I/38984/2019 File No.LABR-22015/4/2019-IR SEC-Dept. of LABOUR

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

No. Labr./196/(LC-IR)/ 22015/4/2019 Date : 19.02.2019

ORDER

WHEREAS an industrial dispute existed between M/s India Foils Ltd. (now ESS DEE Aluminium), 1, Sagar Dutta Ghat Road, Kamarhati, Kolkata - 700058 and their workman Sri Subir Kumar Das, S/o. Late Satindra Nath Das, 6/283, Mahajati Nagar, P.O. Agarpara, Dist. North 24 Parganas, Kolkata – 109 regarding the issues being a matter specified in the second schedule of the Industrial Dispute act, 1947 (14of 1947);

AND WHEREAS the workman has filed an application directly under sub-section 2 of Section 2A of the Industrial Dispute act, 1947 (14of 1947) to the Judge, First Industrial Tribunal Specified for this purpose under this Department Notification No. 101–IR dated 2.2.12;

AND WHEREAS the Judge of the said First Industrial Tribunal heard the Parties and framed the following issues as the "Issue" of the said dispute;

ISSUES

1) Is the present case arising out of an application under Section 2A (2) of the I.D. Act maintainable in law ?
2) Was there any cause of action on the part of the applicant Sri Subir Kumar Das to file this case before this tribunal ?
3) Is the case barred by limitation ?
4) Is this case bad for want of making ESS DEE Aluminium Ltd. as a party to this case?
5) Has this Tribunal jurisdiction to entertain this case ?
6) Is the termination of service of Sri Subir Kumar Das w.e.f. 03.12.2002 by way of refusal of employment by the management of the company justified ?
7) What relief/relieves is the applicant entitled under I. D. Act ?

AND WHEREAS the said Judge, First Industrial Tribunal has submitted to the State Government its Award on the said Dispute.

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

ANNEXURE
(Attached herewith)

By order of the Governor,

Sd/-

Deputy Secretary
to the Government of West Bengal

No. 196/1(2) – IR Date : 19.02.2019

Copy forwarded for information to :

1. The Judge, First Industrial Tribunal with reference to his Memo No. 205 – L.T. dated 12.02.2019.
2. The Joint Labour Commissioner (Statistics), W.B., 6, Church Lane, Kolkata-700001.

Sd/-
Deputy Secretary

No. 196/2(5) – IR Date : 19.02.2019

Copy with a copy of the Award is forwarded for information & necessary action to:

1. M/s India Foils Ltd. (now ESS DEE Aluminium), 1, Sagar Dutta Ghat Road, Kamarhati, Kolkata – 700058.
2. Sri Subir Kumar Das, S/o. Late Satindra Nath Das, 6/283, Mahajati Nagar, P.O. Agarpara, Dist. North 24 Parganas, Kolkata – 700109.
3. The Assistant Labour Commissioner, W.B., In-Charge of Labour Gazette.
4. The Labour Commissioner, W.B., New Secretariat Building (11th Floor), 1, Kiran Sankar Roy Road, 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

In the matter of an industrial dispute between M/s. India Foils Ltd. (now ESS DEE Aluminium), 1, Sagar Dutta Ghat Road, Kamarhati, Kolkata-700 058 and its workman Sri Subir Kr. Das, s/o. Late Satindra Nath Das, 6/283, Mahajati Nagar, P.O. Agarpara, District-24-Parganas (North), Kolkata-109.

(Case No. 10/2013) u/s 2A(2) of I.D. Act, 1947.

