

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

No. Labr./678/(LC-IR)/22015(16)/478/2018

Date : 10.09.2018

**ORDER**

WHEREAS an industrial dispute existed between M/S Dulichand Finance and Leasing Limited, Chatterjee International Centre, 15<sup>th</sup> Floor, Suite No. 13, 33 A, Jawaharlal Nehru Road, Kolkata – 700071 and their workman Sri Debasis Paul, S/o Bijay Bhusan Paul, Dakshinpara Natun Pally, P.O. – Purba Putiary, P.S. – Regent Park, Kolkata – 700009 regarding the issues being a matter specified in the second schedule of the Industrial Dispute act, 1947 (14 of 1947);

AND WHEREAS the workman has filed an application directly under sub-section 2 of Section 2A of the Industrial Dispute act, 1947 (14 of 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 Industrial Tribunal heard the Parties and framed the following issues as the “Issue” of the said dispute;

**ISSUES**

1. Whether the application is maintainable both in facts and in law ?
2. Whether the alleged termination of service of Sri Debasis Paul w.e.f. 01.08.2013 is justified or not ?
3. To what relief is he legally entitled to as per law ?

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./678/1(2) – IR

Date : 10.09.2018

Copy forwarded for information to :

1. The Judge, Seventh Industrial Tribunal with reference to his Memo No. 1439 – L.T. dated 13.07.2018.
2. The Joint Labour Commissioner (Statics), W.B., 6, Church Lane, Kolkata-700001.



Deputy Secretary

No. Labr./678/2(5) – IR

Date : 10.09.2018

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

1. M/s Dulichand Finance and Leasing Limited, Chatterjee International Centre, 15<sup>th</sup> Floor, Suite No. 13, 33 A, Jawaharlal Nehru Road, Kolkata – 700071
2. Sri Debasis Paul, S/o Bijay Bhusan Paul, Dakshinpara Natun Pally (near Pushpa Apartment), P.O. – Purba Putiary, P.S. – Regent Park, Kolkata – 700009.
3. The Assistant Labour Commissioner, W.B., In-Charge of Labour Gazette.
4. The Labour Commissioner, W.B., New Secretariat Building (11<sup>th</sup> 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**

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

**Case No.37/2013, u/S.2A(2) of the Act 14 of 1947**

**An Industrial Dispute**

**-Between -**

Shri Debasis Paul, S/o. Bijay Bhusan Paul,  
Dakshinpara Natun Pally, P.O.-Purba Putiary,  
P.S.- Regent Park, Kolkata – 70009.

**....Applicant**

**- A n d -**

M/s. Dulichand Finance and Leasing Limited, Chatterjee International Centre,  
15<sup>th</sup> Floor, Suite No. 13, 33A, Jawaharlal Nehru Road,  
Kolkata – 700 071.

**....O.P. / Company**

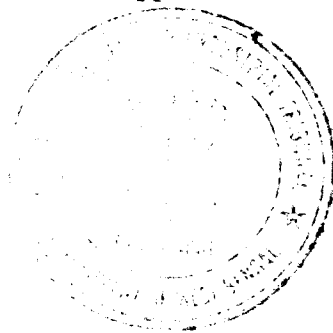
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**A W A R D**

**Dated : 09-07-2018**

1. The instant case came to be registered when an application under Section 2A(2) of the Industrial Disputes Act, 1947 was filed on 22.10.2013 by Sri Debasis Paul, referred to as the 'applicant' hereinafter, purportedly raising an industrial dispute against his employer M/s. Dulichand Finance and Leasing Limited, thereby and therein challenging the alleged illegal and unjustified termination of his employment by such employer and seeking relief, inter alia, of reinstatement with full back-wages and consequential benefits.
2. On the case being registered, notice was issued, together with a copy of such application, to M/s. Dulichand Finance and Leasing Ltd., referred to as O.P./Company hereinafter, at its address given in the application, directing its appearance and filing of its written statement. The O.P./Company duly appeared through their authorised Ld. Advocate and have contested this proceeding by filing their written statement, wherein and whereby they have substantially rebutted the claims made by the applicant in his application.

