

I/36367/2019

File No.LABR-22015(13)/1/2019-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./64/(LC-IR)/22015(13)/1/2019

Date : 24.01.2019

ORDER

WHEREAS an industrial dispute existed between M/s A. P. Fashions Pvt. Ltd., 227, A. J. C. Bose Road, Kolkata - 700020 and their workman Sri Susanta Kumar Sarkar, S/o Late Jatindra Nath Sarkar, Vill & P.O. Boinbaria, P.S. Usthi, Dist. South 24 Parganas, PIN - 743375 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, Seventh Industrial Tribunal Specified for this purpose under this Department Notification No. 101-IR dated 2.2.12;

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

ISSUES

1. Whether the alleged termination of service of Sri Susanta Kumar Sarkar is justified or not ?
2. To what relief, is he legally entitled to ?

AND WHEREAS the said Judge, Seventh 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,



Deputy Secretary
to the Government of West Bengal

No. Labr./64/1(2) – IR

Date : 24.01.2019

Copy forwarded for information to :

1. The Judge, Seventh Industrial Tribunal with reference to his Memo No. 2098 – L.T. dated 26.10.2018.
2. The Joint Labour Commissioner (Statics), W.B., 6, Church Lane, Kolkata-700001.



Deputy Secretary

No. Labr./64/2(5) – IR

Date : 24.01.2019

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

1. M/s A. P. Fashions Pvt. Ltd., 227, A, J. C. Bose Road, Kolkata – 700020.
2. Sri Susanta Kumar Sarkar, S/o Late Jatindra Nath Sarkar, Vill & P.O. Boinbaria, P.S. Usthi, Dist. South 24 Parganas, PIN - 743375.
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 Seventh Industrial Tribunal, West Bengal
New Secretariat Buildings, Kolkata

Present : Sri Avani Pal Singh,
Judge, Seventh Industrial Tribunal, West Bengal.

Case No.23/2A(2)/2015

Susanta Kumar Sarkar.

S/o. Late Jatindra Nath Sarkar, Vill & P.O. Boinbaria,
P.S. Usthi, Dist. 24-Parganas (South), PIN-743375.

...Applicant

VS.

M/s. A.P. Fashions (P) Ltd.

227, A.J.C. Bose Road, Kolkata-700020.

...OP/Company

A W A R D

Dated : 26.09.2018

1. The instant proceedings originated when Sri Susanta Kumar Sarkar, hereinafter referred to as the applicant, filed an application purportedly under Section 2A(2) of the Industrial Disputes Act, 1947 on 24.03.2015 against M/s. A.P. Fashion Pvt. Ltd., hereinafter referred to as the OP/Company, and Sri Amit Jhunjhunwala, as the other opposite party in his capacity as the Director of the OP/Company, claiming therein that the applicant was an employee of the OP/Company and that his such employment was unlawfully terminated under the veil of forced resignation under pressure and intimidation by the authority concerned with effect from 01.10.2014, with the prayer that his alleged termination of service by way of refusal of employment and pressurising to submit resignation being unjustified and illegal, he was entitled to reinstatement in his such service with the OP/Company with full back wages and other consequential benefits.
2. On the instant case being registered on 24.03.2015, notice(s) was issued to the OP/Company along with a copy of such application, by registered post with

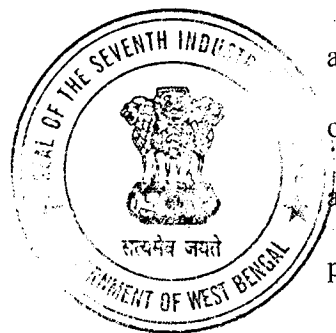


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Judge, 7th Industrial Tribunal, West Bengal.

[23/2A(2)/2015]

A.D., directing them to appear and file written statement, in reply thereto. Records further reveal that, on 15.05.2015 the OP/Company appeared through their Ld. Advocate(s), who also represented the other opposite party Sri Amit Jhunjhunwala simultaneously, and thereafter on 22.06.2015 a written statement was filed on behalf of both the opposite parties, wherein there was substantive rebuttal of the contentions of the applicant in his aforesaid application.

