/s Ankit Metal & Power Ltd. Vill+ P.O. Jorehira P.S. Chhatna, Dist- Bankura Pin-722137 and their workman Shri Pradip Banerjee, C/O: Satyanarayan Banerjee, Vill+P.O.- Barapalason, P.S. - Memari, Dist- Burdwan, Pin- 713426 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, 4th. Industrial Tribunal, West Bengal.


AND WHEREAS the Judge of the said 4th. Industrial Tribunal, West Bengal, has submitted to the State Government its award on the said Industrial Dispute.

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,



Deputy Secretary
to the Government of West Bengal

No. Labr/ 173/1(5) / (LC-IR)

Date : 14.12.19

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

1. M/s: Ankit Metal & Power Ltd. Vill+ P.O.: Jorehira P.S. Chhatna, Dist- Bankura Pin-722137.
2. Shri Pradip Banerjee, C/O: Satyanarayan Banerjee, Vill+P.O.- Barapalason, P.S. - Memari, Dist- Burdwan, Pin- 713426 .
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The Labour Commissioner, W.B. New Secretariate Buildings, 1, K. S. Roy Road, 11th Floor, Kolkata- 700001.
- ✓ 5. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Department's website.


Deputy Secretary

No. 173/2(2)/Le-IR

Date : 14.2.19

Copy forwarded for information to :

1. The Judge, 4th. Industrial Tribunal, West Bengal with reference to his Memo No. 74=LT dated 09/01/2019 .
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.

Deputy Secretary
Government of West Bengal.

In the matter of an Industrial Dispute between M/s. Ankit Metal & Power Ltd., Village & P.O. – Jorehira, P.S. Chhatna, Dist. Bankura, PIN - 722137 and its worker Shri Pradip Banerjee, C/o. Satyanarayan Banerjee, Village & P.O. – Barapalason, P.S. Memari, Dist. Burdwan, PIN- 713426.

(Case No. VIII-03/15)

BEFORE THE FOURTH INDUSTRIAL TRIBUNAL: WEST BENGAL

P R E S E N T

SHRI GOPAL KUMAR DALMIA, JUDGE
FOURTH INDUSTRIAL TRIBUNAL
KOLKATA.

A W A R D

In the matter of an Industrial Dispute between M/s. Ankit Metal & Power Ltd., Village & P.O. – Jorehira, P.S. Chhatna, Dist. Bankura, PIN -722137 and its worker Shri Pradip Banerjee, C/o. Satyanarayan Banerjee, Village & P.O. – Barapalason, P.S. Memari, Dist Burdwan, PIN- 713426, Vide G.O. No. 1580-IR/IR/10L-21/2014 dated 24.12.2014 referred to this Tribunal for adjudication of the following issues.

I S S U E (S)

1. Whether the refusal of employment of Sri Pradip Banerjee (workman) on and from 14.02.2011 by the employer is justified.
2. What relief, if any, is the workman entitled to?

The Sri Pradip Banerjee's case in short is that he has been appointed as a Sinter Plant Supervisor on 28.08.2010 by Shri A. K. Ghosh, the General Manager of Ankit Metal & Power Ltd. His salary was fixed at Rs. 3,500/- per month and a bachelor accommodation was also provided to him. It is also claimed by him that after joining the job, he became physically ill and was under medical treatment of Dr. Samir Chatterjee

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who prescribed him to take rest for a few days. After recovery of health, he went to his place of work for joining his duty but the Authority of the Company ousted him from the said premises and orally stated that he had been dismissed from the service. On being asked, the person holding the charge of the Company stated to him that he has been terminated from the service due to his absence without any intimation. Thereafter, he showed his medical documents to the Authority of the Company but it did not entertain them and forcibly prevented him from joining the work. It is also alleged by him that he filed a petition before the Assistant Labour Commissioner, Bankura for his unlawful termination of service who started a proceedings; wherein joint meetings of the representative of the Company and him were held under supervision of the Assistant Labour Commissioner, Bankura. In the meeting dated 09.01.2013, the Management of the Company was requested to consider the matter sympathetically and allow him to join his work. When he went for submitting an application to the Company, the Authority of it did not take his application. Even it did not obey the settlement arrived at before the Assistant Labour Commissioner, Bankura. Thereafter, he filed a petition before the Additional Labour Commissioner, Durgapur who directed the Assistant Labour Commissioner, Bankura to look after the matter. It appears to have also been claimed by him that after getting direction from the Labour Commissioner, the Assistant Labour Commissioner, Bankura issued notice upon the Company and him for a joint decision but the man of the Company did not come there and ultimately the Assistant Labour Commissioner, Bankura sent his report. As the dispute was not settled there it has been referred to this Tribunal by the Government.



On the other hand, Ankit Metal & Power Limited (hereinafter referred to as the Company) has claimed that it is a private limited Company and is engaged in the manufacturing of various kind of metals. It has denied the material allegations and claim of Shri Pradip Banerjee and claimed inter alia that the order of reference is mis-conceived, erroneous and not maintainable and that Shri Pradip Banerjee was not the workman and there is no industrial dispute between him and it. It is also

claimed by the Company that it has a Sinter Plant and the matter of maintenance of said plant was given to various contractors and in the year, 2010 the work of maintenance of said plant was assigned to one contractor namely M/s. Star Engineering. It is clearly denied by the Company that Shri Pradip Banerjee was appointed as a supervisor by its General Manager, Mr. A. K. Ghosh. It has claimed that Shri Pradip Banerjee was a temporary employee of M/s. Star Engineering, a contractor and he was sent to the factory of the Company on 28.08.2010 by said M/s. Star Engineering for maintenance of the Sinter Plant. The relationship of employer and employee was never existed between the Company and Shri Banerjee and therefore, the question of existence of any industrial dispute does not arise. It has also been claimed by the Company that in case of refusal of employment, jural relationship between the Company and its workman exists but in case of termination of service there is severance of jural relationship between the Company and its employee. It has also claimed that as Shri Pradip Banerjee never completed 240 days of continuous working as per section 25B of the Industrial Disputes Act he is not entitled to get any protection of the said Act. It is further alleged by the Company that Shri Pradip Banerjee is gainfully employed.

