

I/36360/2019

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

No. Labr./65 /(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 Rohit Mishra, 192, C. R. Avenue, Kolkata – 700007 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 Rohit Mishra w.e.f. 30.04.2015 by the opposite party is justified or not ?
2. Whether the case is maintainable or not ?
3. To what relief, is he 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

(2)

No. Labr./65/1(2/-IR

Date :24.01.2019.

Copy forwarded for information to :

1. The Judge, Seventh Industrial Tribunal with reference to his Memo No. 2281 – L.T. dated 26.11.2018.
2. The Joint Labour Commissioner (Statics), W.B., 6, Church Lane, Kolkata-700001.


Deputy Secretary

No. Labr./65/2(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 Rohit Mishra, 192, C. R. Avenue, Kolkata – 700007.
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.30/2A(2)/2016

Rohit Mishra,
192, C.R. Avenue, Kolkata-700007
vs.

...Applicant

M/s. A.P. Fashions Pvt. Ltd.
227, A.J.C. Bose Road, Kolkata-700020.

...OP/Company

A W A R D

Dated : 05.10.2018

1. The instant proceedings originated when Sri Rohit Mishra, hereinafter referred to as the applicant, filed an application purportedly under Section 2A(2) of the Industrial Disputes Act, 1947 on 26.08.2016 against M/s. A.P. Fashion Pvt. Ltd., hereinafter referred to as 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 refusal of employment under pressure and intimidation by the authority concerned with effect from 30.04.2015, 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 26.08.2016, notice was issued to the OP/Company along with a copy of such application, by registered post with A.D., directing them to appear and file written statement, in reply thereto. Records further reveal that, on 27.09.2016 the OP/Company appeared through their Ld. Advocate(s), and thereafter on 31.01.2017 a written statement was filed on their behalf, wherein

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Kolkata, W B.



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 has its registered office located at 227, A.J.C. Bose Road, Kolkata – 700020 within the jurisdiction of this Tribunal and the OP/Company was covered under the purview of the West Bengal Shops & Establishment Act, 1965 and that, the applicant came to be employed by them on and from 01.09.2003 by issuance of an appointment letter whereby, though the OP/Company had offered him a ‘colourful designation’ being ‘Shipping Assistant’, his nature of work was manual, operational and technical through utilization of computer machine, on payment of monthly salary during his tenure of employment with the OP/Company. It is the further case of the applicant that, right from his joining the OP/Company, the applicant worked continuously and there was not an iota of blemish during his long employment, prior to the alleged termination of his services w.e.f. 30.04.2015 by way of refusal of employment and non-payment of salary. It is the further case of the applicant that he approached the Management several times after 30.04.2015 requesting them to allow him to resume his duties but without success and, left without any option, he thereafter sent a Demand for Justice on 24.06.2016 by registered post to the OP/Company, but despite receipt of his such representation 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 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, prior to his such termination, which had violated express provisions of the Industrial Disputes Act, 1947 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 OP/Company by their written statement dated 31.01.2017 highlighted the contradictions in the claim-statement of the applicant and put the applicant to strict proof of his various averments therein and stated that, since the applicant had not filed any proof against the OP/Company, the allegations 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 applicant had failed to remain present as a result such conciliation failed. The OP/Company contended that, in terms of clause 17(b) of the appointment letter of the applicant dated 30.08.2003, the OP/Company had made payment against 'notice-period', together with last-month's salary as well gratuity to the applicant for his service rendered, and that the applicant had suppressed such materials facts before this Tribunal for his material gain wrongfully.
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 nature of work that the applicant had claimed to be doing under the OP/Company

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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.1, 4, 5, 6, 7 & 10 of his claim-statement 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 with the stress on the fact that the applicant used his personal opinion and motive over the organisation's voice and suppressed facts and figures to mislead the Tribunal.