3. The case of the applicant as made out in his application briefly is that the OP/Company is a company having its registered office located at 227, A.J.C. Bose Road, Kolkata – 700020 within the jurisdiction of this Tribunal and that, he came to be employed by them on and from 26.07.2010 vide an appointment letter dated 24.07.2010 whereby, though the OP/Company had offered him a 'colourful designation' being 'Consultant for Administration', he had to mainly perform such work and duties which were out and out manual, technical and clerical in nature during his tenure of employment with the OP/Company, like preparing salary-sheet(s), maintaining attendance-register(s), sundry maintenance jobs, maintaining log-books of two cars and looking after their repairs and looking after maintenance and upkeep of office furniture and fixtures, as directed by the management, besides looking after the renewal of various licenses of the OP/Company. It is the further case of the applicant that he was forced by the OP/Company to work more than 48 hours in a week, without payment of any overtime or additional wages, and that the company earned handsome profits from year to year by the hard labour of its employees. It is the further case of the applicant that the OP/Company did not follow the mandate and statutory obligations prescribed under the West Bengal Shops & Establishment Act, 1965, and further the OP/Company victimised its employees by adopting 'hire and fire policies' and/or forcing them to resign, having the consequential effect of



termination of the services of such employees. It is the further case of the applicant that right from joining the OP/Company on 26.07.2010, the applicant worked continuously with honesty and efficiency and that, there was no interruption to his such services and neither was there any iota of blemish during his long employment and prior to the alleged termination of his services w.e.f. 01.10.2014, which came about as a consequence of the applicant being forced to resign, due to non-payment of his salary and due to issuance of letters dated 14.09.2014 and 15.12.2014 by the OP/Company. It is the further case of the applicant that he raised his voice against his such termination by the OP/Company vide his representation dated 22.12.2014 but when the OP/Company did not respond to the same, the applicant had no option but to bring the matter before the conciliatory authority. It is the further case of the applicant that, having waited for 45 days after initiating the conciliatory mechanism and having not found any success thereat, the applicant filed the instant application before this Tribunal. It is the further case of the applicant that the OP/Company did not take any disciplinary action or conduct any domestic enquiry or issue any show-cause notice, affording the applicant an opportunity to make out his defence, prior to pressurising him to resign with a view to terminate his employment and hence his such termination was a clear case of retrenchment as defined under Section 2(oo) of the Industrial Disputes Act, 1947, and in light of his uninterrupted service to the OP/Company, the OP/Company could not have forced him to resign, with a view to terminate his employment, as that had violated express provisions of Section 25F of the Industrial Disputes Act, and accordingly, the applicant was entitled to reinstatement with full back wages and other consequential benefits.

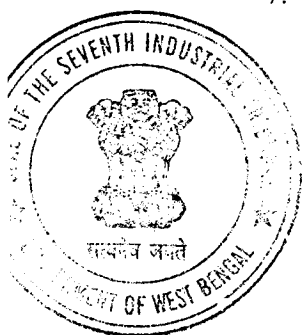


4. Opposing such contentions of the applicant in his claim-statement, the opposite parties including the OP/Company by their written statement dated 22.06.2015 highlighted the contradictions in the statements made by the applicant and contended that after the applicant had joined the OP/Company, it was revealed that the applicant did not have any expertise, as he had claimed to have had at the time of his interview and by his subsequent communications, and the applicant was found unfit for the said post and yet, taking a humanitarian approach, the OP/Company did not terminate him at the relevant time and granted him further time and scope to improve his work quality to meet at least the minimal expertise required for the said post. The OP/Company further contended that since the applicant was not at all fit for the said post nor did he have expertise so required, the applicant sought to resign from the OP/Company, however when the applicant did not receive any better opportunity, he had filed the instant case with the ill motive to defame the said OP/Company. That apart, the OP/Company put the applicant to strict proof of his various averments and stated that since the applicant had not filed any proof against the OP/Company, the allegations that the OP/Company made the applicant work more than 48 hours a week, or that the OP/Company administered discipline arbitrarily and vindictively against its employees were all baseless allegations and that the applicant was not entitled to any relief as prayed for, or at all, and that the applicant had not put in even 180 days of continuous-service as a confirmed employee and that, during the conciliation process in the office of the Assistant Labour Commissioner, the OP/Company out of humanitarian consideration for the long unemployment of the applicant, had offered him monetary compensation, and that the conciliatory process had failed due to the conduct of the applicant, who failed to remain present and that the applicant had suppressed such materials facts before this Tribunal for his material gains.

5. Having noted the pleadings of both parties, more particularly the written-statement filed by the OP/Company, it came out that there was no challenge to this proceeding on the ground of its maintainability, or on the grounds that the applicant was not a 'workman' or that the OP/Company was not an 'industry' as defined under the Industrial Disputes Act, 1947 or that the Issues between them, including the alleged termination of the applicant from the employment under the OP/Company, could not be held to be an 'industrial dispute' as defined under the said Act of 1947. That apart, the list of duties as well as the work that the applicant had claimed to be doing under the OP/Company were also not denied by them, and even though at para. 3 of their written-statement, the OP/Company stated that the statements of the applicant at para. Nos. 4 to 10 and 14 to 21 of his application were false, concocted and frivolous in nature yet the same cannot be said to be specific denial of the assertions made by the applicant in those paragraphs, and appear to be general and evasive denials by the OP/Company.
6. In light of the aforesaid pleadings, and upon the parties filing their respective list of documents, and exchanging copies thereof amongst themselves, this Tribunal by Order dated 21.08.2015 framed the following Issues:-