sd/-



3. The case of the applicant as made out in the application briefly is that the O.P./Company is a registered company under the Companies Act, 1956 and it is also an 'employer' carrying out an 'industry', as defined under provisions of the Industrial Disputes Act, 1947, referred to as the Act hereinafter, and further, that the applicant came to be employed as a computer operator (DEO) with the company on 17.05.1995 and that he rendered 18 long years of unblemished service to the O.P./Company but unfortunately, on 01.08.2013, the O.P./Company, without issuing any show-cause notice or causing any domestic enquiry, terminated his such services and that, his such termination was bad, unjustified, illegal and void ab-initio, and amounted to "**retrenchment**" in violation of the mandatory provisions of Section 25F of said the Act and hence, the applicant was entitled to be reinstated with full back wages and consequential benefits.

4. The O.P./Company, by its written statement filed on 27.12.2013, at the outset challenged the maintainability of the application under Section 2A(2) of the Act, among others, on the ground that the applicant had not raised any dispute with the OP/Company prior to filing of the said application and that, no conciliation, as prescribed, was held between the parties either. Further, answering the specific claims made by the applicant, the OP/Company **admitted** that the applicant was indeed a computer operator (DEO) under them since 17.05.1995 and that he had rendered 18 years of service without blemish and further, **admitting** that no show-cause was issued nor any domestic enquiry held against the applicant, the OP/Company also accepted that the services of the applicant were indeed terminated, but claimed that such termination came about for the reason(s) that applicant had refused to perform duties assigned to him and that, the applicant had

also misbehaved with the Director of the company, and that the OP/Company would prove such misconduct of the applicant before this Tribunal. That apart, the O.P./Company stated that it used to be in the business of financing vehicles, however their such business underwent **changes** w.e.f. October, 2013 and only a part of the business, relating to the recovery of loans advanced, was going on and further the O.P./Company stated that as such, there was no scope for reinstatement of the applicant, as all the other staff had resigned w.e.f. October, 2013 and the business of financing had stopped and further, that the O.P./Company by letter dated 18.11.2013 had wanted to settle the legal dues of the workman, but he refused to accept the same.

5. In the light of the aforesaid pleadings by the parties, this Tribunal framed following Issues on 22.04.2014 :-

Issue No.1 : Whether the application is maintainable both in facts and in law ?

Issue No.2: Whether the alleged termination of service of Sri Debasis Paul  
w.e.f. 01.08.2013 is justified or not ?

Issue No.3: To what relief is he legally entitled to as per law?

6. In support of his case, the applicant Debasish Paul examined himself as PW-1, and was cross-examined as such, and during his evidence copies of his appointment letter, termination letter, salary statements as well as other relevant documents were taken into evidence and marked as Exts.-1 to 7 series, and would be discussed at the relevant portions hereinafter.

7. In support of its contention, the O.P./Company summoned and examined Sri Sudip Karmakar, Inspector, Labour Department, as OPW-1 while Sri Krishna Sadhan Dey, Legal Officer of the O.P./Company was examined as OPW-2, and both OPWs were cross-examined as such, and the O.P./Company brought into evidence the entire conciliation file (Ext.-A) and letters of resignation of its other employees, extracts from the salary register for the months July, 2013 - September, 2013 as well as relevant monthly muster reports, all of which have been variously marked Exhibits - A/1 to A/6 series, and are discussed hereinafter at the relevant portions.
8. The point of determination therefore, is to examine if the applicant has succeeded in establishing his contentions by way of cogent and consistent evidence and, to further examine if the applicant is entitled to any relief(s), as prayed for or at all, as against the O.P./Company.