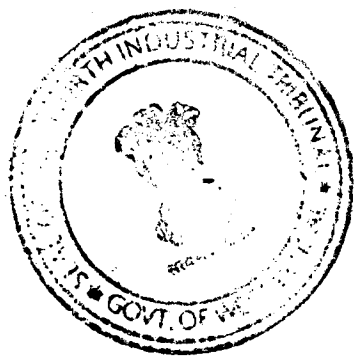
In order to prove the case, Shri Pradip Banerjee has been examined as P.W.1 and one Shri Sumanta Shekar Roy, the Assistant Labour Commissioner, Bankura has been examined as P.W. 2. Documents have been marked as Exhibits 1 to 9.

One Shri Samir Mukherjee has been examined as O.P.W-1 and one Shri Uday Sankar Banerjee has been examined as O.P.W-2 on behalf of the Company. Documents have been marked as Exhibits A to E.

Rulings of the Hon'ble Courts referred to on behalf of the Company:—

1. 2007(115) FLR-553, 2. 2004 (II) LLJ-327, 3. 2002 (93) FLR-179, 4. 2005 (105) FLR-1067, 5. 2006 (1) LLJ-12, 6. 2005 (105) FLR-1, 7. 2008-III, LLJ-562, 8. 2009-III, LLJ-38, 9. 2016 1 SCC (L&S)-186, and 10. 2018 (III) CLR-679.

Rulings of the Hon'ble Courts referred to on behalf of Shri Pradip Banerjee.



1. 1993 SCC (L&S)-723, 2. 2014 (6) Supreme To-Day-243, 3. 2013 (139) FLR-541, 4. 2009 LAB. I.C. page-3198 and 5. 2007 SCC (L&S)-630.

DECISION WITH REASONS

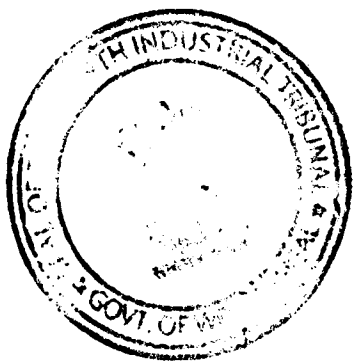
It is claimed by Shri Pradip Banerjee that he was appointed as a supervisor of a Sinter Plant of the Company on 28.08.2010 and his monthly salary was Rs. 3,500/- and a bachelor accommodation was also provided to him there. It appears to have also been claimed by him that after joining the service he became physically ill and was under medical treatment of Dr. Samir Banerjee who advised him to take rest for a few days and as such he could not intimate said matter to the Authority of the Company in time. But after recovery of health, when he went to his place of work for joining his duty, he showed his medical prescription and certificate to the Authority of the Company but said documents were not entertained by the Management of the Company and he was prevented from joining the duty. In fact, he was thrown out from the said premises and was orally informed that he has been dismissed from the service.

The Company has denied the aforesaid allegations of Shri Pradip Banerjee and claimed inter alia that he was not a workman and that there is no industrial dispute between him and it. It is further claimed by the Company that it has a Sinter Plant and the matter of maintenance of said plant was given to various contractors and in the year, 2010 the work of maintenance of said plant was assigned to one contractor namely M/s. Star Engineering. It has also claimed that Shri Pradip Banerjee was a temporary employee of said M/s. Star Engineering and he was sent to the factory of the Company on 28.08.2010 by said M/s. Star Engineering for maintenance of the Sinter Plant. It is clearly denied by the Company that Shri Pradip Banerjee was appointed as a supervisor by its General Manager, Mr. A. K. Ghosh. The relationship of employer and employee was never existed between the Company and Shri Banerjee and therefore the question of existence of any industrial dispute does not arise.

During argument, Ld. Lawyer for the Company has emphatically argued that burden is on Shri Pradip Banerjee to prove that he was a

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workman of the Company. In support of his said submission he has relied upon the paragraph no. 20 of the judgement of the Hon'ble Bombay High Court, reported in 2007 (115) FLR page 553. He has also submitted that Shri Banerjee has failed to prove his claim that he is a workman as per section 2 (s) of the Industrial Disputes Act.

Ld. Lawyer for Shri Pradip Banerjee has submitted that Shri Pradip Banerjee is a workman of the Company and he has been able to prove his said claim by adducing evidences. He has referred to paragraph no. 28 of the ruling of the Hon'ble Apex Court reported in (2007) 1 SCC (L&S) page, 630 and submitted that before the Conciliation Officer the Company did not raise any plea that Shri Pradip Banerjee is not appointed by it.