1. ***Whether the alleged termination of service of Sri Susanta Kumar Sarkar is justified or not?***
2. ***To what relief, is he legally entitled to?***

7. Called upon to lead evidence in respect of the aforesaid Issues, the applicant examined himself as PW-1 and was cross-examined as such at length by the OP/Company, and during his such examination he brought into record copies of



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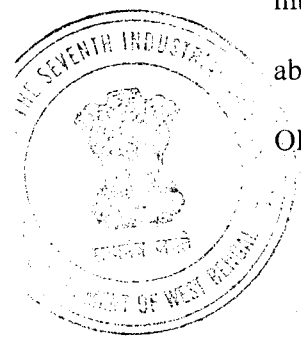
several documents which were variously marked **Exhibit-1 to Exhibit-26 series**, and would be discussed at relevant portions hereinafter.

8. With a view to rebut the contentions and evidence of the applicant, as well as to support their own contentions, the OP/Company examined Sri Rajesh Agarwal, CEO of the OP/Company as OPW-1, who was cross-examined at length on behalf of the applicant, and during such evidence of OPW-1 he identified and brought into record copies of seven (7) documents which were variously marked **Exhibit-A to Exhibit-G series**, and are discussed at relevant portions hereinafter.
9. The point of determination therefore would be to examine if the applicant had succeeded in establishing his case by way of cogent and consistent evidence and to further examine, in the light of facts emerging out of evidence, if the applicant was entitled to any relief(s) and the extent thereof, as against the OP/Company.

Decision with Reasons

10. Before proceeding to examine and deliberate upon each of the aforesaid Issues separately, this Tribunal finds it imperative to examine the evidence led by both parties in support of their respective contentions.
11. As noted earlier, applicant Susanta Kumar Sarkar examined himself as PW-1 by tendering his affidavit-in-chief on 15.10.2015, on which date he identified a copy of his appointment letter dated 24.07.2010 (**Exhibit-1**), copy of his identity card (**Exhibit-2**), copy of bank-statement showing receipt of salary from November, 2013 till September 2014 (**Exhibit-3**), copies of monthly pay-slips from January to September, 2014 (**Exhibit-4**), copies of money-receipt issued by M/s. Maa

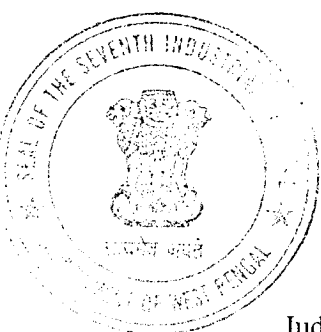
Tara Enterprises, Diamond Harbour (**Exhibit-5**) and fund-transfer statement to them (**Exhibit-5/1**), copy of WRAP Audit Report dated November, 2011 (**Exhibit-6**), copy of mail sent on 20.10.2012 by the applicant (**Exhibit-7**), copy of declaration by landlord of the premises occupied by M/s. Balaji Stitchers, Amtala (**Exhibit-8**), copy of full and final account of M/s. Balaji Stitchers, Amtala (**Exhibit-9**), copy of full and final account of the landlord of the premises at Howrah (**Exhibit-10**), copy of quotation from Tapan Bag (**Exhibit-11**), copy of mail from S. Rajagopal, one of the Directors, regarding S.A. 8000 Audit with its attachment (**Exhibit-12**), copy of mail sent by the applicant to his employer (**Exhibit-13**), copy of attendance register for September, 2014 (**Exhibit-14**), copy of leave statement of the applicant issued by the OP/Company as on 30.09.2014 (**Exhibit-15**), copy of legal notice issued on behalf of the applicant, with copy of A/D card showing receipt thereof by the OP/Company (**Exhibit-16**), copy of letter sent to Deputy Labour Commissioner, Govt. of West Bengal on 15.12.2014 (**Exhibit-17**), copy of letter dated 15.12.2014 issued by the OP/Company (**Exhibit-18**), copy of reply dated 24.12.2014 of the applicant to the letter dated 15.12.2014 (**Exhibit-19**), copy of letter dated 04.02.2015 issued by the conciliatory authority (**Exhibit-20**), copy of letter dated 03.03.2015 of the OP/Company (**Exhibit-21**), copy of letter of the applicant in response to the said letter dated 03.03.2015 (**Exhibit-22**), copy of letter dt. 27.03.2015 (**Exhibit-23**), copy of letter dt. 13.05.2015 of conciliatory authority (**Exhibit-24**), copy of applicant's reply to the letter dated 13.05.2015 of the Assistant Labour Commissioner (**Exhibit-25**) and copy of increment list for all employees of the OP/Company at Sankrail for 2014-2015 (**Exhibit-26**), all of which were taken into evidence, without any objection. That apart, the PW-1 testified that he was about 50 years of age (on 07.10.2015) and he had joined the employment of the OP/Company, which had its office at M/s. A.P. Fashion Pvt. Ltd., 227, A.J.C.