### **DECISION WITH REASONS**

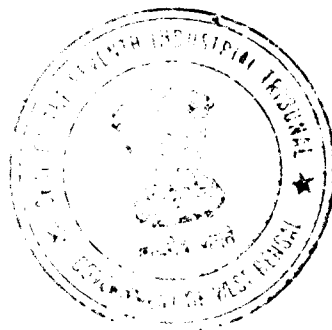
9. At the outset, it is relevant to recollect that the O.P./Company in its pleadings has admitted that the applicant was its employee who had joined as a computer-operator w.e.f. 17.05.1995 (para. 3, page-3 of its w/s) and that, the applicant had rendered more than 18 years of service to the O.P./Company without an iota of blemish (para. 12, page-5 of its w/s) and further, the O.P./Company admitted that it had not issued any show-cause notice to nor conducted any domestic enquiry against the applicant prior to termination of his services (para. 15, page-5 of its w/s), though the OP/Company contended that the termination of employment of



the applicant was on account of his misconduct which the OP/Company would prove at the time of evidence. Thus, in the light of the aforesaid admission(s) made by the O.P./Company, only such portions of evidence, as would be found relevant and necessary for deliberation upon matters-in-issue between the parties, would be taken up so as to avoid repetition of the same.

10. Before proceeding with the deliberation and decision separately on each of the Issues, as aforesaid, it is imperative to examine the evidence on record of both parties in support of their respective contentions, as well as facts relevant thereto.

11. Testifying in support of his pleadings, the applicant deposed as PW-1 on 14-07-2015 and was duly cross-examined as such, on behalf of the OP/Company on 14-07-2015, 31-08-2015 and on 03-11-2015. Stating that his Employee Code No. was 1009 and his last drawn monthly salary was around Rs. 12,000/-, PW-1 further testified that his services as a computer-operator were used for data-entry and that apart, he had to perform similar such functions, as and when called upon by his employer, during his long span of employment since 17-05-1995 till his illegal termination w.e.f 01.08.2013. Throwing light on incidents preceding the issuance of the letter of termination dated 31.07.2013, PW-1 stated that the Director of the OP/Company had sought to provoke him into submitting a letter of resignation so that the OP/Company would not have to pay any compensation, however when he did not submit his resignation, the OP/Company, in blatant abuse of its authority and in violation of the laws of the land, terminated his services without even giving him an opportunity to raise his defence to any alleged misconduct, if at all, whether by issuing a show-cause or by conducting a domestic enquiry in that regard. Reiterating that he had rendered meritorious and



unblemished service to the OP/Company for long years, to the complete satisfaction of the management, till his such unjustified and illegal termination of service, PW-1 further testified that under the unfortunate circumstances, and without finding any alternative avenue, he was compelled to raise an industrial dispute before the Assistant Labour Commissioner, Govt. of West Bengal by his letter dated 27.08.2013, who tried to call for and hold a number of Joint-Conferences, but the matter was not settled due to arrogant and non-compromising attitude of the OP/Company. In this backdrop, PW-1 further stated that since his termination was completely illegal, unjustified and void-ab-initio, he was entitled to be reinstated to his service, with full back-wages and other consequential benefits, and accordingly prayed that the Tribunal grant him such relief(s). To reinforce his such testimony, PW-1 identified and brought on record copies of his letter of appointment dated 17.05.1995 (**Exhibit-1**), of letter dated 31.07.2013 terminating his services w.e.f 01.08.2013 (**Exhibit-2**), of a letter dated 18.11.2013 issued by the OP/Company in respect of his termination (**Exhibit-3**), of a letter dated 30.08.2013 sent by him through registered post to the OP/Company (**Exhibit-4**), of another letter sent by him to the OP/Company on 20.11.2013 (**Exhibit-5**) and finally, copies of computation of his income/salary issued by the OP/Company for the years 2012 & 2013 (**Exhibit-6, collectively**), and all of such copies were taken into evidence without any objection by the OP/Company.

12. With a view to rebut the case of the applicant, as well as to substantiate its own stand, the OP/Company examined two witnesses. Sudip Karmakar, Inspector from the office of the Labour Commissioner, Government of West Bengal testified as OPW-1 and produced the entire file of conciliatory proceedings (**Exhibit-A**) held in connection with the dispute between the OP/Company and Debasis Paul, and