BEFORE THE FIRST INDUSTRIAL TRIBUNAL: WEST BENGAL

PRESENT

SHRI TANMOY GUPTA, JUDGE

FIRST INDUSTRIAL TRIBUNAL, KOLKATA

A W A R D

The instant case arose out of an application u/s 2A(2) of the Industrial Disputes Act, 1947 as amended filed by Sri Subir Kr. Das, s/o. Late Satindra Nath Das, 6/283, Mahajati Nagar, P.O. Agarpara, District-24-Parganas (North), Kolkata-109, against his employer M/s. India Foils Ltd. (now ESS DEE Aluminium Ltd.), 1, Sagar Dutta Ghat Road, Kamarhati, Kolkata-700 058 in connection with the termination of his service by way of refusal of employment by the employer praying for an award declaring such termination of service with effect from 03.12.2012 is illegal and unjustified and also to direct the company to reinstate the workman in service with full back wages along with other consequential relief.

On receipt of such application notice was issued to the opposite party to appear and to file written statement. The opposite party appeared and filed written statement on 06.06.2014.

The case as made out by the applicant/workman in the claim statement is that he was initially appointed by the company at its Taratala Unit and thereafter posted to Kamarhati unit of the said company. The workman was permanent employee of Taratala unit of the company and thereafter he was transferred to Kamarhati unit as per Memorandum of Settlement dated 16.05.2002 and since then he continued his service and drew his wages from the Kamarhati unit of the said company. He worked in the company for several years without any iota of blame and his last drawn wages was Rs. 7062/-. On 25.11.2002 a notice was given by the said company for 'voluntary retirement scheme' and duration of the scheme was from 25.11.2002 to 02.12.2002 within which the interested workman could apply for the said scheme. The workman went to the company for performing his duty on regular basis on 03.12.2002 but was not allowed to join his duty. The workman prayed before the management of the company on several times for allowing him to join his duty. The matter was also informed to the union of the workman including various departments from time to time. In spite of such several prayers the management of the company terminated the service of the workman by way of refusal of employment without showing any cause and holding any domestic enquiry. Finding no other alternative

by letter dated 24.01.2007 the said workman prayed before the Assistant Labour Commissioner for conciliation regarding his illegal refusal of employment by the said company. By letter dated 07.04.2011 the workman along with the other workmen prayed before the Senior Manager (P & A) of the company namely M/s. ESS DEE Aluminium Ltd. for arrear salary and provident fund but company did not take any step. Thereafter by letter dated 01.12.2012 the concerned workman along with other workmen again prayed before the Senior Manager (P & A) of M/s. ESS DEE Aluminium Ltd. claiming outstanding salary/wages and seeking clarification about the up to date figure of the provident fund amount but no reply has been received from the company. The workman is unemployed due to refusal of employment by the company with effect from 03.12.2002. The concerned workman then prayed the Labour Commissioner, Govt. of West Bengal, New Secretariat Building, (11th Floor), Kolkata-700 001by his letter dated 24.01.2007 for his intervention for reinstatement in service of the workman with all consequential benefits including back wages. Several conciliation proceedings were held before the conciliation officer and Assistant Labour Commissioner, Govt. of West Bengal but no fruitful result was obtained due to the adamant and non-co-operative attitude on the part of the company.

On that score the instant application has been filed by the applicant/workman seeking an award in terms of the prayer made in the application.

The company has contested the case by filing a written statement containing three parts. **In Part-A** the company has incorporated some facts of the case. It is contended that the erstwhile company was manufacturing Aluminium Foils and other products. At the relevant time the erstwhile company had three manufacturing plant- one at Kamarhati, one at Hoira and another at Taratala in Kolkata. In March 2000 the Vedenta group through its one of the group company took over the management and control of the company. Since erstwhile company due to adverse business condition has been suffering heavy losses in its operation, the erstwhile company filed a reference application u/s15(1) of the Sick Industrial Company (Special provision) Act, in short **BIFR,** seeking registration as a sick industrial company and requesting the appropriate measures to revive it. After due consideration a rehabilitation scheme was sanctioned by the **BIFR** vide its order dated 18.08.2008 and in view of the grim financial situation the erstwhile company proposed to merge with ESS DEE Aluminium Ltd. to take advantage of its financial strength and various business of the later company. Accordingly, the erstwhile company namely India Foils Ltd. submitted modified draft rehabilitation proposal. The Taratala plant of the erstwhile company was incurring heavy financial losses since 2000 and as a result the company declared suspension of operation of its Taratala plant due to circumstances beyond the control of the company on the principle of 'no work no pay'. Thereafter a discussion was held within the representative of the union namely India Foils Sramik Kalyan Samiti and by a Memorandum of Settlement dated 16.05.2002 it was agreed that