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Bose Road, Kolkata – 700020, within the jurisdiction of this Tribunal, and he was employed on and from 26.07.2010 vide the said appointment letter dated 24.07.2010 (*Exhibit-1*) and that his designation was 'consultant for administration' and that such designation was colourful and his duties were mainly manual, technical and clerical in nature during his entire tenure with the OP/Company upto his alleged termination on 01.10.2014, under the veil of forced resignation under pressure and intimidation by the OP/Company. Testifying on the nature of his job, PW-1 stated that he used to maintain attendance-register(s) and prepare salary-sheet(s) and ESI statements of all employees, and that he used to look after all maintenance and repairing works of the office building as well as the office furniture and fixtures and further, PW-1 stated that he used to maintain log books of two company cars and also used to look after their repair and regular maintenance work, besides ensuring statutory compliance(s) like renewal of licenses etc of the OP/Company. PW-1 further stated that the OP/Company used to compel him to work for more than 48 hours a week, without additional remuneration or overtime, and that the OP/Company used to earn handsome profits year to year yet it used to administer discipline arbitrarily and that it had a poor statutory-compliance record. PW-1 further stated that though he was in continuous work since his appointment and discharged his duties honestly and efficiently, and without any interruption and without an iota of blemish, the OP/Company tried to compel him to submit his forced-resignation, vide their letters dated 14.09.2014 and 15.12.2014 (*Exhibit-18*), and that, PW-1 had protested against such unlawful demand of the OP/Company by his letter dated 22.12.2014 (*Exhibit-19*) and when his such representation did not yield any result, he had brought the matter to the notice of the Labour Commissioner on 16.12.2014 by his representation dt. 15.12.2014 (*Exhibit-17*). PW-1 further stated that since the conciliatory machinery failed despite him



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waiting for 45 days, he filed the instant application before this Tribunal. PW-1 further stated that the illegal act of the OP/Company of terminating his services, by refusal of employment and by pressuring him to submit his resignation, did not find support in the prescribed scheme of law and was hence liable to be set aside, and since he was unemployed after his such termination, he was entitled to reinstatement in service with full back wages and other consequential benefits.

12. The OP/Company, on the other hand, examined their Chief Executive Officer (CEO) Sri Rajesh Agarwal, as OPW-1 who tendered his affidavit-in-chief on 24.11.2016 and upon his identification, copy of cheque No.273659 dated 31.03.2015 issued by the OP/Company in favour of the applicant for value Rs.25,000/- was marked **Exhibit-A**, copies of notices issued by the office of the Labour Commissioner on 13.05.2015, 27.03.2015 and 04.02.2015 were collectively marked **Exhibit-B**, copy of a letter dated 15.12.2014 issued by the HR Department of the OP/Company to the applicant was marked **Exhibit-C**, while a copy of legal notice issued on behalf of the applicant on 17.11.2014 by Sri Soumya Kanti Chatterjee, Advocate was marked as **Exhibit-D**; a copy of full and final calculation of the claims of the applicant was marked as **Exhibit-E**, while a letter dated 14.05.2013 issued by OPW-1 was marked as **Exhibit-F** and the copy of appointment letter of the applicant came to be marked as **Exhibit-G**. That apart, OPW-1 testified to the effect that the applicant did not have the requisite skills and expertise, as claimed at the time of his interview and in his subsequent communications for the post of 'Consultant for Administration', and that the applicant was found to be unfit for the said position though the OP/Company took humanitarian view and accordingly did not terminate the applicant any time earlier but tried to give some more time and scope, for the applicant to improve his quality and expertise for the said post. OPW-1 further

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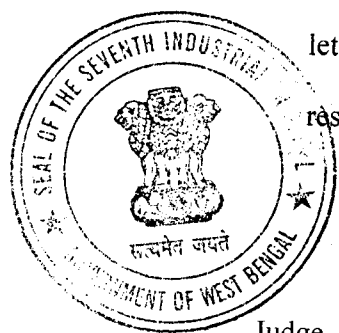
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deposed that the applicant had made self-contradictory statements and that was suppressing proper facts and circumstances before this Tribunal to hide that the applicant had resigned from his duties as he could not discharge all his duties properly. OPW-1 further deposed that the instant case had been filed by the applicant with an ill motive to defame the OP/Company and that, the applicant failed to get any better opportunity after resigning from the OP/Company and hence, he had chosen to file the instant case. OPW-1 further testified that in terms of the appointment letter (*Exhibit-G*), the applicant was appointed on the terms and conditions laid therein, which were binding upon the applicant especially the terms laid down in para. 16 on 'termination of services'. OPW-1 also stated that the applicant had failed to attend the conciliatory proceedings, which led failure thereof.