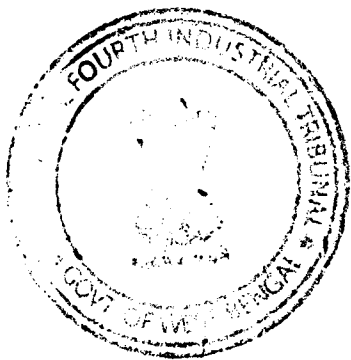
It appears from paragraph no. 28 of ruling of the Hon'ble Apex Court reported in (2007) 1 SCC (L&S) page, 630 that *"The workmen whether before the Labour Court or in writ proceedings were represented by the same union. A trade union registered under the Trade Unions Act is entitled to espouse the cause of the workmen. A definite stand was taken by the employees that they had been working under the contractors. It would, thus, in our opinion, not lie in their mouth to take a contradictory and inconsistent plea that they were also the workmen of the principal employer. To raise such a mutually destructive plea is impermissible in law. Such mutually destructive plea, in our opinion, should not be allowed to be raised even in an industrial adjudication. Common law principles of estoppel, waiver and acquiescence are applicable in an industrial adjudication."* In this case, Shri Pradip Banerjee's plea that he was appointed by the Company is consistent. On the other hand, said plea of Shri Banerjee is denied by the Company. In view of the above, the principle enunciated in the said ruling does not appear to be applicable to the facts and circumstances of this case.

In paragraph no. 20 of the judgement of the Hon'ble Bombay High Court, reported in 2007 (115) FLR-553, it has been observed by the Hon'ble Court that *"In Northcote Nursing Home Pvt. Ltd. (supra) this Court while considering the similar issue held that initially the burden is on the respondent employee to prove that she/he is workman under section 2 (s) of I.D. Act and she/he has to enter into the witness box. As she/he as*

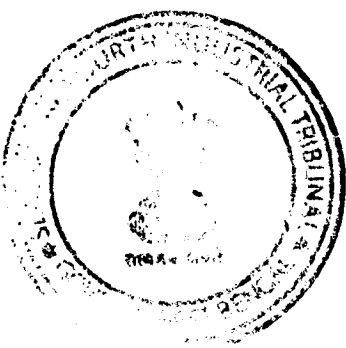


asserted positively that she/he was workman as contemplated under the I.D. Act and once the basic material placed on record by the workman, the respondent Company required to rebut the same to prove otherwise." It is clear from the aforesaid observation of the Hon'ble Court that initial burden is on the employee to prove that she/he is a workman under Section 2 (s) of the I.D. Act. Said position of law is not challenged or disputed by the Ld. Lawyer of Shri Pradip Banerjee.

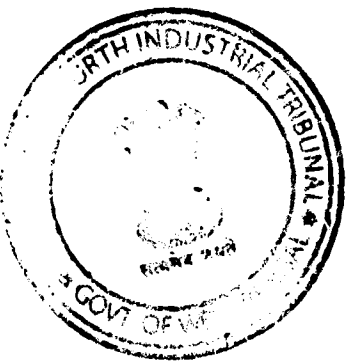
In view of aforesaid rival claims of the parties, now this Tribunal has to ascertain as to whether Shri Pradip Banerjee was appointed as a supervisor of Sinter Plant of the Company by the Company itself or by its contractor M/s. Star Engineering. In respect of the aforesaid matter P.W.1, Shri Pradip Banerjee has clearly stated in his evidence that he was appointed as a Sinter Plant supervisor under Ankit Power & Metal Limited and he started working in the factory of the said Company as a permanent employee. He appears to have urged also that though he was designated as a Sinter Plant Supervisor but he had to do clerical works without any command or control over the staff. He has also urged in his evidence that he did not have any power to take decision independently or grant leave to the employees or take any disciplinary action against them. His monthly wage was Rs. 3,500/-. It is further stated by him that he suddenly became ill and was to be treated from 23.01.2011 to 30.01.2011. He joined his duty after production of medical certificate and worked upto 13.02.2011. But when he went to do his work on 14.02.2011 he was not allowed to do so. He has produced photo copies of his medical certificate and prescription before the Tribunal. He has identified a photo copy of a resolution dated 09.01.2013 (Exhibit-1) signed by one Mr. P. K. Mukhopadhyay, a representative of the Management of the Company and him before the Conciliation Officer. Original of said resolution and other resolutions were identified by the P.W.-2, Shri Sumanta Shekar Roy as Exhibit-7. P.W.-1, Shri Pradip Banerjee has also identified photo copies of two letters signed by the Addl. Labour Commissioner, one addressed to the Asst. Labour Commissioner, Bankura (Exhibit-2) and another to the Deputy Labour Commissioner, Durgapur (Exhibit-3). He has also Identified photo copies of three letters signed by the Asst. Labour Commissioner, Bankura, all