since Taratala plant is not in operation all the permanent workman of Taratala plant will only mark their attendance from 17th May 2002 at the factory gate of Kamarhati plant between a specified time and thereafter they were not required to stay in the factory premises after marking the attendance. It was also agreed that the workman of Taratala plant will get 21 days of basic pay and dearness allowance from 17th May 2002 and the issue will be finalised in due course. Thereafter on negotiations the company announced early separation scheme for the Taratala permanent workmen and the same was notified on 25.11.2002. Excepting the 32 workmen of Taratala unit almost all the workmen responded to the early separation scheme and received compensation as offered vide early separation scheme. After the merger proposal was finalised the ESS DEE Aluminium Ltd. took over the management and control of erstwhile company India Foils Ltd. with effect from 19.11.2008. The merger of India Foils and ESS DEE Aluminium Ltd. took place vide **BIFR** order dated 30.09.2010. On demand by the union those 32 workmen, the company notwithstanding the fact that the Taratala unit continued to be in suspension and purely on humanitarian ground the present management offered the said 32 workmen an opportunity to work at its Daman unit. About 15 workmen accepted offer of the present company and joined in its Daman unit. Few workmen resigned at their own accord leaving about 10 workmen who in spite of opportunity given to them to work at Daman did not show any interest to work at Daman unit of the company. The matter was discussed before the Joint Labour Commissioner by the present company (ESS DEE Aluminium Ltd.) from time to time since 2011 onwards. The said Commissioner impressed upon the workman concerned to accept the offer but the workman remained adamant.

In Part-B of the written statement it is contended that the present application is totality misconceived in law. The preconditions and prerequisites of a valid application u/s 2A (2) of the ID Act are totally absent. The present application after 12 years from the date of alleged refusal of employment is hopelessly barred and is liable to be dismissed. The application is not also maintainable for non-impleading ESS DEE Aluminium Ltd as the opposite party and the application is wholly untenable and this tribunal has no jurisdiction to take cognizance of the application filed by the applicant. It is contended further at the time of acquisition by ESS DEE Aluminium of erstwhile India Foils Ltd. the applicant/ Workman was not on the role of India Foils Ltd. and there was no proceeding pending in connection with alleged termination of the said applicant/workman by the India Foils Ltd. and as such no liability can be fastened upon the ESS DEE Aluminium Ltd. by the concerned applicant.

In Part-C it is denied by the company that the applicant was posted in Kamarhati unit of the company as alleged and that at no point of time the applicant was posted in the said unit. The other statement made by the applicant/workman in his claim statement have been denied by the company. The company has denied that no application was received

from the workman at any point of time. On that score, the company has prayed for rejection of the claim of the workman as the same is bad in law and thereby to dismiss the case.

On the basis of the pleadings of the parties some issues were framed by this tribunal on 22.12.2014.

ISSUE(S)

1) Is the present case arising out of an application under Section 2A (2) of the I.D. Act maintainable in law?
2) Was there any cause of action on the part of the applicant Sri Subir Kumar Das to file this case before this tribunal?
3) Is the case barred by limitation?
4) Is this case bad for want of making ESS DEE Aluminium Ltd. as a party to this case?
5) Has this Tribunal jurisdiction to entertain this case?
6) Is the termination of service of Sri Subir Kumar Das w.e.f. 03.12.2002 by way of refusal of employment by the management of the company justified?
7) What relief/relieves is the applicant entitled under I.D. Act?