13. Having noted the evidence on record of both parties, in support of their respective contentions as well as facts relevant thereto, this Tribunal would now proceed to discuss and deliberate upon the Issues in the instant case, with a view to arrive at a decision thereupon.

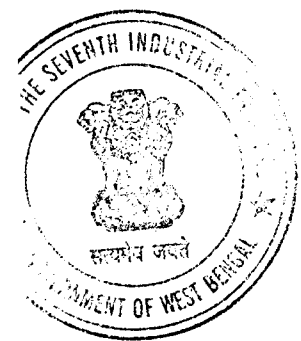
Issue No. 1 : *Whether the alleged termination of service of Sri Susanta Kumar Sarkar is justified or not?*

14. Testifying with regard to termination of his services by the OP/Company, the applicant as PW-1 stated that the OP/Company had terminated his services under the veil of 'forced-resignation' sought to be obtained under pressure and intimidation from him w.e.f. 01.10.2014, and further PW-1 also relied on two letters regarding non-payment of his salary as well as the demand for his resignation by the OP/Company, being letters dated 14.09.2014 (*Exhibit-13*) &



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15.12.2014 (*Exhibit-17*). From Exhibit-13, it appears that the applicant had written to the officials of the OP/Company, including Mr. Ashok Kumar Jhunjhunwala (MD), stating that, to keep the verbal advice of the MD, he had decided to discontinue his services from 01.10.2014 and requested that his legal dues, specified therein, may be released by the OP/Company before the Durga Pujas 2014, to enable him to maintain his family expenses. Further, from Exhibit-13 it also appears that the applicant had sent one reminder-mail on 29.09.2014, seeking early approval of his request vide his earlier mail dated 15.09.2014. In this connection, this Tribunal also examined Exhibit-17, which is a copy of representation dated 15.12.2014 submitted by the applicant in the office of the Labour Commissioner, wherein he had stated that he had not been given any work since the month of September, 2014 and the officers of the OP/Company did not allow him to put his signatures on the attendance register and that he was told that the OP/Company intended to close down its businesses, and further the applicant had stated that he was also informed that the management would use force to compel employees to resign from their services and that he had expressed his desire to sign on a formal resignation letter only after he had received statutory dues from the management whereas, the management insisted that the applicant should first submit his formal letter of resignation and only then the management would consider paying him his dues in accordance with law. From Exhibit-17, it further appears that the applicant had stated that he had been rendered unemployed and having no other alternative, he had tried to re-join his duties from 15.10.2014 as he had not resigned formally from his services but his such efforts were futile, as he was abused by the officers of the management of the OP/Company. In this regard, this Tribunal also examined the letter dated 15.12.2014 (*Exhibit-18*), issued by the HR Department of the OP/Company to the applicant, and drawing reference to telephone-calls made by that department



to the applicant, the OP/Company stated that on 10.12.2014 the HR Department had asked the applicant to submit a proper resignation letter and collect his dues, but the applicant had refused to provide any such resignation letter on the ground that the OP/Company had terminated him. From Exhibit-18, it further appears that the HR Department of the OP/Company had again called the applicant on 12.12.2014 and asked him to provide **proper resignation letter**, but when the applicant refused to give such resignation, **the HR Department had asked him to join his services from the next day (13.12.2014)** but the applicant did not further reply to it, and it further appears from Exhibit-18 that the OP/Company had asked the applicant to join his service without any delay within seven days of receiving that letter dated 15.12.2014.