during cross-examination by the applicant, OPW-1 identified a letter dated 27-08-2013 of the applicant (**Exhibit-7**) and stated that the said letter was received officially by the Department of Labour on that date. Krishna Sadhan Dey deposed as OPW-2 on 18-09-2017 by tendering his affidavit-in-chief, wherein he stated that he had been working in the OP/Company as a Legal Officer and that the applicant was an employee of the same firm since 17.05.1995 as a computer-operator. OPW-2 further stated that one Gour Hari Tosh, who used to look after Excel-sheet work of the company, was to be superannuated w.e.f 30.10.2013 and accordingly, the Director of the company had advised the applicant Debasis Paul to look after the Excel-sheet work of the company but, unfortunately the applicant had not only refused to work on the excel-sheet but also damaged the software and misbehaved with the Directors, and as such the management had no other alternative but to terminate the services of the applicant, by way of issuance of the letter dated 31.07.2013. Further, OPW-2 emphasised that there was no requirement of issuing a show-cause or causing a domestic-enquiry by the OP/Company as it was a small company whose functions were looked after directly by the Director(s) and the applicant had not only refused to obey the advise of the Director, but also misbehaved with the Director and hence, the services of the applicant could not be continued with by the OP/Company. OPW-2 further testified that the applicant could not be re-instated because, *firstly*, the business of the Company had changed since October, 2013 as its business of financing purchase of vehicles had completely stopped and all its employees had resigned in that month, and only the recovery process of outstanding loans remained and that the company was financially handicapped, and *secondly*, that the applicant had already attained the age of 58 years, as he was 37 years old on 17-05-1995, and thus had attained the age of superannuation as per policy followed by the Company. OPW-2 identified copies of resignation letters of four

employees, including himself, all dated 01.09.2013 (**Exhibits A/1, A/2, A/3 & A/4**), as well as copies of salary register for the months July–September 2013 as well as the monthly muster reports of the OP/Company (**collectively Exhibit-A/5**). OPW-2 was cross-examined on 18.09.2017 and 10-11.2017, and during his cross-examination OPW-2 identified his letter of authority issued by a Director of the OP/Company (**Exhibit-B**).

13. Having examined the evidence brought on record by both parties, this Tribunal would now proceed to deliberate upon and decide each of the Issues separately hereinafter.

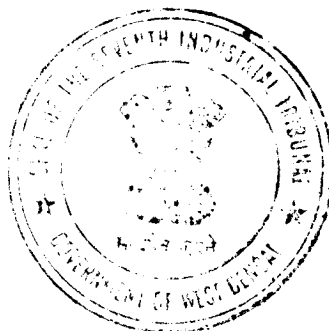
**Issue No. 1 : Whether the application is maintainable both in facts & in law ?**

14. While challenging the maintainability of the instant application, it was contended on behalf of the O.P./Company that the applicant had failed to raise any demand or dispute with them, prior to raising the dispute before the Labour Commissioner, Govt. of West Bengal, and further it was contended that it was the statutory mandate that an application under Section 2A(2) of the Industrial Disputes Act, 1947 could be filed only after expiry of 45 days from initiation of conciliatory proceedings before the authority and that in the instant case such statutory pre-condition had been violated and that no effective conciliation took place before the conciliation machinery without which the application under Section 2A(2) of the Act could not have been filed. Though the point of maintainability was not raised and/or argued at the time of arguments on behalf of



the O.P./Company, yet as a measure of abundant caution, this Tribunal would examine the relevant aspects to ascertain if the instant application is maintainable, or otherwise, in the eyes of law, before this Tribunal.

15. Since the O.P./Company has not denied, in its written statement that it was a Company within the meaning of Companies Act, 1956 and an 'industry' within the meaning of Section 2(j) of the Act, and also an employer as pleaded by the applicant in paragraphs - 1 & 2 of his application, this Tribunal finds no impediment and holds that the O.P./Company is an industrial establishment or undertaking under Section 2(ka) of the Act involved in an 'industry' under Section 2(j) of the Act carrying out the business of financing the purchase of vehicles by different parties and hence it would be covered by the provision of the Industrial Disputes Act, 1947. Further, the O.P./Company admitted that the applicant was a computer operator in their employment since 17.05.1995 and the applicant, deposing as PW-1 stated that the nature of his duties was primarily entry of data into the computer and such works which were given to him from time to time by the O.P./Company. It would be clear that, by dint of the nature of his duties/job, the applicant would fall within the definition of 'workman' under Section 2(s) of the Act carrying out skilled work of clerical nature under the OP/Company against payment of wages. In the light of the aforesaid discussions, it is not left to any doubt that the termination of employment of the applicant by the O.P./Company would fall squarely within the definition of an 'industrial-dispute' as defined under Section 2A(1) of the Act and accordingly, this Tribunal would have jurisdiction u/S. 7A of the Act, to adjudicate upon such industrial dispute, falling under the Third Schedule (Entry No. 10) of the said Act or under the Second Schedule (Entry No. 3) thereof, as the case might be.



