

File No.LABR-22015(15)/2/2019-IR SEC-Dept. of LABOUR
1/36417/2019

Government of West Bengal
Labour Department
I.R. Branch
N.S.Bldgs., 12th Floor
1, K.S.Roy Road, Kol – 1

No.Labr./67/(LC-IR)
22015(15)/2/2019

Dated, Kolkata, 24.01.19.

ORDER

WHEREAS an industrial dispute existed between M/s. Maheswary Ispat Pvt. Ltd., P-5, Kalakar Street, 51, Nalini Seth Road, 4th Floor, Kolkata-700 007 and Sri Subhash Mahato, C/o Anup Kumar Singh, 12, Rup Chand Ray Street, 3rd Floor, Kolkata-700 007 regarding the issue, being a matter specified in the 2nd Schedule to the Industrial Disputes Act, 1947 (14 of 1947);

AND WHEREAS the workman has filed an application under section 10(1B)(d) of the Industrial Dispute Act, 1947(14 of 1947) to the Judge, Seventh Industrial Tribunal, Kolkata specified for this purpose under this Deptt.'s Notification No.1085-IR/12L-9/95 dtd.25.07.1997.

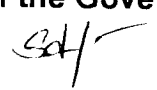
AND WHEREAS, the Judge of the said Seventh Industrial Tribunal, Kolkata heard the parties under section 10(1B)(d) of the I.D. Act, 1947(14 of 1947).

And WHEREAS the said Judge, Seventh Industrial Tribunal, Kolkata, has submitted to the State Government its Award under section 10(1B)(d) of the I.D. Act, 1947(14 of 1947) on the said Industrial Dispute.

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

ANNEXURE
(Attached herewith)

By Order of the Governor


Deputy Secretary to the
Government of West Bengal.

(Contd... 2)

**FILE No. LABR-22015(15)/2/2019-IR SEC-Dept. of LABOUR
1/36417/2019**

No.Labr./67/1(5)(LC-IR)

Dated, 24.01.19

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

1. M/S Maheswary Ispat Pvt. Ltd., P-5, Kalakar Street, 51, Nalini Seth Road, 4th Floor, Kolkata-700 007
2. Sri Subhash Mahato, C/o Anup Kumar Singh, 12, Rup Chand Ray Street, 3rd Floor, Kolkata-700 007
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The Labour Commissioner, W.B., N.S. Bldgs,(11th Floor), 1, K.S. Roy Road, Kol-1.
- ✓ 5. The O.S.D., IT Cell, Labour Deptt., with the request to cast the Award in the Department's website.



Deputy Secretary

No.Labr./67//2(2)(LC-IR)

Dated, 24.01.19.

Copy forwarded for information to :-

1. The Judge, Seventh Industrial Tribunal, Kolkata, with respect to his Memo No.2282-L.T. dtd.26.11.2018.
2. The Joint Labour Commissioner(Statistics), West Bengal, 6, Church Lane, Kolkata-700001.

Deputy Secretary



Jnt/order

In the Seventh Industrial Tribunal, West Bengal
New Secretariat Buildings, Kolkata

Present : Sri Avani Pal Singh,
Judge, 7th Industrial Tribunal, W.B.

Case No.42/10(1B)(d)/2016

Shri Subhash Mahato
C/o. Anup Kumar Singh,
12, Rup Chand Ray Street,
3rd Floor, Kolkata-700007

... Applicant

Versus

M/s. Maheswary Ispat Pvt. Ltd.,
P-5, Kalakar Street,
51, Nalini Seth Road, 4th Floor, Kolkata-700007

... OP/Company

A W A R D

Dated : 12-10-2018

1. The instant case arose out of an application filed by Sri Subhash Mahato, hereinafter referred to as the applicant, purportedly under Section 10(1B)(d) of the Industrial Disputes Act, 1947 together with Form-S dated 19.09.2016, raising industrial dispute against M/s. Maheswary Ispat Pvt. Ltd., hereinafter referred to as the OP/Company, in connection with termination of his services by such OP/Company, and alleged the same to be illegal and prayed for reinstatement in service with full back wages and consequential benefits.
2. On the case being registered on 08.12.2016, notice together with copy of the application was sent by registered post to the OP/Company at the given address with the direction upon them to appear and file their written statement, if any. Records further reveal that the OP/Company duly appeared on 04.01.2017, through their Ld. Advocate, and also filed their written statement on 29.06.2017, wherein and whereby the OP/Company sought to deny and dispute the claims of the applicant made in his said application and also sought to make out their own case, upon which they were directed to file their list of documents upon which they sought to rely upon, together

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Judge
Seventh Industrial Tribunal
Judge, 7th Industrial Tribunals, W.B.



with copies thereof. Records further reveal that the OP/Company failed to file their 'list of documents' despite repeated opportunities granted to them, and taking note of such failure of the OP/Company this Tribunal directed the OP/Company on 16.11.2017 to show-cause as to why the matter would not proceed and be determined ex-parte, in accordance with law. Records further reveal that on 30.05.2018, this Tribunal noted that not only did the OP/Company fail to file any show-cause as directed but they had also stopped appearing on several dates thereafter and accordingly, this Tribunal directed that the instant case was a fit case to proceed **ex-parte** against the OP/Company, and the case has accordingly proceeded as such till date.