addressed to the Company (Exhibits-4, 5, & 6). P.W.-2, Shri Sumanta Shekar Roy has identified photo copy of a report U/S 12(4) of the Act (Exhibit-8) and a photo copy of a letter of Shri Pradip Banerjee addressed to the Asst. Labour Commissioner, Bankura (Exhibit-9). It appears from the resolution dated 09.01.2013 signed by Shri Pradip Banerjee, one Mr. P. K. Mukhopadhyay, a representative of the Company and the Conciliation Officer that both sides took part in the discussion held before the Conciliation Officer. Said documents clearly show that Shri Pradip Banerjee claimed before the Conciliation Officer also that he joined as an employee (Supervisor) at Ankit Metal & Power Ltd., Jorehira on 28.08.2010 and had been working there since that day. It has also been claimed there that he was ill from 23.01.2011 to 30.01.2011 and submitted a medical certificate to the Authority of the Company but the Personal Manager of it did not allow him to join there. He was forced to get out of the industry by the Security man. It also depicts from the resolution dated 09.01.2013 that the Sr. General Manager of the Company after showing the documents stated before the Conciliation Officer that in spite of absence of Shri Pradip Banerjee without any notice he was allowed to join his duty on 01. 02. 2011 who worked there from 01.02.2011 to 03.02.2011 but again remained absent from 04.02.2011 to 11.02.2011 and thereafter joined his duty on 12.02.2011 and worked there till 13.02.2011. He did not come to his work on and from 14.01.2011 without any intimation. On that day, Conciliation Officer requested the Management of the Company to consider the matter of Shri Pradip Banerjee sympathetically and allow him to join the work. It further discerns from the resolution of the joint meeting held in the office of the ALC, Bankura,,dated 04. 07. 2014 that the representative of the Company stated there that no notice of termination of service of Shri P. Banerjee had been issued by the Management. Even no letter seeking explanation of unauthorized absence from 14.02.2011 was issued to Shri Pradip Banerjee by the Management of the Company. It further appears from the said resolution that till that day i.e. 04.07.2014 the Management of the Company neither issued any notice to show-cause upon Shri Pradip Banerjee nor initiated any disciplinary action against him. That apart on that day, the representative of the Management of the



Company stated there that the Management will look into the provisions for getting the workman re-employed and for the said purpose he sought some time. From the resolutions of the meetings held between Shri Pradip Banerjee and representative of the Management of the Company before the Conciliation Officer it has become crystal clear that the Company never claimed there that Shri Pradip Banerjee is not its employee or that his service was provided by its contractor M/s. Star Engineering. In fact, the Company circuitously admitted the claim of Shri Banerjee that he was appointed by the Company. It is also profitable to mention here that Shri Pradip Banerjee has claimed that he was appointed as a Supervisor of Sinter Plant by Shri A. K. Ghosh, the General Manager of the Company on 28.08.2010 at a monthly salary of Rs. 3,500/-. He has produced a photo copy of his Bio-data (Exhibit-A) and an endorsement with signature of A. K. Ghosh (Exhibit-A/1) thereon. Said document has been exhibited into the evidence at the instance of the Company. Exhibit-A/1 i.e. the endorsement with signature of A.K. Ghosh on the Bio-data of Shri Pradip Banerjee clearly shows that he was appointed as a supervisor of Sinter Plant on 28.08.2010 and his monthly salary was Rs. 3500/- with a bachelor accommodation. During cross-examination of P.W.1, Shri Pradip Banerjee when said document was shown to him he identified the same as his appointment letter. On the other hand, the Company in its written statement has claimed that Shri Pradip Banerjee was a temporary employee of M/s. Star Engineering, a contractor and he was sent to the factory of the Company on 28.08.2010 by said M/s. Star Engineering for maintenance of the Sinter Plant and that the relationship of employer and employee was never existed between the Company and Shri Pradip Banerjee and therefore the question of existence of any industrial dispute does not arise. Photo copies of two documents i.e. a report of the Conciliation Officer under Section 12 (4) of the I.D. Act (Exhibit-B) and a letter of the Addl. Labour Commissioner addressed to the Deputy Labour Commissioner, Durgapur (Exhibit-B/1) have been identified by the P.W.-2, Shri Sumanta Shekar Roy when said documents were shown to him during his cross examination on 05.05.2017. Some documents of the Conciliation Proceedings including a letter of Shri Pradip Banerjee addressed to the



Durgapur (Exhibit-B/1) have been identified by the P.W.-2, Shri Sumanta Shekar Roy when said documents were shown to him during his cross examination on 05.05.2017. Some documents of the Conciliation Proceedings including a letter of Shri Pradip Banerjee addressed to the Labour Commissioner, Bankura have been collectively marked as Exhibit-C on admission of both sides. One Work Order said to be issued on behalf of the Company in favour of M/s. Star Engineering (Exhibit-D) and a letterhead of M/s. Star Engineering (Exhibit-E) have been identified by the O.P.W.-1, Shri Samir Mukherjee. O.P.W.1, Shri Samir Mukherjee who is the Manager (Legal) of the Company and O.P.W.2 Shri Uday Sankar Banerjee who is working as an Advisor of the Company have deposed in the line of the claim made in the written statement of the Company but said claim of the Company does not inspire my confidence in the light of the facts, circumstances of the case and evidences both oral and documentary available on record especially when the Company did not challenge the jural relationship of the employee and employer between Shri Pradip Banerjee and it before the Conciliation Officer. Moreover, the Company has failed to explain as to why the endorsement regarding appointment of Shri Pradip Banerjee (Exhibit-A/1) was made and signed by Mr. A. K. Ghosh on his bio-data. Even the Company for the reasons best known to it has not brought any man of M/s. Star Engineering to prove its claim that Shri Pradip Banerjee was appointed by said M/s. Star Engineering and not by it. On careful analysis of the facts, circumstances and evidence on record, the claim and evidence of P.W.-1, Shri Pradip Banerjee that he was appointed as a supervisor of the Sinter Plant of Ankit Metal & Power Ltd. on 28.08.2010 and his monthly salary was Rs. 3,500/- and a bachelor accommodation was also provided to him there, appear to be believable and inspire the confidence of this Tribunal. In view of the above, this Tribunal comes to an irresistible conclusion that Shri Pradip Banerjee was appointed as a supervisor of Sinter Plant by the Company and that the claim of the Company that Shri Pradip Banerjee was appointed by its contractor M/s. Star Engineering and not by it is a fruit of the thought made after initiation of this case for resisting the claim of Shri Banerjee.