16. On the specific point raised by the O.P./Company that no dispute was raised with them before filing of the application before the conciliatory authority by the workman, the answer to such challenge appears in the contents of **Exhibit-7**, which is a copy of letter of the workman dated 27.08.2013 to the Labour Commissioner, Govt. of West Bengal, wherein it was specifically stated by him that the management was not allowing him to even enter the office and that the management had not paid him the salary for the month of July, 2013. That apart, from **Exhibit-4**, which is a copy of letter dated 30.08.2013 filed together with the original postal receipt showing its despatch on that date itself by registered post to the O.P./Company, it is seen that the workman had clearly challenged the termination notice dated 31.07.2013 (**Exhibit-2**), on the ground that he had not been given any opportunity of hearing and further that he was a permanent employee of the company working since 17.05.1995 and that his dues had not been paid either, with a request that he be allowed to continue with his service and that his dues may be cleared within seven days of receipt of that communication. Clearly, the challenge of the O.P./Company is not sustainable on the evidence on record as it is clear that the workman had indeed raised the dispute on 30.08.2013, after he had already lodged an application dated 27.08.2013 with the Labour Commissioner stating specifically that he was not being allowed to even enter the office of the OP/Company. That apart, the entire conciliation file (Ext.-A) was also examined and it is clear that notices were duly issued and received by the O.P./Company, who in turn had also written back to the concerned Assistant Labour Commissioner seeking a date for a joint-sitting. Further, from Ext.-A led by the OP/Company, it appears that on 31.10.2013, the workman filed an application with the concerned Assistant Labour Commissioner whereby he intimated that having waited for more than 45 days after raising the industrial dispute, he had taken shelter by way of an application u/s. 2A(2) of the Industrial

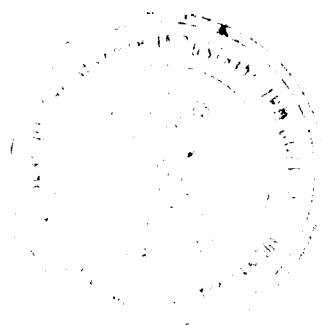


Disputes Act, 1947 before the Seventh Industrial Tribunal, West Bengal, with a request that the conciliation proceeding be dropped immediately. In the light of the aforesaid discussion, this Tribunal finds no substance in the objections raised by the O.P./Company with regard to maintainability of the instant case. Accordingly, it is held that the instant case is maintainable, both in facts and in law, and the **Issue No.1** is answered accordingly.

**Issue No.2 : Whether the alleged termination of service of Sri Debasis Paul w.e.f. 01.08.2013 is justified or not ?**

17. In support of his pleadings that his service was illegally terminated without giving him any opportunity to defend himself (paras. 4, 6 & 7, page-2 of the application by the workman), the workman as PW-1 testified that the O.P./Company had violated the principles of natural justice and express provisions of law by issuing him the letter of termination (Ext.-2) on 31.07.2013 as the O.P./Company had not issued him any show-cause notice nor conducted any domestic enquiry, for any alleged 'misconduct' as was sought to be portrayed by the O.P./Company in such letter of termination. It is relevant to recall that the O.P./Company in its written statement (paras. 6, 15 & 19) admitted categorically that no charge-sheet nor any show-cause notice was issued to the workman, in respect of the misconduct stated or referred to in the letter of termination dated 31.07.2013 (Exhibit-2) and further, it was contended that since the workman had misbehaved with one of its Directors, the O.P./Company, being a small organisation, did not need to comply with such formalities and further, the O.P./Company asserted that it would prove such misconduct of the workman before this Tribunal as and when the occasion arose. In light of such pleadings, this Tribunal examined the testimony of Sri