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 12.05.2017 framed the following Issues:-

1. *Whether the alleged termination of service of Sri Rohit Mishra w.e.f. 30.04.2015 by the opposite party is justified or not?*
2. *Whether the case is maintainable or not ?*
3. *To what relief, is he entitled to?*

7. Called upon to lead evidence in respect of the aforesaid Issues, the applicant examined himself as PW-1 on 17.01.2018 and was duly cross-examined by the OP/Company, and during his such examination he brought into record copies of documents which he sought to rely upon, and those were variously marked **Exhibit-1 to Exhibit-1/3 series**.

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 Santanu Sommadder, one of their employees as OPW-1, who was cross-examined as such on behalf of the applicant, and during such evidence OPW-1 identified and brought into record copies of three (3) documents which were variously marked **Exhibit-A to Exhibit-C series**.



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, the applicant Rohit Mishra examined himself as PW-1 by tendering his affidavit-in-chief on 17.01.2018, on which date he identified a copy of his appointment letter dated 30.08.2003 (**Exhibit-1**), copy of the letter of termination of his services dated 30.04.2015 (**Exhibit-1/1**), copy of letter dated 30.04.2015 regarding full and final settlement issued by the OP/Company (**Exhibit-1/2**) and copy of demand of justice dated 24.06.2016 issued by him to the OP/Company (**Exhibit-1/3**). That apart, PW-1 testified that he was about 38 years of age (on 29.11.2017) and he had joined the employment of the OP/Company on and from 30.08.2003 vide the said appointment letter (*Exhibit-1*) and that his designation was colourful though his duties were mainly manual, operational and technical through utilization of computer machine. PW-1 further deposed that the OP/Company 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 illegally terminated his services under the veil of refusal of

employment w.e.f 30.04.2015, without payment of salary, and that, PW-1 had personally approached the management several times with a request to allow him to rejoin his duties, but it did not yield results and he was left with no option but sent a Demand of Justice (*Exhibit-1/3*) to the OP/Company. PW-1 further testified that when the OP/Company did not respond to his said representation, he had brought the matter to the notice of the Labour Commissioner by his representation dated 29.06.2016 (*Annexure A to the application*) and thereafter, after waiting for 45 days, he filed the instant application before this Tribunal. PW-1 further stated that the OP/Company had not issued any show-cause notice or chargesheet nor conducted any domestic enquiry, and hence such termination of his employment was malafide and an illegal act of the OP/Company, that was not supported in the prescribed scheme of law and thus, such termination was liable to be set aside, and since he was unemployed after his such termination, and was not gainfully employed anywhere, he was entitled to reinstatement in service with full back wages and other consequential benefits, for the period of such 'forced-idleness' created by the illegal acts of the OP/Company.

12. The OP/Company, on the other hand, examined their employee Santanu Sommadder as OPW-1 who tendered his affidavit-in-chief on 29.05.2018 and stated that A.P. Fashions Pvt. Ltd. was a company incorporated under the Companies Act, 1956 with its registered office at 227, A.J.C. Bose Road, Kolkata-20 and that he had been duly authorized to depose on behalf of such company in response to the evidence led by the applicant Rohit Mishra and further, admitting that Rohit Mishra was their employee who was appointed on 30.08.2003 as 'Shipping-Assistant', OPW-1 stated that nowhere in the appointment letter was the nature of work specified as either technical or manual and such contention of the applicant was misleading and misconceived and hence was liable to be rejected, though OPW-1 agreed that the initial and the last drawn salary of the applicant were correctly stated. OPW-1,