It has also been claimed by the Company that in case of refusal of employment, jural relationship between the Company and its workman exists and there is no severance of relationship of employer and employee but in case of termination of service there is severance of the jural relationship between the Company and its employee. In respect of the aforesaid matter, Ld. Advocate for the Company has submitted that as per Shri Pradip Banerjee the Company refused to employ him on and from 14.02.2011 and as such he cannot claim that the jural relationship between Company and him is snapped. Therefore, he is not entitled to get any relief in this case.

On the other hand, Ld. Lawyer of Shri Pradip Banerjee has drawn my attention to the provisions of section 2-A of the Industrial Disputes Act which has been amended by the W.B. Act 33 of 1989. He has referred to paragraph no. 16 of a ruling of the Hon'ble Calcutta High Court reported in 2009 LAB. I.C. page, 3198 and submitted that as the Company refused to employ Shri Banerjee with an intention to terminate his service he has legal right to seek remedy under the I.D. Act.

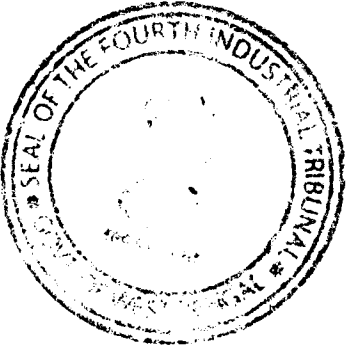
It appears from the paragraph no. 16 of the aforesaid ruling that the Hon'ble Calcutta High Court has been pleased to observe inter alia that *"Though the words 'refusal by an employer to continue to employ' have been used in Section 2 (1) of the said Act to connote lock-out, the words 'refuses employment' 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*



require it to be so understood and it would be inconsistent with the object of the statute."

Considering the facts and circumstances of the case, evidence on record and in the light of the aforesaid principles of law enunciated by the Hon'ble Court I do not find any acceptable force in the submission of the Ld. Lawyer of the Company that Shri Pradip Banerjee is not entitled to get any remedy in this case.

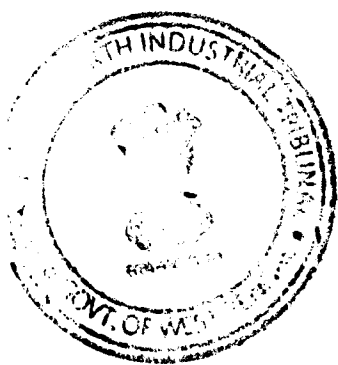
Ld. Lawyer for the Company has drawn my attention to the provisions of Section 25B of the I.D. Act and submitted that where a workman was not in continuous service for a period of one year, he shall have to prove that during a period of twelve calendar months preceding the alleged date of termination 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. He has further submitted that burden of proving of said matter is upon the workman but in this case Shri Pradip Banerjee has failed to discharge his said burden. In support of his submission, he has relied upon the decisions of the Hon'ble Apex Court, reported in 2002 (93), FLR-179; 2005 (105), FLR-1067 and 2006 (I) LLJ, page-12. He has drawn my attention to paragraph No. 2 of the ruling of the Hon'ble Apex Court, reported in 2002 (93) FLR-179 and submitted that only filing of an affidavit by a workman in his favour cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days or 120 days as the case may be. It appears from paragraph no. 2 of the said judgment that the Hon'ble Court has been pleased to observe inter-alia that *"For the view we are taking, it is not necessary to go into the question as to whether the appellant is an 'industry' or not, though reliance is placed on the decision of this Court in state of Gujarat v. Pratam Singh Narsinh Parmar. In our opinion, the Tribunal was not right in placing the onus on the Management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but his*



claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the Award is liable to be set aside."

Ld. Lawyer for the Company has also drawn my attention to paragraph No. 18 of the ruling reported in 2005 (105) FLR, page-1067 and submitted that pleadings are no substitute for proof and doctrine of non-traverse is not applicable in a case under the I. D. Act. It appears that the Hon'ble Apex Court has been pleased to observe inter alia in the said case that *"Pleadings are no substitute for proof. No workman, thus, took an oath to state that they had worked for 240 days. No document in support of the said plea was produced. It is, therefore not correct to contend that the plea raised by the respondents herein that they have worked continuously for 240 days was deemed to have been admitted by applying the doctrine of non-traverse. In any event the contention of the respondents having been denied and disputed, it was obligatory on the part of the respondents to add new evidence."* He has also drawn my attention to paragraph No. 13 of the ruling of the Hon'ble Apex Court, reported in 2006 (I) LLJ, page-12, wherein the Hon'ble Court has been pleased to observe inter alia that *"In our opinion, the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination."*

Ld. Lawyer of Shri Pradip Banerjee did not challenge the argument of Ld. Lawyer of the Company so far as it relates to the provision of Section 25B of the I. D. Act is concerned, but he argued emphatically that Shri Banerjee has worked for more than 120 days under the Company during the period of six months preceding the date of termination of his service i.e. 14.02.2011.



From the aforesaid rulings of the Hon'ble Apex Court it depicts that primary onus is on the workman to prove by adducing cogent evidence that he had worked for more than 240 days in the twelve calendar months or 120 days in six calendar months preceding his termination. On perusal of the ruling of the Hon'ble Apex Court, reported in 2005 (105) FLR, page-1067, I find substance in the submission of the Ld. Lawyer for the Company that pleadings are no substitute for proof and doctrine of non-traverse is not applicable in a case under the I. D. Act.