Decision with reasons

At the outset it would be pertinent to mention that after filing the written statement by the company and after framing the issues by this tribunal, the company made an application on 22.01.2015 raising some points as to the maintainability of the instant case on various grounds including on the point of limitation and prayed before this tribunal for deciding the preliminary issues as to the maintainability of the instant application filed by the workman. The then Presiding Officer of this tribunal vide order no. 39 dated 03.10.2016 disposed of the said application with a finding that the preliminary issues will be decided on merits along with other issues and accordingly fixed a date for hearing of the case on merits. Thereafter the company did not turn up inspite of the issuance of further notice to the company which was duly been received. Initially the workman filed the instant case against India Foils Ltd.. However, on 01.11.2017 an application was filed by the workman for incorporating the name of ESS DEE Aluminium Ltd. in place of India Foils Ltd.. The said application was disposed of by this tribunal on due consideration of the written statement filed by the company stating therein that erstwhile India Foils Ltd. was taken over by the present company ESS DEE Aluminium Ltd. w.e.f. 19.11.2008. In fact the written statement filed in this case for the company has been signed by the authorised signatory under the seal ESS DEE Aluminium Ltd.. Moreover, a plea was taken in the written statement for rejection of the application for non-impleading ESS DEE Aluminium Ltd. as opposite party. An issue being issued no. 4 was also framed on that score. Be that

as it may, on the prayer made by the workman subsequently this tribunal vide order no. 50 dated 22.12.2017 allowed the application filed by the workman praying for changing the name of the company from India Foils Ltd. to M/s. ESS DEE Aluminium Ltd. and necessary correction was made. Since thereafter the company did not turn up. Notice was issued to the company and as already stated in spite of service of such notice company did not turn up and as a result a date was fixed for ex-parte hearing of the case. Accordingly, on 13.06.2018 & 03.07.2018 the case was taken up for ex-parte hearing and the workman Sri Subir Kr. Das examined himself as WW1 by tendering his evidence-in-chief supported by affidavit. Some documents were marked as exhibit-1 to 6 for the workman. No other witness having been examined, the evidence of the workman was closed and argument was heard ex-parte.

Amongst the documents filed for the workman exhibit-1 is the letter dated 16.02.1990 issued by the erstwhile company India Foils Ltd. to the applicant/workman offering him to join in the post of Skilled Workman 'A' in the Taratala factory w.e.f. 17.02.1990. Exhibit-2 is the letter dated 04.08.1990 issued by the said company to the applicant/workman confirming the service of the said workman in the permanent post of skilled workman-A w.e.f. 17.08.1990. Perused the statement of the witness (WW1). Considering the unchallenged testimony of the said witness and considering those documentary evidence it is satisfactorily proved that the workman was appointed as unskilled workman on permanent basis initially on probation and thereafter on permanent basis by the erstwhile company namely India Foils Ltd.. (Exhibit-3 is the Memorandum of Settlement entered into by and between the said India Foils Ltd. and the union for the workman namely India Foils Sramik Kalyan Samiti). It appears therefrom that as per such statement of the permanent workman of Taratala factory was asked to mark their attendance w.e.f. 17th May 2002 at the factory gate of the company at Kamarhati. There are some other clause and terms incorporated in the said Memorandum of Settlement.

Now according to the case has put forward by the workman in the claim statement made under section 2A (2) of the Industrial Disputes Act 1947 on the basis of which the instant case was registered, on 03.12.2002 he went to the company for performing his duty on regular basis and he was not allowed to join his duty. The WW1 has stated that the management of the company without showing any reason terminated him from service w.e.f. 03.12.2002 by way of refusal of employment. In the claim statement in paragraph no. 10 it is stated that by letter dated 24.01.2007 the workman prayed before the Assistant Labour Commissioner for conciliation regarding his illegal refusal of the employment by the company. In paragraph 11 it has been stated that thereafter by letter dated 07.04.2011 concerned workman along with other workers prayed before the Senior Manager (P&A) of M/s. ESS DEE Aluminium Ltd. for arrear salary and provident fund but the company did not take any step. No such letter dated 24.01.2007 has been filed by the workman.