Krishna Sadhan Dey OPW-2, who stated that the Director of the O.P./Company (unnamed) had advised the workman to work on excel sheet as the concerned staff Gour Hari Tosh was being released w.e.f. 30.10.2013, however Sri Paul (workman) not only refused to work as such, but also damaged the software and also misbehaved with the said Director, leaving the O.P./Company with no other alternative but to terminate the service of the workman. From the cross-examination of OPW-2 (on 10.11.2017), it came out that there was no written order/direction upon the workman, issued by the O.P./Company to look after the said job which was being performed by Sri Tosh and further, it came out that the O.P./Company had not filed any document to show that Sri Tosh used to look after the computer-section of the company. During the cross-examination of OPW-2 (on 18.09.2017), it further came out that the O.P./Company had not issued any letter upon the workman in connection with the change in the nature of his duties and that such change was communicated to him verbally by the concerned Director and that the O.P./Company had also not issued any notice or letter to the workman, in connection with his alleged refusal to perform such new work, alleged to have been assigned to him. That apart, this Tribunal also noted from the pleadings of the OP/Company, as well as from the testimony of the OPW-2 and the letter of termination (Exhibit-2), that the **name and identity** of the Director, who may have issued such directions and with whom the workman had allegedly misbehaved, is not mentioned anywhere. Clearly, the O.P./Company has not been able to establish by way of cogent evidence the alleged misconduct of the workman, that was pleaded to be the reason behind the termination of the workman from his services by the O.P./Company.



18. The OP/Company having kept the identity of the concerned Director concealed and/or not having examined the said Director, who ought to have deposed before this Tribunal on the material points, and be cross-examined by the workman on his contentions, the version of OP/Company does not inspire the confidence of this Tribunal and accordingly, this Tribunal is constrained to hold that the O.P./Company has failed to establish misconduct by the workman in course of his employment as alleged or otherwise, and thus, this Tribunal further holds that the termination of the employment of the workman Sri Debasis Paul by letter dated 31.07.2013 (Ext.-2) issued by M/s. Dulichand Finance & Leasing Ltd. would squarely be a case of '**retrenchment**' as defined under Section 2(ooo) of the Industrial Disputes Act, 1947 (as amended by West Bengal Act 17 of 2007, **Section 3, equivalent to Section 2(oo)** of the Industrial Disputes Act, 1947). In this context, the principle(s) laid down by the Hon'ble Supreme Court by judgement dated 16-01-1976 passed in **The State Bank of India versus Shri N. Sundara Money** (Civil Appeals Nos. 933 and 934 of 1975), reported in **AIR 1976 SC 1111 : 1976 LAB. I. C. 769**, and relied upon by the workman herein, in defining the ambit and implication(s) of the **provisions of Section 2(oo) and Section 25F of the Act**, would squarely apply to the fact-situation as has come out in the instant dispute.

19. In the light of the pleadings as well as of the evidence led by the parties, it is also evident that the O.P./Company did not pay any 'compensation' (cross-examination of OPW-2 on 10.11.2017) or comply with the other provisions of **Section 25F** of the Act, prior to such 'retrenchment' of the workman, who admittedly had been in continuous service (as defined by Section 25B of the Act), without any blemish or break, of the O.P./Company for a period of over 18 years, including the year preceding his such termination/retrenchment from service. In



fact, it is on evidence (Exhibit-2) that while terminating his employment, the company also did not pay the workman his salary for the month of July, 2013, and clearly such termination would be hit by Section 25F of the Act, being violative of express provisions thereof.

20. In the light of the aforesaid deliberations, this Tribunal holds that the **termination of service of the workman Sri Debasis Paul by the O.P./Company M/s Dulichand Finance & Leasing Ltd. by their letter dated 31.07.2013 w.e.f. 01.08.2013 was not justified and was not in accordance with law and the same cannot be sustained in the eyes of law.**

21. The Issue No. 2 is answered accordingly, in favour of the workman as against the OP/Company.

**Issue No. 3 : To what relief is he (applicant) legally entitled to as per law?**

22. In light of the findings in respect of Issue No.2 it is imperative to examine as to what relief(s) the workman would be entitled to as per 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 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.*

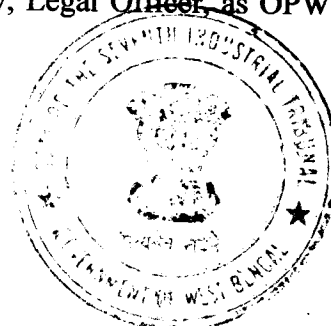
23. Having examined the provisions of law, it is imperative to examine the stand and evidence of the parties on the issue of relief(s) to which the workman may be entitled to as per law.