relying on clause 17 of the letter of appointment, stated that it would appear that the employment of the applicant was purely contractual and could be terminated at the instance of the employer/OP/Company subject to the conditions mentioned therein and further stated, that the letter of discontinuation of service as well as the letter of release, both dated 30.04.2015, were issued to the applicant in terms of the aforesaid clause of the contract, and further deposed that the applicant had duly received his salary cheque and notice-pay cheque, both dated 30.04.2015, and both such amounts were encashed by the applicant, and further stated that even such payments were made by the OP/Company on humanitarian basis as the applicant was not performing at an optimum level and despite ample opportunities given to him, the applicant had failed to achieve the desired level which led to cessation of his employment in accordance with the said termination clause No. 17. OPW-1 further testified that the employment of the applicant was purely contractual and the terms and conditions of such employment were detailed in the said letter of appointment, which were binding on both the parties and that the applicant could not turn around and challenge the letter of appointment having duly accepted the same together with its terms and conditions, and further OPW-1 also testified that the services of the applicant were never confirmed in accordance with clause 17(a) sub-clauses (1) & (2) of the appointment letter and further, OPW-1 stated that the applicant had been duly paid the gratuity amount by way of cheque which had been duly accepted by the applicant on 28.07.2015. OPW-1 further testified that having approached the office of the Labour Commissioner, the applicant himself had not attended any of the hearings and had also evaded to file any reply to the statement submitted by the OP/Company before such conciliatory authority and in that connection, OPW-1 identified the copy of such statement submitted by the OP/Company (Exhibit-C) before the conciliatory authority. OPW-1 in his deposition pointed out that the applicant had suppressed material facts before this Tribunal as well as before the conciliatory authority that he



had not only collected the cheque of gratuity from the office of the OP/Company on 28.07.2015, but had also encashed the same and hence, OPW-1 stated that the applicant had no locus to seek any remedy before this Tribunal and the instant case was liable to be rejected.

13. Having noted the depositions of the witnesses on behalf of the parties as well as the documentary evidence brought on record by them, this Tribunal would now proceed to examine each of the issues separately and in that connection, it is imperative to mention that Issue No.2 will be taken up first as it relates to the maintainability point and thereafter the Issue No.1 and Issue No.3 will be decided consecutively.

Issue No. 2 : Whether the case is maintainable or not ?

14. This Tribunal has noted earlier that, from the written statement of the OP/Company, it could be ascertained that there was no challenge to the maintainability of the instant case, save and except on the fact that the nature of work/duties of the applicant were disputed by the OP/Company. In this regard, however it could be noted that the OP/Company neither pleaded the nature of work or duties of the applicant nor did they lead any evidence to show that the assertion of the applicant, both in his claim-statement as well as in his evidence as PW-1, that his designation as 'Shipping-Assistant' in the letter of appointment (*Exhibit-A*) was a colourful designation and that his actual nature of work and duties was manual, operational, technical through utilization of computer machine or that the applicant had rendered long span of service doing such work/duties for the OP/Company without an iota of blemish or admonition. In this regard, this Tribunal also examined the cross-examination of the PW-1 by the OP/Company and found that the OP/Company had not put any suggestion to PW-1 to the effect that his assertions regarding the nature of work/duties were baseless or that he was doing such job that would not render him to be a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947

or that it would put the applicant in one of the excepted category of employees in that section. Clearly, the evidence on record establishes that the applicant was a workman within the meaning of Section 2(s) of the said Act. That apart, the OPW-1 himself stated that the office of the OP/Company was within the city of Kolkata and that would bring the parties in the case within the territorial jurisdiction of this Tribunal. Further, from the letter of appointment (*Exhibit-A*) as well as from the deposition of OPW-1 it also comes out that the OP/Company was registered under the Companies Act and hence, the OP/Company could be said to carry-out 'industry' as defined under Section 2(j) of the Industrial Disputes Act, 1947, and thus the instant case that relates to the termination of service of an individual workman, being the applicant, by an employer carrying out 'industry' within the jurisdiction of this Tribunal would certainly comprise an 'industrial dispute' as defined under Section 2A of the Industrial Disputes Act, 1947. That apart, this Tribunal also noted that the applicant had made representation to the conciliatory authority on 29.06.2016 (*Exhibit-1/3*), while the instant application came to be filed on 26.08.2016 and hence the applicant has complied with the statutory mandate of Section 2A(2) of the said Act. In this regard, this Tribunal further noted that the instant application was registered before this Tribunal on 26.08.2016 and hence the period of filing was within three years from the date of the termination of his employment by the OP/Company and hence there was no impediment or bar, as prescribed by sub-Section 3 of Section 2A of the said Act, that would render the instant application non-maintainable.