To appreciate the argument of both sides I find it just and proper to mention here the provisions of Section 25B of the I. D. Act, which runs as follows :-

25B. Definition of continuous service. - *For the purposes of this Chapter,--*

(1) a workman shall be 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;

(b) for a period of six months, if the workman, during a period of six 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) ninety five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.-- For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which--

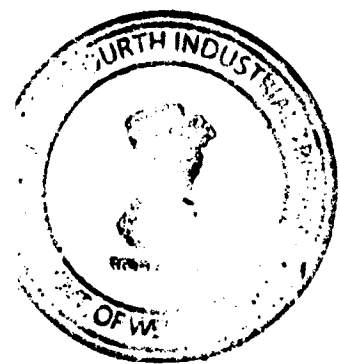
(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

It appears from the provisions of sub-Section (1) of Section 25B of the I.D. Act that a workman shall be 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. It further appears from sub-Section (2) of Section 25B of the Act that where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, the rider of 240 days or 120 days as the case may be comes into play. In this case, it is alleged that Shri Pradip Banerjee joined his service under the Company as a supervisor of Sinter Plant on 28.08.2010 and on 14.02.2011 the company terminated his service. The Company has claimed that Shri Pradip Banerjee was an employee of M/s. Star Engineering and not of it and that said M/s. Star Engineering sent him to the factory of the Company on 28.08.2010 for maintenance of the Sinter Plant. Said matter is also reflected in the deposition of OPW-1, Shri Samir



Mukherjee and OPW-2, Shri Uday Sankar Banerjee. In view of the aforesaid factual aspects, it is not disputed that Shri Pradip Banerjee started working in the Sinter Plant of the Company on and from 28.08.2010. It is also not disputed that Shri Pradip Banerjee did not work for six months as per provision of sub-Section (1) of Section 25B of the I.D. Act. Therefore, this Tribunal has to see whether Shri Pradip Banerjee has worked for not less than 120 days during a period of six calendar months preceding the date of termination of service by way of refusal of employment or not.

It is claimed by Shri Pradip Banerjee that he joined the service on 28.08.2010 and thereafter he became physically ill and was under medical treatment from 23.01.2011 to 30.01.2011 and worked upto 13.02.2011. When he went to join his duty on 14.02.2011 he was not allowed to do so. He has duly corroborated the said matter by his evidence. On the other hand, OPW-1, Shri Samir Mukherjee and OPW-2, Shri Uday Sankar Banerjee have claimed in their deposition that Pradip Banerjee worked as a casual employee of M/s. Star Engineering and he did not complete 240 days in one year prior to the date specified in the order of Reference. Now, let me see the documentary evidence available on record. It appears from the resolution dated 09.01.2013 duly signed by Mr. P.K. Mukhopadhyay, the Senior General Manager of the Company, Shri Pradip Banerjee and the Conciliation Officer that said Senior General Manager of the Company took part in the discussion held on 09.01.2013 before the Conciliation Officer and after showing the documents claimed there that in spite of absence in duty without notice Pradip Banerjee was allowed to join his duty on 01.02.2011 and he worked there from 01.02.2011 to 03.02.2011 but again he remained absent from 04.02.2011 to 11.02.2011. Thereafter he joined his duty on 12.02.2011 and worked there till 13.02.2011 but thereafter he remained absent from 14.02.2011. In view of the aforesaid evidence, facts and circumstances available on record it has become clear that Shri Pradip Banerjee worked there during the period from 28.08.2010 to 13.02.2011 but remained absent from 23.01.2011 to 30.01.2011 and 04.02.2011 to 11.02.2011. Therefore, total period of absence of Shri Pradip Banerjee is not more than 16 days i.e. from 23.01.2011 to 30.01.2011 and 04.02.2011 to 11.02.2011, out of 170 days.

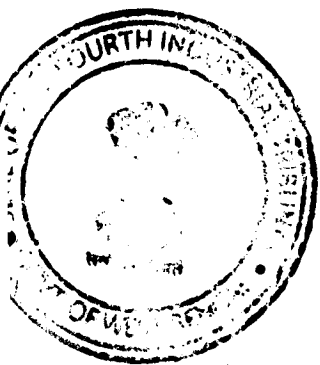


So, I am to hold without any hesitation that Pradip Banerjee worked as a Supervisor under the Company at least for 154 days during a period of six calendar months preceding the date of termination of his service.

During argument, Ld. Lawyer of the Company has submitted that burden is on Shri Pradip Banerjee to prove that he is a workman as defined in Section 2 (s) of the I.D. Act. Shri Pradip Banerjee nowhere of his written statement has described the nature of works done by him under the alleged employment of the Company but has adduced evidence on that point. He has also argued that that in absence of a plea in the written statement the evidence adduced by Shri Pradip Banerjee should not be looked into. In support of his said submission, he has referred to paragraph no. 27 of a ruling of the Hon'ble Supreme Court, reported in 2004 (II) LLJ-327 and paragraph nos. 18 and 19 of an another ruling of the Hon'ble Apex Court reported in 2005 (105) FLR, page-1.