However, the letter dated 07.04.2011 has been filed without having any signature of any workmen therein and as such the same was not marked as exhibit. No letter dated 01.12.2012 as stated in paragraph no. 12 in the claim statement allegedly written by the concerned workman along with other workmen addressed to Senior Manager (P&A) of the company claiming outstanding salary/wages and clarification regarding the amount of provident fund has been filed by the workman. In his evidence in chief the workman has stated that he himself and other workman raised an industrial dispute before the Labour Directorate vide letter dated 09.11.2005. Xerox copy of the said letter has been marked as exhibit-4.

Now before entering into the merits of the matter it would be appropriate to consider some issues as mentioned in issue no. 1 to 5. According to the case as put forward by the workman in his claim statement he was terminated from service due to refusal of employment by the company w.e.f. 03.12.2002. The instant claim petition has been filed by the workman u/s 2A of the Industrial Disputes Act 1947on 29.07.2013. The said Section 2A runs as follows:

"[2A(2)[(1)] **Dismissal, etc., of an individual workman to be deemed to be an industrial dispute**:-Where any employer discharges, dismisses, retrenches or otherwise terminates the services on an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the; dispute.]

[(2) Notwithstanding anything contained in Section 10, any such workman as is specified in sub-section(1) may. make an application direct to the Labour Court or Tribunal for adjudication of the dispute referred to therein after the expiry of forty-five days from the date he has made the application to the Conciliation Officer of the appropriate Government for conciliation of the dispute, and in receipt of such application the Labour Court or Tribunal shall have powers and jurisdiction to adjudicate upon the dispute, as if it were a dispute referred to it by the appropriate Government in accordance with the provisions of this Act and all the provisions of this Act shall apply in relation to such adjudication as they apply in relation to an industrial dispute referred to it by the appropriate Government.

(3) The application referred to in sub-section (2) shall be made to the Labour Court or Tribunal before the expiry of three years from the date of discharge, dismissal, retrenchment or otherwise termination of service as specified in sub-section (1)]".

The instant case has been filed by the workman on 29.07.2013. According to the case as put forward by the workman as stated earlier that his service was terminated by the company by way of refusal of employment w.e.f. 03.12.2002. So, the instant application

has been filed before this tribunal after a lapse of more than 10 years from the date of alleged refusal of employment. Sub-section 2 of Section 2A, which begins with a non-obstante clause qua section 10 of the Industrial Dispute Act 1947 has removed the hurdles in the raising of an industrial dispute by an individual workman in the matter involving dismissal, discharge, retrenchment or termination of service. The said sub-section now facilitates direct making of application by the workman to the tribunal or labour court for adjudication of the dispute referred to therein. However sub-section 3 of said section 2A of the said act provides that the application under sub-section (2) shall be made to the labour court or tribunal before the expiry of 3 years from the date of discharge, dismissal, retrenchment or otherwise termination of service as specified in sub-section (1). So, it is clear that said sub-section (3) has imposed a period of limitation for making an application under sub-section (2).

While deciding writ petition no. 22991(W) of 2013 (Smt. Swapna Adhikari VS The state of West Bengal & others) as reported in 2014 (4) CHN (CAL) 435, it has been held by the Hon'ble High Court, Calcutta in paragraph no. 20 that –

"Time stipulated for invocation of the forum of the Labour Court under sub-section (3) of Section 2A is "before the expiry of three years from the date of discharge, dismissal, retrenchment or otherwise termination of service specified in sub-section (1)" thereof. Time limit for making an application to the Labour Court stipulated in sub-section (3) of Section 2A does not appear to have a bearing to the provisions of sub-section (2) of Section 2A. In any event right conferred under Section 2A lapse immediately preceding the date of expiry of three years of the date of dismissal etc. This sub-section (3) of Section 2A operates independently, continuation of the conciliation proceeding not with standing".