3. The case made out by the applicant, in his application, briefly is that he was employed as a driver by the OP/Company in the year 2003 and had been working as such continuously till termination of his service by the OP/Company w.e.f. 28.04.2015 and that, the OP/Company was a profit-earning concern engaged in manufacturing, processing and training of steel & iron equipments, but the OP/Company had an unfair policy and little regard for the provisions of industrial laws, specially those enacted for the welfare of the workman and as such the OP/Company did not issue appointment letter(s), did not maintain muster-roll, made its employees work long hours for very meagre wages and without extra remuneration and deprived its employees/workmen of amenities like leave, holiday (festival & weekly), provident fund and ESI facilities, etc. and that the applicant was also one of the victims of such anti-labour policies and act(s) of the OP/Company. It is the further case that despite such anti-labour practices of the OP/Company, the applicant all along had been working hard and with diligence in rendering service to the OP/Company, but suddenly, without assigning any reason or even compensation, on 28.04.2015 the OP/Company terminated the employment of the applicant and on such

date, the last drawn salary of the applicant was Rs.8,500/- per month. It is the further case of the applicant that prior to his such termination, the OP/Company had not issued any show-cause or brought any charge against him or given him any opportunity to defend himself and accordingly, the applicant had made a written representation on 22.05.2015 to the OP/Company demanding immediate reinstatement together with full back wages, however, despite of receipt of such letter, the OP/Company did not show any interest to settle such demand. It is the further case of the applicant that he sought intervention of the office of the Labour Commissioner, West Bengal, vide his representation dated 22.05.2015, yet the OP/Company did not cooperate and accordingly the conciliation process failed, compelling the applicant to apply for and obtained a pendency certificate in Form-‘S’ from the conciliatory authority and thereafter, file the instant application before this Tribunal. It is the further case of the applicant that he has remained fully unemployed since such termination of service by the OP/Company and has failed to obtain any other job and has been passing his days in hardship and accordingly the applicant has sought a declaration that the termination of his services by the OP/Company was illegal and void, with a further direction that the applicant be reinstated in his services with full back wages and consequential benefits and such other relief(s).

4. Leading **ex-parte evidence** in support of his contentions in the aforesaid application, the applicant examined himself as PW-1, on oath, on 04.07.2018 by tendering his affidavit-in-chief and further, upon his identification, copy of his written-representation dated 22.05.2015 (**Exhibit-1**) to OP/Company, his representation dated 26.06.2015 (**Exhibit -2**) to the office of the Labour Commissioner, Govt. of West Bengal, copies of notices dated 09.03.2016 (**Exhibit-3**) and 04.07.2016 (**Exhibit-4**), both issued by the conciliatory authority, copy of an application in prescribed Form P-4 dated 09.09.2016 submitted to such authority (**Exhibit-5**) and copy of a

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certificate dated 28.10.2013 issued by the OP/Company (**Exhibit-6**) as well as a character and efficiency certificate dated 20.03.2014 (**Exhibit-7**) issued by the OP/Company, were taken into evidence and marked accordingly.

5. Having examined the pleadings as well as the testimony in support thereof, as aforesaid, this Tribunal finds that uncontroverted evidence on record reflects that the applicant had joined the employment of the OP/Company as a 'driver' in the year 2003 and had worked continuously till 28.04.2015, on which date his services stood terminated by the OP/Company. In this regard, this Tribunal also examined *Exhibit-6*, which appears to be a letter of authority issued on the letter-head of the OP/Company by their authorised signatory on 28.10.2013, wherein it was recorded, among others, that the OP/Company was authorising the applicant, being their driver, to drive their company-owned vehicle bearing No. OR 05 AC 5000 on the roads as and when required, and the letter (*Exhibit-6*) also reflects the licence number of the applicant (**WB_01_2004464889**) as well as his duly attested signature. This Tribunal also examined another certificate issued by the OP/Company on 20.03.2014 (*Exhibit-7*), wherein it is stated that the applicant had been working since last eight (8) years as their authorised car driver and had shown extraordinary efficiency and devotion to duty and that he had good moral character and was drawing a monthly salary of Rs.8000/- per month. In light of the aforesaid testimony as well as the documentary evidence, this Tribunal holds that the applicant has established by his unchallenged evidence that he was a workman, duly employed under the OP/Company as a 'driver' and further that he had rendered service as such to the OP/Company for at least eight (8) years continuously (*as per Exhibit-7*), prior to his termination on 28.04.2015 and, in light of such evidence on record, further holds that the applicant had rendered '**continuous service**' as defined under Section 25B of the Industrial Disputes Act, 1947, to the OP/Company. In such view of the matter, this Tribunal further examined