24. The workman, at para. 19 of his pleadings, has stated that the purported termination of his service was *void ab initio*, illegal and inoperative for which, the applicant / workman was entitled to reinstatement with full back wages and other consequential benefits thereto for the period of forced idleness so created by the OP/Company, and that apart in the prayer portion, besides seeking directions to

the effect that the termination of the service by way of refusal of employment was unjustified, uncalled for and illegal, the applicant / workman also asserted that he was entitled to reinstatement in service with full back wages and other consequential benefits and/or relief(s), and that the employer be directed to reinstate the workman/petitioner with full back wages and other consequential benefits.

25. Deposing in support of his such pleadings and prayers, the workman Debasis Paul (PW-1) prayed for (paras. 13 & 14 of his affidavit-in-chief) reinstatement in service with full back wages and other consequential benefits and further, PW-1 identified copies of his annual salary sheets for the years 2012-2013 and 2013-2014 (**Exhibit – 6** collectively, reflecting, among others, the rate of annual increments) he had been given by the OP/Company w.e.f. 1<sup>st</sup> April, 2012 and 1<sup>st</sup> April, 2013 respectively. Though it was not pleaded nor testified by the workman that he was unemployed during the pendency of this proceedings, during the cross-examination of PW-1 (on 03.11.2015) it came out specifically that the applicant/workman was unemployed. Further, it is also admitted by both parties that the workman had put in 18 long years of unblemished service and that he was a permanent staff of the OP/Company.

26. On the other hand the OP/Company, answering to the claims of the workman for reinstatement and full back wages, stated that there was no scope for reinstatement of the applicant (para. 7 of its w/s) primarily for the reasons that the business of the OP/Company had changed w.e.f. October, 2013 and that the other staff of the company had resigned, and further that the only activity going on was realization of loans already given to its clients. Supporting such plea of the OP/Company, Krishna Sadhan Dey, Legal Officer, as OPW-2 reiterated that the



business of financing had completely stopped and the only activity going on was realization of outstanding loans which was negligible (para. 9 of his affidavit-in-chief) and further that the OP/Company was financially handicapped due to such halt of its business of financing (paragraph-10) and further, OPW-2 also stated that as per the procedure in their company the age of superannuation of an employee was 58 years (paragraph - 16 of his affidavit) and that since the workman at the time of his appointment on 17.05.1995 was 37 years old as per his own biodata (**Exhibit – 1**), the workman had already attained the age of superannuation and hence there was no scope for his reinstatement in the Company.

27. OPW-2, in support of his testimony also brought on record the copies of resignation letters of four staff of the Company, all dated 01.09.2013 (**Exhibits – A/1, A/2, A/3 and A/4**).

28. With regard to the first limb of argument(s) advanced by the OP/Company to support its stand that there was no scope for reinstatement, this Tribunal finds that the resignation letters of four staff members (Exhibits- A/1, A/2, A/3 & A/4), all apparently signed and/or submitted on a single day (01/09/2013), by themselves are neither an indicator nor a proof of change of its business or closure of the OP/Company. In this regard, it came to be noted that, at the instance of the workman, the letter of authority issued to OPW-2 by the OP/Company to depose before this Tribunal was marked as **Exhibit-B** and from such document it would appear that on 27.05.2014 (the date of its issuance), the company was not only operating from a new address, but also that Sri Krishna Sadhan Dey was very much in service of the OP/Company on that date. It would be relevant to recall that among the resignation letters brought on record by the OPW-2, one belonged