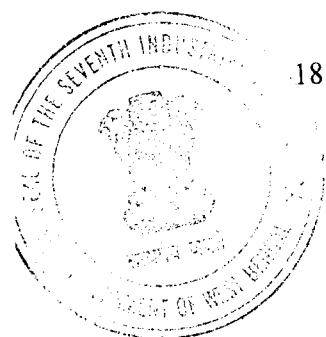
15. Having examined the contents of Exhibits-13, 17 and 18, this Tribunal noted that it was an admitted position between the parties that **no formal resignation letter had been submitted by the applicant** and it further came out that the OP/Company was insisting upon the applicant to submit his formal resignation letter and to collect his final dues from the HR Department. On this issue, this Tribunal examined the testimony of PW-1/applicant, particularly his cross-examination on 15.10.2015, 04.02.2016 and 15.03.2016, and noted that there was nothing therein that would counter the contents of Exhibits-13, 17 and 18 and in fact, one suggestion was given to PW-1 / applicant that as he was not performing his duties properly he had tendered his resignation on his own, but such suggestion was denied by PW-1. That apart, at para. 15 of his affidavit-in-chief the applicant specifically stated that the OP/Company had not issued any charge-sheet or show-cause notice to him nor did the OP/Company initiate any domestic enquiry against the applicant, to afford him an opportunity to meet any charge that the OP/Company may have had against him, and on this point this Tribunal

noted that there is nothing in the cross-examination of PW-1 to challenge such specific statement by the witness on oath.

16. In light of the aforesaid discussion, evidence indicates that **there was indeed insistence by the OP/Company upon the applicant to submit his resignation but such resignation never came to be submitted by him** and further, evidence on record further indicates that the OP/Company, despite its claim that the applicant was a non-performer or that he did not have the requisite experience or skills, did not issue any show-cause to the applicant nor did it initiate any disciplinary action against the applicant prior to cessation of the services of the applicant by them. In this context, from Exhibit-18 it is established that the OP/Company had indeed withheld dues including wages and other payments of the applicant and were insisting upon him to submit his formal resignation, **as a precondition to release thereof.**

17. In the light of the evidence aforesaid, it is established before this Tribunal that there was no formal resignation by the applicant and that his services were terminated w.e.f. 01.10.2015 by the OP/Company, by way of refusal of employment to him. In this light of the matter, this Tribunal further holds that since such termination was not an outcome of any disciplinary action or any penal action resulting therefrom, such termination would be a case of '**retrenchment**', as defined under Section 2(oo) of the Industrial Disputes Act, 1947.

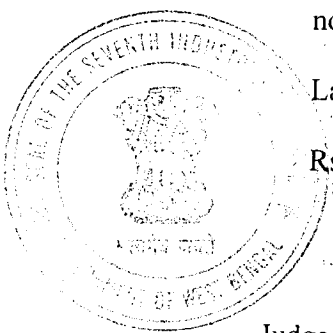
18. In such view of the matter, this Tribunal examined the letter of appointment (*Exhibit-1*), wherefrom it appears that the applicant had joined the employment



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Judge, 7th Industrial Tribunal, West Bengal

of the OP/Company on 26.07.2010, on the terms and condition laid down therein, and further, from Exhibit-3 which is a copy of bank pass-book, it reveals that the OP/Company was transferring the salary of the applicant to his bank-account month on month and his last salary was deposited on 13.10.2014 for the month of September, 2014. Such fact is also corroborated by the pay-slips (*coll. Exhibit-4*) which reveals that the applicant was paid Rs.18,070/- as his salary for the month of 2014. Clearly, such documentary evidence lends support to the testimony of PW-1 that he had worked for the OP/Company from 26.07.2010 continuously, without any interruption or no iota of blemish till his illegal termination w.e.f. 01.10.2014. In this regard, this Tribunal also examined the cross-examination of PW-1, however, nothing comes out therefrom that would indicate anything to the contrary.

19. Accordingly, this Tribunal holds that the evidence on record establishes that the applicant was in uninterrupted service of the OP/Company from 26.07.2010 till the said termination/refusal of employment by the OP/Company on and from 01.10.2014, and such uninterrupted service of the applicant would definitely count as his '**continuous service**', as defined by **Section 25B** of the Industrial Disputes Act, 1947, under the OP/Company and hence, under provision of **Section 25F** of the said Act, **the OP/Company was required to comply with the statutory pre-conditions prescribed before retrenching the applicant and/or terminating his employment.** It is in evidence that no compensation whatsoever was paid to the applicant prior to his such retrenchment; this Tribunal noted the testimony of OPW-1 (*para. 7*) wherein it was stated that the OP/Company was very humanitarian and when they heard that the applicant had no other alternative job but had filed his representation in the office of the Labour Commissioner, they had offered the applicant to take a cheque of Rs.25,000/-in his favour for 'long time unemployment', and in support of such



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testimony a copy of cheque No. 273659 was also identified by OPW-1 (*Exhibit-4*). Clearly, and in their own words, the OP/Company was not paying any statutory retrenchment compensation, but seem to be offering some amount, towards the **state of unemployment** of the applicant, which was clearly a consequence of the acts of the OP/Company. Thus, evidence on records clearly points to the fact that the **OP/Company, while retrenching the workman/applicant, had acted in violation of the express provision of Section 25F of the Industrial Disputes Act, 1947** and, as such the retrenchment of the applicant by the OP/Company would be unlawful and illegal, violative of the said law.