In the next paragraph no. 21 of the said judgement, it has further been observed by Hon'ble Court that -

"The petitioner was dismissed from her service on and with effect from July 31, 2005 and the prescribed period of limitation of three years began to run on and from the date of termination (31st July, 2005) and expired on 30th July, 2008. Although, Section 2A (1) was enacted in 1965 (Act 35 of 1965 w.e.f. 1st December, 1965) enabling individual workman to take recourse to Section 10 of the Act for relief under sub-sections (2) and (3) of Section 2A restricting a time limit for seeking relief to Labour Court was enacted by Act 24 of 2010 which came into effect from 13th September, 2010. Since the petitioner was dismissed on July 31, 2005, the three years period under sub-section (3) of Section 2A expired on July 30, 2008 approximately two years prior to coming into effect of the said sub-section (3) of Section 2A. Hence the petitioner is not eligible to seek relief under sub-section (3) of Section 2A which was nonest on the date, its cause of action arose and continued".

As already discussed, that the instant application under Section 2A (2) of the industrial dispute act has been filed before this tribunal by the concerned workman on 29.07.2013 i.e. after the expiry of more than 10 years from the alleged date of dismissal of service w.e.f. 03.12.2002 by way of refusal of employment. It is claimed in the claim statement that thereafter the concerned workman on several times prayed before the management for joining his duty and inform the union and other departments in the matter. However, no document could be produced by the workman to substantiate such contention. The WW1 has stated that finding no other alternative he himself and other workman raised an industrial dispute before the Labour Directorate vide letter dated 09.11.2005. The xerox copy of such letter has been marked as exhibit-3. Nothing has been stated by the witness as to the fate of such application. In paragraph no. 10 of the claim statement filed by the workman it is stated that by letter dated 24.01.2007 concerned workman prayed before the Assistant Labour Commissioner for conciliation. But no such letter has been produced by the workman.

In terms of section 10(1B) of the industrial dispute act 1947 as amended by the West Bengal Act, 33 of 1989 w.e.f. 8th December 1989, it was open to an individual workman to apply to the conciliation officer for a certificate during the conciliation proceedings, in the event no settlement has arrived at within a period of 60 days from the date of raising of the dispute. The conciliation officer thereafter on receipt of such application shall issue a certificate within 7 days from the date of receipt in such a manner as may be prescribed. The party may within a period of 60 days from the receipt of such certificate or where such certificate has not been issued within 7 days as aforesaid within a period of 60 days commencing from the day immediately after the expiry of 7 days as aforesaid, file an application in the prescribed form to the labour court or tribunal as may be specified by the appropriate government.

In the instant case no recourse has been taken by the concerned workman to the said amended provision of section 10 (1B) of the industrial dispute act, 1947. Instead the concerned workman has come up before this tribunal with an application dated 29.07.2013 under section 2A(2) of the ID Act claiming that he has been terminated by the company by way of refusal w.e.f. 03.12.2002 i.e. more than 10 years after the said alleged date of termination of service. Sub-section 3 of section 2A of the industrial dispute act has imposed a period of limitation for making an application under section 2A. No explanation could be offered by the workman as to such delay in approaching this tribunal.

Therefore, following such clear provision as enshrined in sub-section (3) of Section 2A of the Industrial Dispute Act and the observation made by the Hon'ble High Court, Calcutta in the aforesaid reported case, I am of the view that the instant case is hopelessly time barred. Consequently, I am of the view further that this tribunal cannot entertain the

instant case as the same is not maintainable in view of the fact that the same is barred by limitation. That being so, I find no need to enter into discussing the issue no. 6 & 7.

Therefore, considering all aspects of the materials on record and in view of discussions made above and the reasons stated thereon the instant case is liable to be dismissed as the same is not maintainable in view of the fact that the same is palpably time barred. Consequently, the instant case stands dismissed accordingly.

This is my Award.

Dictated & corrected by me.

Judge.

Judge
First Industrial Tribunal
Kolkata
29.11.2018

JUDGE
FIRST INDUSTRIAL TRIBUNAL
WEST BENGAL