15. On the grounds aforesaid, as well as in the light of the fact that the OP/Company has not pleaded or established any other ground that would show that the instant case was not maintainable, this Tribunal has no hesitation in holding that materials on record establish that the instant case is maintainable in its form and contents as well as in the eyes of law, and this Tribunal holds so.

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The Issue No. 2 is decided accordingly.

Issue No. 1 : *Whether the alleged termination of service of Sri Rohit Mishra w.e.f. 30.04.2015 by the opposite party is justified or not?*

16. In respect of the termination of his employment w.e.f. 30.04.2015, the applicant had pleaded that such termination was carried out by the OP/Company under the veil of refusal of employment and that there were no allegation or any iota of blemish on his career and service record and further, the applicant had also pleaded that he was not granted any opportunity to defend himself from any allegation of misconduct, if at all, and elaborated that the OP/Company had neither issued any show-cause notice nor any charge-sheet and neither was any domestic enquiry conducted by the OP/Company prior to such termination of his engagement. Responding to such allegations of the applicant, the OP/Company had pleaded that the termination of employment of the applicant was carried out in terms of clause 17 of the letter of his appointment dated 30.08.2003 (*Exhibit-A*) and further that the employment was purely contractual in nature and that the applicant had duly accepted the cheques of his salary, notice-pay as well as of gratuity which have been issued to him and had had also got the same encashed. In this regard, this Tribunal noted that OPW-1, deposing in support of the contentions of the OP/Company had stated (para. 8) that the payments made to the applicant by the OP/Company after the discontinuation / termination of his employment were made entirely on humanitarian grounds as because, the service record of the applicant was not at an optimum level, from his appointment till his termination and despite ample opportunities granted by the OP/Company to the applicant to develop and grow, the applicant during his entire tenure had failed to achieve the desired level that led to the cessation of his employment rightfully, in accordance with the termination clause being clause No.17.

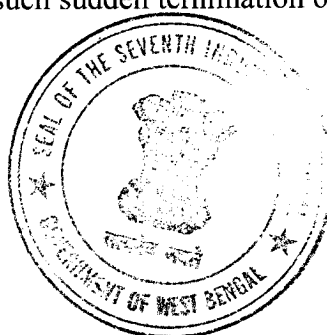


In this regard, OPW-1 was cross-examined on behalf of the applicant and he could not clearly state if the performance of the applicant over the long years of his engagement with the OP/Company was satisfactory or not and, to avoid answering the specific questions, OPW-1 merely stated that he needed to consult the records to state if the applicant was ever issued any show-cause for dereliction of his duties or on such other grounds. It further appears from the cross-examination of OPW-1 that the applicant Rohit Mishra had not conducted himself in any manner, in the course of his official duties during his long career, so as to invite any disciplinary action against him. When the question was specifically put to OPW-1 if the applicant had been offered opportunity to defend himself, in respect of the grounds of his termination, OPW-1 stated that he had heard that prior to issuance of the said letter of termination dated 30.04.2015, the applicant had been offered such opportunity though OPW-1 could not come out clearly or specify what was implied by such opportunity. In this regard, this Tribunal further examined the evidence of the applicant as PW-1 and nothing appears from his cross-examination by the OP/Company that would indicate that he had been granted any such opportunity to defend himself any time prior to the termination of his employment or would cast any manner of doubt over the specific statement in his chief, that the OP/Company had acted mala fide while terminating his services at their whim and choice and had not issued any show-cause notice or any charge-sheet and not conducted any domestic enquiry prior to termination of his such service.