20. Accordingly, this Tribunal holds that the applicant has established by cogent and consistent evidence that the cessation of his employment or termination thereof by way of retrenchment w.e.f. 01.10.2014 was unjustified and unlawful and that, the applicant was entitled to a declaration to such effect, and further such termination w.e.f. 01.10.2014 is liable to be set-aside.

21. The **Issue No. 1** is answered in the aforesaid terms.

Issue No. 2 : *To what relief, is he legally entitled to?*

22. In view of the findings of this Tribunal, in respect of the Issue No. 1 as aforesaid, this Tribunal would now proceed to examine the relief(s) that the applicant may be entitled to. Law, in this regard, has been laid down in various pronouncements of the Hon'ble Supreme Court, applying to various fact-situations. Discussing such law, as laid down through various pronouncements, the Hon'ble Supreme Court, while rendering the judgment dated August 12, 2013



Sd/-
Judge, 7th Industrial Tribunal, West Bengal

in Civil Appeal No. 6767 of 2013 *Deepali Gundu Surwase vs Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors.*, as reported in (2013) 10 Supreme Court Cases 324, was pleased to hold, inter alia, at para 38 thereof :

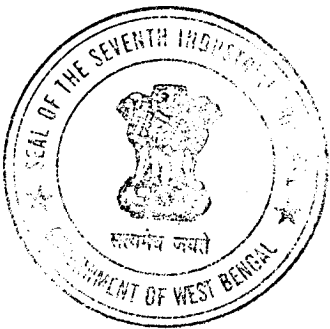
38. The propositions which can be culled out from the aforementioned judgments are:

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

38.2. 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.

38.3. 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 averment 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.

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



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misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works (P) Ltd. v. Employees* [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53].

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal* [(2007) 2 SCC 433 : (2007) 1 SCC (L&S) 651] that on reinstatement the employee/workman cannot claim continuity of service



as of right is contrary to the ratio of the judgments of three-Judge Benches [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53], [Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

[Emphasis added]

23. Having examined the provisions of law, it is imperative to examine the stand and evidence of the parties on the issue of relief(s) to which the workman may be entitled to as per law.
24. In his claim statement (*para. 20*), while claiming that the purported termination of his services by the OP/Employer was *void ab initio* and inoperative, **the applicant also claimed that he was entitled to reinstatement in his service with full back wages and other consequential benefits for the period of 'forced idleness' as created by the OP/Company.** While testifying in support of his pleadings, the applicant, as PW-1 stated (*at para. 17*) that he was praying for an order of reinstatement in his service under the OP/Company, with full back wages and other consequential benefits, as it was the unlawful act(s) of the OP/Company, who have not adhered to statutory provisions of the Industrial Disputes Act, 1947, that had resulted in his such retrenchment. On the aforesaid testimony, **PW-1 was not cross-examined at all neither was it suggested to him that he was not entitled to the relief(s) that he had so prayed for.**
25. In this regard, this Tribunal also examined the pleadings of the OP/Company and, as noted earlier, found that the OP/Company did not specifically deny that the applicant was not entitled to reinstatement or that he was not entitled to back-wages or consequential benefits, however, it was only stated (*at para. 15*) that the applicant was making some unfortunate prayers for his 'personal gain' only

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with some consideration in relation with Industrial Disputes Act, 1947, and it was further stated therein that such relief did not lie in the instant case as the applicant had not completed his 180 days of continuous service. Further, this Tribunal also noted that testifying in support of the contentions of the OP/Company, OPW-1 did not state that the applicant was not entitled to reinstatement or that he was not entitled to such back-wages or consequential relief(s) as prayed for and to that end, OPW-1 did not make any statement at all with regard to the relief as was being prayed for by the applicant. The only contention that OPW-1 stuck to was that the applicant had submitted resignation letter to the OP/Company, however, answering the specific question during his cross-examination on 18.05.2017 on the point, OPW-1 stated that he had not filed copy of such resignation of the applicant. Clearly, on the point of relief, the OP/Company does not appear to have any stand or say, especially on the specific prayer of the applicant for reinstatement with full back wages and consequential benefits.