It appears that in paragraph no. 18 of the ruling of the Hon'ble Apex Court reported in 2005 (105) FLR, page-1, the Hon'ble Court has been pleased to observe that *"It is now trite that the issue as to whether an employee answers the description of a workman or not has to be determined on the basis of a conclusive evidence. The said question, thus, would require full consideration of all aspects of the matter."* In paragraph no. 19 of the said ruling, the Hon'ble Apex Court has been pleased to observe that *"The jurisdiction of the Industrial Court to make an award in the dispute would depend upon a finding as to whether the concerned employee is a workman or not. When such an issue is raised, the same being a jurisdictional one, the findings of the Labour Court in that behalf would be subject to judicial review."*

In paragraph no. 27 of the ruling of the Hon'ble Supreme Court, reported in 2004 (II) LLJ-327, the Hon'ble Court has been pleased to observe that *"According to Mr. Ashok H. Desai, learned senior counsel appearing for the appellant-Company, there are no pleadings either on the issue of 'community of interest' or on the issue of 'estoppel' in the Statement of Claim filed by the respondent-Staff & Officers' Association 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"

In this view of the matter, we are of the opinion that the findings rendered regarding 'community of interest' or 'estoppel' in the absence of pleadings by the Association, cannot at all be looked into."

On perusal of the aforesaid rulings of the Hon'ble Apex Court it appears clearly that the question as to whether an employee is a workman or not has to be determined on the basis of conclusive evidence and that in the absence of a plea no amount of evidence led in relation thereto can be looked into. It is true that in the written statement Shri Pradip Banerjee did not state the details of the works done by him as a supervisor of the Sinter Plant but it appears to have clearly been claimed in his Written Statement that he was appointed to be a supervisor of a Sinter Plant of the Company on 28.08.2010 and accordingly he started working there as a supervisor. Said claim appears to have been fortified by the Exhibit-A/1 which has been brought into evidence of this case at the instance of the Company. In the Written Statement of the Company, it is claimed that Shri Pradip Banerjee was an employee of M/s. Star Engineering, a contractor of the Company and said M/s. Star Engineering sent him to the factory of the Company on 28.08.2010 for maintenance of its Sinter Plant and that Pradip Banerjee was not a workman of the Company as per Section 2 (s) of the I.D. Act. But nowhere in its W.S. it has stated the details of the works done by Shri Pradip Banerjee in its factory. Shri Pradip Banerjee has claimed as P.W.1 that he had to do clerical works and that he did not have any command or control over the members of the staff or authority to take any decision independently but said matter is not mentioned in his Written Statement. In view of the principles of law enunciated by the Hon'ble Court, said part of evidence of P.W.1 Shri Pradip Banerjee cannot be looked into. But from the evidence and materials on record, in no stretch of imagination it can be said that Shri Pradip Banerjee was employed or worked under the Company in a managerial or administrative capacity. On the contrary, it depicts clearly that he was appointed to be a supervisor of

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Sinter Plant of the Company on 28.08.2010. The Company in its Written Statement has claimed about Shri Pradip Banerjee that he was sent to the factory of the Company on 28.08.2010 by M/s. Star Engineering for maintenance of the Sinter Plant. In the light of the facts and circumstances of the case and evidence available on record, I am of the considered opinion that the name of the post of Shri Pradip Banerjee i.e. supervisor and aforesaid claim of the Company made in its Written Statement also speak loudly the nature of works done by Shri Pradip Banerjee at Sinter Plant of the Company. Exhibit-7 (resolution dated 09.01.2013) signed by P. K. Mukhopadhyay, Shri Pradip Banerjee and the Conciliation Officer also reflects that Shri Pradip Banerjee was appointed as a Supervisor. Considering the pleadings of both sides, evidences and other materials available on record it can be said with all reasonable certainty that Shri Pradip Banerjee worked at the Sinter Plant of the Company as a Supervisor. I find it profitable to mention here that as per **Section 2 (s)** of the I.D. Act "*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 ten 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."

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. In this case Shri Pradip Banerjee was appointed as a Supervisor of the Sinter Plant of the Company on 28.08.2010 at a monthly salary of Rs. 3,500/- which was, at that time, more than the ceiling prescribed in sub clause (iv) of clause (s) of Section (2) of Industrial Disputes Act. But 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 the monthly salary/ wages of Shri Pradip Banerjee became less than the prescribed ceiling. Therefore, it can be said without any hesitation that from 15.09.2010 shri Pradip Banerjee has become a workman as defined in Section 2 (s) of the I.D. Act and on 14.02.2011 i.e. the date of termination of his service also he was a workman. Under the circumstances, I am to hold that Shri Pradip Banerjee is a workman as defined in Section 2 (s) of the I.D. Act.

From the evidence and materials on record it has become crystal clear that service of Shri Pradip Banerjee was terminated without giving any notice to him. In this regard, Ld. Lawyer of shri Pradip Banerjee referred to paragraph no. 14 of a judgement of the Hon'ble Apex Court, reported in 1993, SCC (L&S), page-723 and submitted that the service of Shri Banerjee was terminated without following the principles of natural justice and fair play.



It appears that in paragraph no. 14 of the aforesaid ruling, the Hon'ble Apex Court has been pleased to observe 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*

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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 the Constitution Bench, per majority, 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."

It has already been held that Shri Pradip Banerjee was appointed as a supervisor of Sinter Plant by the Company on 28.08.2010 and he worked there at least for 154 days during a period of six 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. In view of the above, I am to hold that the refusal of employment of Shri Pradip Banerjee, workman on and from 14.02.2011 by the employer M/s. Ankit Metal & Power Limited is not justified.

Now, the question as to the entitlement of the workman Shri Pradip Banerjee consequent to unjustified termination of his service comes. In this regard, Ld. Lawyer of Shri Pradip Banerjee has referred to the paragraph nos. 17 & 33 of a ruling of the Hon'ble Apex Court reported in 2013 (139) FLR, page-541 and a portion of paragraph no. 39 of an another ruling of the Hon'ble Apex Court, reported in 2014 (6), Supreme To-Day, page-243 and submitted that in case of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. It appears that in paragraph no. 17 of the ruling of the Hon'ble Apex Court reported in 2013 (139) FLR, page-541, the Hon'ble Court has been pleased to observe 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

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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."