17. In view of the aforesaid deliberations, it comes out that nowhere did the OP/Company give any ground or reason for such sudden termination of the long services of the applicant, much prior to the prescribed age of retirement of the OP/Company, and that apart, it is in evidence that such termination was not an outcome of any disciplinary action that had may have been taken by the OP/Company against the

applicant and hence, such termination would squarely fall within the definition of **‘retrenchment’** as defined under Section 2(oo) of the Industrial Disputes Act, 1947. Further, in the facts and circumstances of the instant case, wherein the OP/Company has admitted on record the assertion of the applicant that he had served the OP/Company from 2003 continuously till the date of his termination on 30.04.2015, this Tribunal holds that the retrenchment of the applicant, in light of his **‘continuous service’** of over twelve years as under Section 25B of the Industrial Disputes Act, 1947, was required to follow the mandate of Section 25F of the said Act, failing which it would be hit by such provision rendering it unlawful and void in the eyes of law.

18. In light of the aforesaid discussion, this Tribunal further examined the testimony of OPW-1 and found that the payments made by the OP/Company to the applicant at the time of his termination or thereafter were merely his salary as well as one month’s wage in lieu of notice not given by the OP/Company, and clearly that would not amount to ‘retrenchment compensation’ as is laid down and specified in Section 25F of the Industrial Disputes Act, 1947 and that apart, the OPW-1 did not testify to any ‘reasons for retrenchment’ that are also required to be stated **statutorily**. Further, on the point, OPW-1 did not testify in any manner if the notice of such retrenchment had been served upon the appropriate authority of the Government. In such view of the matter, this Tribunal does not find any material to show that the OP/Company had complied with the provisions of Section 25F of the Industrial Disputes Act, 1947, keeping in line with the protection afforded to the workman who had rendered ‘continuous service’ as defined under Section 25B of the said Act and squarely applicable to the instant case as established before this Tribunal by the applicant. The invocation of clause 17 of the appointment letter (*Exhibit-A*) by the OP/Company cannot be construed to ‘giving reasons’ for such sudden termination of the services of



the applicant/workman, for the simple reason that clause 17 of the said appointment letter only spells out the procedure that may be adopted by either of the parties to bring an end to the employment but it does not lay down the grounds on which such laid down procedure may be invoked by either of the parties. This aspect gains relevance in the instant matter, for the reason that even if the employment of the applicant is considered to be contractual, no contract can be interpreted in a manner to the violative of the express provisions of law or the protection granted therein in favour of the workman. In the present case, it is clearly evident from the materials on record that the OP/Company could not come up with any cogent reason to justify its decision to terminate the long-standing employment of the applicant/workman all of a sudden and neither could the OP/Company establish that such action had been as a consequence of some disciplinary issue or action taken in connection therewith.

19. In light of the aforesaid deliberations, this Tribunal holds that the applicant has established by cogent and consistent evidence that the termination of his services by the OP/Company w.e.f. 30.04.2015 was unlawful and unjustified being violative of the express provision of Section 25F of the Industrial Disputes Act, 1947 and that the applicant was entitled for a declaration to that effect by this Tribunal.

The Issue No. 1 is answered accordingly.

Issue No. 3 : *To what relief, is he legally entitled to?*

20. 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 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 misconduct or that the employer had foisted a false charge,

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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 hereingabove and cannot

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Judge, 7th Industrial Tribunal, West Bengal



be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

[Emphasis added]