the testimony of PW-1 as well as of other documentary evidence on record, and found that such unchallenged testimony reflects that the OP/Company had terminated the services of the applicant suddenly 28.04.2015, and that prior to such termination, the OP/Company had neither issued any show-cause or taken any disciplinary action against the applicant and hence, the termination of the services of the applicant by the OP/Company would squarely fall within the definition of '**retrenchment**' as per Section 2(oo) of the Industrial Disputes Act, 1947.

6. In light of the aforesaid findings, that the applicant / workman had rendered 'continuous service' and that his such service was terminated by way of retrenchment, this Tribunal proceeded to examine if such retrenchment had been done in accordance with law as prescribed under Section 25F of the Industrial Disputes Act, 1947, but found that PW-1 testified that he had neither been offered any compensation or remuneration or notice-pay at the time of termination of his services and thus, in light of such testimony, the termination/retrenchment of the workman/applicant by the OP/Company on 28.04.2015 cannot be held to be in accordance with law and was illegal and void, for being in violation of the express provision(s) of the statute and accordingly, this Tribunal further holds that the services of the workman / applicant could not have been terminated by the OP/Company without complying with the express provision of Section 25F of the said Act. that the applicant is entitled to a declaration to that effect.

7. In light of the aforesaid findings, this Tribunal proceed further to examine the scope of relief(s) that may be available to the applicant in accordance with law. Law, in this regard, has been laid down in various pronouncements of the Hon'ble Supreme Court, applying to various fact-situations. Discussing the law laid down through various pronouncements, the Hon'ble Supreme Court, while rendering the judgment dated

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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:

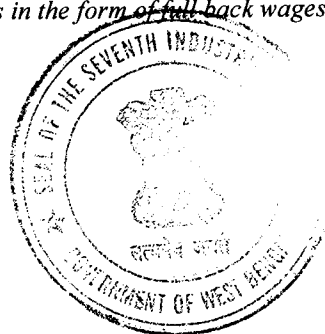
38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

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, 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.

8. In light of the law so laid down, this Tribunal noted that from the unchallenged testimony of the applicant/PW-1, it appears that the applicant was rendered jobless by his such wrongful termination by the OP/Company and further, that he has remained unemployed thereafter and had been facing financial stringency. Further, from his affidavit-in-chief, it appears that the age of the applicant on the date of deposition (04.07.2018) was 37 years and hence, he would have long years of productive remaining with him.
9. Accordingly, in light of the law laid down as well as the evidence on record, this Tribunal is of the view that the ends of justice would be served if the the termination of employment of the applicant by the OP/Company, by way of refusal of employment, is declared illegal and void and set aside, with further directions that the applicant be reinstated in service of the OP/Company, who would pay him full back-

wages, from 28.04.2015 till reinstatement, and accord him all consequential benefits on account of his such reinstatement.

Hence

It is

ORDERED

- i. That, the termination of employment of the applicant Subhash Mahato, by way of refusal of employment w.e.f. 28.04.2015 by M/s., Maheswary Ispat Pvt. Ltd., as their driver is found to be illegal and unjustified, and is accordingly declared so and set aside;
- ii. That, the applicant Subhash Mahato is directed to be reinstated in his employment as driver of M/s. Maheswary Ispat Pvt. Ltd. from and onwards of 28.04.2015, with further direction that the Company shall pay full back-wages from 28.04.2015 till the date of his reinstatement, to the applicant, and accord the applicant all consequential benefits on account of his such reinstatement.
- iii. That, there shall be no order as to any costs.

The aforesaid shall constitute the Award in the instant case being No.42/10(1B)(d)/2016, passed **ex-parte** against M/s. Maheswary Ispat Pvt. Ltd.

The instant case stands disposed of. Copies of the Award be sent to the concerned authorities at the earliest.

Dictated & corrected by me

sd/-

Judge

Judge
Seventh Industrial Tribunal
Kolkata, W.B.

sd/-

Judge,
Seventh Industrial Tribunal
Kolkata
12/10/2018

Judge
Seventh Industrial Tribunal
Kolkata, W.B.

Sd/-
Judge, 7th Industrial Tribunal, W.B.
Seventh Industrial Tribunal
Kolkata, W.B.