26. Having noted the pleadings as well as the evidence brought on record by the parties, this Tribunal further examined that on the date of affirming his affidavit (07.10.2015) the applicant Susanta Kumar Sarkar was aged about 50 years and also noted from clause 14 of his appointment letter (*Exhibit-1*) that the terms of employment included his retirement from such employment at the age of 58 years. In this regard, this Tribunal further noted that the date of birth of the applicant as recorded with the OP/Company was 17.01.1965, as appears from his identity card (*Exhibit-2*). It is on evidence that the applicant had been in uninterrupted service of the OP/Company from 26.07.2010 till the said termination / refusal of employment by the OP/Company on and from 01.10.2014, and thus, it is in evidence that the applicant had rendered over four

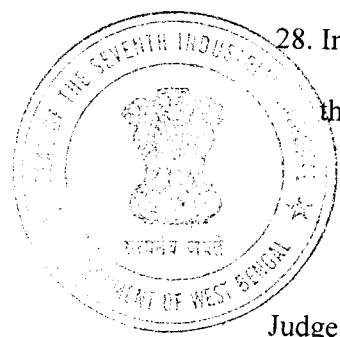
years of service to the OP/Company, which **may not be long but cannot be said to be short either**. From Exhibit-1, which is the appointment letter of the applicant it appears that the period of probation was for six months from date of joining that could be extended by a further period of six months and it was nowhere contended by the OP/Company that the employee / applicant was a probationer whose services had not been confirmed. Though it was contended by the OP/Company that they had allegedly found the expertise and the experience, as claimed by the applicant during his interview, to be absent in his performance, this Tribunal has already observed that in absence of evidence of any disciplinary action being taken by the OP/Company, there is nothing therein to support such contention of the OP/Company. In light of such observation, this Tribunal is inclined to hold that the services of the applicant would have been **deemed to be confirmed**, in terms of his contract of employment (*Exhibit-1*).

27. To sum up the material on record, it would appear that the applicant is a 53 years old employee whose confirmed employment was terminated unlawfully by way of illegal retrenchment by the OP/Company, without due process and without following the principles of natural justice and that, in terms of the stated policy of the OP/Company, the applicant would still have around five years of service to put. That apart, it has neither been pleaded nor established before this Tribunal that the OP/Company has been suffering from financial stringency or from some such or similar reason that would militate against reinstatement of the applicant to his job or bring out such circumstances under which payment of compensation in lieu of reinstatement would be the appropriate relief.

28. In the circumstances as aforesaid, as well as in the light of the evidence led by the parties and in the light of the law laid down as aforesaid, this Tribunal is of

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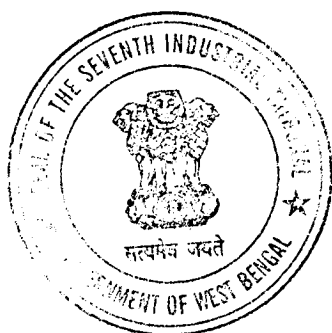
the view that the ends of justice would be served if the termination of employment, by refusal thereof, of the applicant by the OP/Company w.e.f. 01.10.2014 be set aside, for being unlawful and unjustified as well as for being violative of specific statutory provisions, with further directions that the applicant be reinstated into his service with the OP/Company, in the same post as well as the status onwards of 01.10.2014, with further direction upon the OP/Company to pay full back wages, from the 01.10.2014 till date, and consequential benefits, as a result of such reinstatement of service of the applicant.

Hence,

It is,

ORDERED

- i) That the termination of employment of the applicant Susanta Kumar Sarkar by the OP/Company M/s. A.P. Fashions Pvt. Ltd. w.e.f. 01.10.2014 by way of refusal of employment, be and the same is hereby held to be unjustified and unlawful and violative of Section 25F and such other provisions of the Industrial Disputes Act, 1947, and accordingly such termination is declared to be illegal and void and the same is set-aside;
- ii) That the services of the applicant Susanta Kumar Sarkar are directed to be reinstated with the OP/Company M/s. A.P. Fashions Pvt. Ltd. w.e.f. 01.10.2014, with further direction upon the OP/Company to pay full back wages to the applicant as well as to accord full consequential benefits, in line with such reinstatement of the applicant in their service;



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- iii) That, in the facts and circumstances of this case, there shall be no order as to costs.

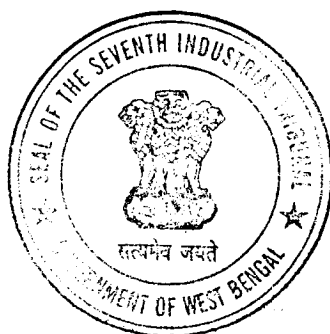
All the Issues are answered accordingly. The aforesaid shall constitute the **Award, on contest**, passed by this Tribunal in the instant Case No.23/2A(2)/2015, which shall stand disposed of.

Copies of the award be sent to the concerned authorities for information and necessary action.

Dictated & corrected by me

Sd/-

Judge
Judge
Seventh Industrial Tribunal



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Judge
Seventh Industrial Tribunal
Kolkata
26/09/2018

Judge
Seventh Industrial Tribunal

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