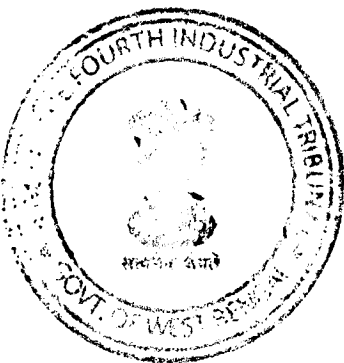
It appears that in the case reported in 2014 (6), Supreme To-Day, page-243, the Hon'ble Apex Court referred to the ruling reported in 2013 (139) FLR, page-541 (Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya & others) and discussed the matter.

On the other hand, Ld. Advocate for the Company submitted that there is no averment in the written statement of Pradip Banerjee that he is unemployed since 14.02.2011 and that grant of back wages is not automatic. In support of his submission, he has referred to the rulings of the Hon'ble Apex Court reported in 2018 (III), CLR, page-679; (2016) 1 SCC (L&S), page-186; 2009 LLJ, III, page-38 and 2008 LLJ, III, page-562. He has drawn my attention to paragraph no. 12 of the ruling reported in 2018 (III), CLR page-679, wherein it has been observed that "*It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or / and his family. The employer is also entitled to prove it otherwise against the employee, namely, the employee was gainfully employed during the relevant period and hence not entitled to claim any back wages. Initial burden is, however, on the employee."*

Ld. Lawyer for the Company has also referred to paragraph no. 19 of the ruling of the Hon'ble Apex Court, reported in (2016) 1 SCC (L&S), page-186, in support of his submission that in an appropriate case the

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Tribunal can grant compensation to the workman instead of passing of an order of his reinstatement. He has also referred to paragraph no. 8 of the ruling of the Hon'ble Supreme Court reported in 2009 LLJ, III, page-38 wherein it has been observed that *"In our view, since the respondent has already been reinstated in service and considering the fact that there was no plea nor any evidence or proof to show that from the alleged discontinuation of his engagement till the date of the award, the respondent was not in gainful employment, we are of the view that instead of payment of 50% of the back wages, the award may be modified to the extent that the respondent shall be entitled to 25% of the back wages."* My attention was also drawn to paragraph no. 17 of the ruling, reported in 2008 LLJ, III, page-562 wherein it has been observed clearly by the Hon'ble Apex Court that *"Once the termination of service of an employee is held to be illegal, the relief of reinstatement is ordinarily available to the employee. But the relief of reinstatement with full back-wages need not be granted automatically in every case where the Labour Court / Industrial Tribunal records the finding that the termination of services of a workman was in violation of the provisions of the Act. For this purpose, several factors, like the manner and method of selection; nature of appointment ad hoc, daily-wage, temporary or permanent etc., period for which the workman had worked and the delay in raising industrial dispute, are required to be taken into consideration."*

In this case, it appears that Shri Pradip Banerjee did not claim in his Written Statement that he is not gainfully employed since the date of termination of his service but 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 with the help and charity of his friends and relatives. On the other hand, O.P.W.-1, Shri Samir Mukherjee and O.P.W.-2, Shri Uday Shankar Banerjee have simply claimed in their evidence that the workman Pradip Banerjee is gainfully employed. They have not stated as to when and where the workman Pradip Banerjee got employment after 13.02.2011. In fact, on perusal of the evidence and materials on record I do not find anything reliable to hold that Shri Pradip Banerjee is gainfully employed. On the contrary, the



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evidence of Pradip Banerjee (P.W.1) that he is unemployed since termination of his service, appears to be believable. Accordingly, I am to hold that the workman Shri Pradip Banerjee is not gainfully employed since the date of termination of his service.

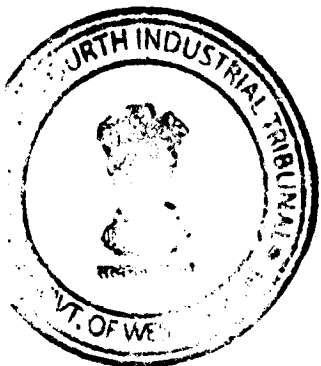
In the light of the facts, circumstances of the case, evidence on record and the principles of law I am of the view that the workman Shri Pradip Banerjee is entitled to be reinstated in his service with a portion of back-wages. It is clear that the workman Shri Pradip Banerjee had worked under the Company for a very small period i.e. from 28.08.2010 to 13.02.2011. Considering the quantum of wages, period for which the workman Pradip Banerjee had worked under the Company and all other aspects of the matter and keeping in mind the principles of law enunciated by the Hon'ble Courts, I am of the view that 35% of the back-wages should be awarded to the workman Pradip Banerjee. Hence, it is

ordered

that workman Shri Pradip Banerjee be reinstated in his service under M/s. Ankit Metal & Power Limited within 60 days of this day. He will also get 35% of back-wages till reinstatement of the service.

M/s. Ankit Metal & Power Limited is directed to reinstate the workman Shri Pradip Banerjee in the service and pay 35% of the back-wages to him within 60 days of this day.

This is my Award.



Dictated & Corrected by me,

Sd/- G.K. Dalmia

Judge

Sd/- G.K. Dalmia

Judge

Fourth Industrial Tribunal

Kolkata

31.12.2018

Judge
Fourth Industrial Tribunal, W.B