21. 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.
22. In his claim statement (*para. 12*), while claiming that the purported termination of his services by the OP/Employer under the veil of refusal of employment 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' so created by the OP/Company,** violating the pre-conditions of the laws of the land and further the applicant pleaded that he was not gainfully absorbed (employed) anywhere till date. While testifying in support of his pleadings, the applicant, as PW-1 stated (*at para. 9*) that he was praying for an order of reinstatement of his service under the OP/Company, with full back wages and other consequential benefits for the period of 'forced idleness' created by the OP/Company in violation of the laws of the land and further, PW-1 testified that he was not gainfully employed anywhere after his such termination. 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,** though he was questioned on the fact if he had received gratuity and PF amount from the concerned department by the OP/Company, to which the PW-1 had replied in the affirmative. Be that as it may, the acceptance of gratuity or provident fund by the applicant/workman cannot be construed to absolve the OP/Company from its duties and obligations to act in compliance with the provisions of the Industrial Disputes Act, 1947 and not otherwise, and further **both the gratuity and provident fund are in the nature of receipts that accrue due to the hard work of the**

employees and are part of the welfare measures, enjoined upon the employers to undertake for the benefit of the staff and employees of any such employer.

23. 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 in as many words or in clear terms, however, it was only stated (*at para. 11*) that the applicant was making some unfortunate prayers for his 'personal gain' only 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 such contentions of the OP/Company, OPW-1 did not specifically state or assert that the applicant was gainfully employed after his such termination or 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 accepted the termination, in terms of the letter of appointment, and that the applicant had also accepted payments released by the OP/Company as a consequence of such termination. 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.

24. 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 (29.11.2017) the applicant Rohit Mishra was aged about 38 years and it was also noted from the clause 15 of his appointment letter (*Exhibit-A*) that the terms of employment included

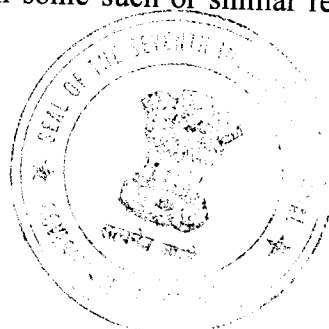
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his retirement from such employment at the age of 58 years. In this regard, this Tribunal further noted that the date of birth of the applicant is not available anywhere on the records and there is no challenge to the age as testified by PW-1, as above. It is on evidence that the applicant had been in uninterrupted service of the OP/Company from 01.09.2003 till the said termination / refusal of employment by the OP/Company on and from 30.04.2015, and thus, it is in evidence that the applicant had rendered over **twelve years of service** to the OP/Company, which is a long tenure by any measure. From Exhibit-1, which is also a copy of 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. Though it was contended by the OP/Company that the applicant/workman had not rendered 180 days of continuous service as confirmed employee, the OP/Company failed to lead any evidence in support of such contention or to show that there had been such breaks in the long service tenure of the applicant that it would not fall within '**continuous service**' or that such services could not be considered 'confirmed'. In light of such observation and in absence of any contra-evidence, 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*), during his such long tenure of employment with the OP/Company.

25. To sum up the material on record, it would appear that the applicant is a 38 year old workman, 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 long 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

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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.

26. In the circumstances as aforesaid, as well as on the face of the evidence led by the parties and in the light of the law laid down as aforesaid, this Tribunal is of 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. 30.04.2015 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 30.04.2015, with further direction upon the OP/Company to pay full back wages, from the 30.04.2015 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 Rohit Mishra by the OP/Company M/s. A.P. Fashions Pvt. Ltd. w.e.f. 30.04.2015 by way of refusal of employment, be and the same is hereby held to be unjustified, 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 Rohit Mishra are directed to be reinstated with the OP/Company M/s. A.P. Fashions Pvt. Ltd. w.e.f.

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30.04.2015, with further direction upon the OP/Company to pay full back wages from 30.04.2015 till date to the applicant as well as to accord full consequential benefits, in line with such reinstatement of the applicant in his service;

- 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.30/2A(2)/2016, which shall stand disposed of.

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

Dictated & corrected by me

Sd/-

Judge

Judge
Seventh Industrial Tribunal
Kolkata, W.B.

sd/-

Judge

Seventh Industrial Tribunal
Kolkata
05/10/2018

Judge
Seventh Industrial Tribunal
Kolkata, W.B.



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Judge
Seventh Industrial Tribunal
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