to Krishna Sadhan Dey (**Exhibit – A/2**) and hence, mere submission of resignation letters does not in any manner support the plea of the OP/Company that its business had changed and/or closed or that it suffers from financial incapacity, and it clearly appears to be an afterthought and a narrative developed to evade statutory responsibility. This finding also derives support from the language of the resignation letters themselves, where each of the staff states that he cannot continue in his employment, due to some unavoidable circumstances w.e.f. 01.10.2013. That apart, the OP/Company has not brought any other evidence that would reflect such change of business, or closure thereof or financial incapacity of the OP/Company. During the cross-examination of OPW-2, it came out that the OP/Company had not filed any document to show the financial incapacity and further it came out that they did not send any legal dues to the workman by way of a cheque because the amount was not settled. For the reasons aforesaid, this Tribunal does not find any cogent material on record to support the plea of the OP/Company that the reinstatement of the workman was not possible for reasons of change or closure of business of the OP/Company wef: October 2013, or for financial incapacity of the OP/Company.

29. However, on the second limb of argument(s) by the OP/Company that the workman had already reached the age of superannuation i.e. 58 years, it appears that such assertion of OPW-2, in his affidavit-in-chief, was neither denied nor put to the witness during his cross-examination suggesting that such age of superannuation was incorrect. On the point, this Tribunal also examined the contents of Exhibit-1, being the appointment letter as led by the workman himself, and it would appear that his date of birth mentioned therein is **11.01.1958**. It is thus clear that the workman would have attained the age of 58 years on **11.01.2016**, during the pendency of this case, and there appears

substance in the contention of the OP/Company that reinstatement of the workman was not possible as he had already reached the age of superannuation during the pendency of this proceedings.

30. To recollect the fact situation, as discussed hereinabove, it stands established that the applicant/workman was a permanent employee of the OP/Company, who had put in the golden years of his life to the long service of the OP/Company and at the age that he was unlawfully terminated from his job, it would have been extremely difficult for him to start afresh. That apart, it came out that the workman has been unemployed since termination of his service. Further, it has also come out that the case of the OP/Company that its business had changed or it was suffering from financial incapacity, has no legs to stand on and hence, cannot be believed. It also came out that had the workman been in service, he would have retired from the OP/Company on or around 11.01.2016, on superannuation, after completing nearly 21 years of service, which could not be possible solely for the reason of unlawful and unjust termination of the services of the workman by the OP/Company, as decided under Issue No.2 above.

31. In the light of the aforesaid discussion, and in light of the law laid down in Deepali Gundu (*supra*) this Tribunal finds and holds that the workman is entitled to the following relief(s) and is granted the same, and accordingly :

IT IS HEREBY

**ORDERED**

- (i) That, the order of termination dated 31-07-2013 w.e.f. 01-08-2013 of the workman issued by the OP/Company is found and held to be unjustified and

*sd/-*  
Judge, 7<sup>th</sup> Industrial Tribunal, Kolkata



unlawful, and is hereby set aside for it being illegal and unsustainable in terms of Section 25F and such other provisions of the Industrial Disputes Act, 1947;

- (ii) That, there shall be no order of reinstatement of the workman, however he shall be paid compensation in lieu thereof, and for calculation of such compensation/monetary relief, the workman shall be deemed to have continued in his service all along till the end of the month of his retirement i.e. 31.01.2016 and accordingly, he shall be paid full back-wages from the month of July 2013 till January 2016 (both inclusive), by the OP/Company, with consequential benefits, including increment at the same rate at which it was granted w.e.f. 01.04.2013, over and above the annual earnings of the workman for the previous fiscal;

The OP/Company is directed to pay the entire amount of compensation, as aforesaid, to the workman, within four weeks from the date of publication of the Award.

All the **Issues** in the instant proceedings are answered in the aforesaid terms.

The aforesaid shall constitute the Award of this Tribunal, in the instant Case No. 37/ 2A(2)/ 2013, which shall stand disposed of, on contest.

Dictated & Corrected by me

*sdl/-*  
Judge

*sdl/-*  
(Avani Pal Singh)  
Judge  
Seventh Industrial Tribunal,  
Kolkata  
09-07-2018

*Judge*  
Seventh Industrial Tribunal

*sdl/-*  
Judge, 7<sup>th</sup> Industrial Tribunal, Kolkata

