

I/365459/2023

Government of West Bengal

Labour Department

I. R. Branch

N.S. Building, 12th Floor

1, K.S. Roy Road, Kolkata - 700001

No. Labr/. 120 / (LC-IR)/22015/2/2018 Date: 15-02-2023

ORDER

—
WHEREAS an industrial dispute existed between M/s. Metro Garage, 37, Motisil Street, Kolkata – 700013 and Sri Hari Shankar Bhartia, S/o Munnial Bhartia, Darwan's Quarter of Metro Garage, 37, Motisil Street, Kolkata – 700013 regarding the issue, being a matter specified in the second schedule to the Industrial Dispute Act, 1947 (14 of 1947);

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

AND WHEREAS, Second Labour Court, Kolkata heard the parties under section 10(1B) (d) of the I.D. Act, 1947 (14of 1947).

AND WHEREAS Second Labour Court, Kolkata has submitted to the State Government its Award under section 10(1B) (d) of the I.D. Act, 1947 (14of 1947) on the said Industrial Dispute.

Now, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14of 1947), the Governor is pleased hereby to publish the said Award dated 20/12/2022 as shown in the Annexure hereto vide memo no. 181- L.T. dated – 07/02/2023.

ANNEXURE

(Attached herewith)

By order of the Governor,

Sd/-

Special Secretary
to the Government of West Bengal

I/365459/2023

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

: 2 :

Date: 2023

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

1. M/s. Metro Garage, 37, Motisil Street, Kolkata – 700013.
2. Sri Hari Shankar Bhartia, S/o Munnialal Bhartia, Darwan's Quarter of Metro Garage, 37, Motisil Street, Kolkata – 700013.
3. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Building, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata – 700001.
5. The Sr. Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

Special Secretary

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

Date : 2023

Copy forwarded for information to: -

1. The Judge, Second Labour Court, West Bengal, with respect to his Memo No. 181 -L.T. dated 07/02/2023.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata – 700001.

Special Secretary

In the matter of an Industrial Dispute between Sri Hari Shankar Bhartia Son of Munnalal Bhartia residing at Drawan's Quarter of Metro Garage, at 37, Motisil Street, Kolkata-700013 and Sri Sailen Kumar Sen of M/s. Metro Garage, 37, Motisil Street, Kolkata-700013.

[Case No. 08/2008 U/s 10(1B)(d) of the Industrial Disputes Act, 1947]

BEFORE THE SECOND LABOUR COURT, WEST BENGAL, KOLKATA

PRESENT: SRI ARGHA BANERJEE, JUDGE

SECOND LABOUR COURT

KOLKATA.

DATED: 31/01/2023

A W A R D

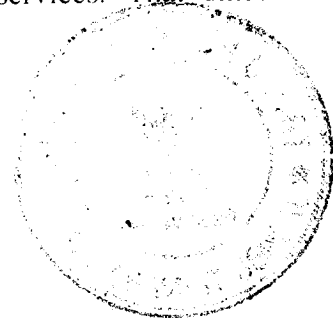
This is a case under section 10 (1B)(d) of The Industrial Disputes Act, 1947 filed by the applicant for his reinstatement in service along with full back wages /salaries for the period of unemployment. The case of the applicant as elucidated in the application under section 10 (1B)(d) of the Industrial Disputes Act, 1947. That the case in a nutshell is:

FACTS OF THE CASE IN BRIEF

CASE OF THE APPLICANT

That the O.P concern as elucidated by the applicant is a reputed Garage in Calcutta and is being managed by its Proprietor Sri Sailen Kumar Sen and his son in a very autocratic and discriminatory manner without having any regard to the laws of the land. That the said employer indulges in unfair Labour practices and treat the workmen as slaves and resorting to the policy of hiring and firing. The management victimizes the workmen who raised their voices against the management for their wrongful and illegal acts by implicating them in false, baseless, frivolous and imaginary charges. It also discriminates one workman from another Co-workman. That the applicant was appointed long back in the year 1997 as "Darwan" and used to stay inside the room of the said Metro Garage premises like his father and was a faithful Employee of the Employer. That his last drawn salary was 2,300/- p.m. plus other benefits for 24 hours duty as a Care-Taker and Darwan staying inside the Metro Garage and had been discharging his duties honestly and sincerely and was appreciated for his performances during his long service period since 1997. That the said workman was involved in the membership of the Employees' Association affiliated to Hind Mazdoor Sabha and the concerned workman through union submitted their charter of demands to the management for enhancement of wages and other benefits. The employer then and only then became angry and started behaving badly with workman and gave wild, baseless and false allegations against him for terminating his services. That the O.P had terminated the services of Sri Hari Shankar Bhartia w.e.f 1st October, 2006 verbally on flimsy and imaginary ground without issuing a charge-sheet and providing him any opportunity to explain the reason behind his termination from services. That since

Sd/-
Judge
Second Labour Court W.B.



September, 2006 no wages and other benefits was paid to the concerned workman despite his repeated appeals and request, causing enormous hard ship to the concerned workman.

That the said workman requested the employer to: withdraw the termination order and allow him to resume his duties but the said appeal was turned down by the employer despite the fact the concerned workman has been working over the years in this said Metro Garage. That finding no other means the said workman sought the intervention of the Labour commission Govt. of West Bengal at the long last relating to the illegal termination of his services. That the Assistant Labour Commissioner called a numbers of conciliation meetings but the employer did not attend the said meetings and conferences despite repeated calls and intimation to him by the conciliation officer and his representatives. However, that the conciliation had failed due to adamant and non-cooperative attitude of the employer of the Metro; Garage and the concerned workman requested the conciliation officer to issue certificate vide no. 111/165/07/LCC dated 18.01.2008.

That it is the further contention of applicant that his termination is not only illegal and malafide in view of non-issuance of any show-cause/charge-sheet and/or holding of domestic enquiry but as well as due to non-compliance of provisions of Sec. 25F of the Industrial Dispute Act, 1947 and hence it is liable to be quashed in limine. That, the concerned workman is still not gainfully employed and facing tremendous financial difficulties and hardship to run his family.

[The father of Hari Shankar Bhartia, Late Munilal Bhataria who worked in this Garage for more than 40 years and died in harness but said employer did not pay his legal dues and gratuity/provident fund etc. despite repeated request by his son Sri Hari Shankar Bhartia, applicant of this case under reference.]

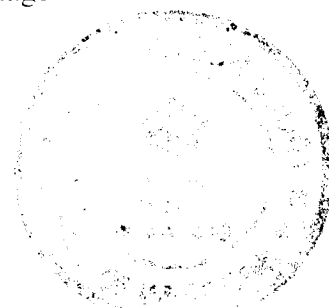
CASE OF THE OPPOSITE PARTY

It is the contention of the Opposite Party who had appeared in the instant matter that the instant case is false, frivolous, malicious, vexatious, harassing, had been filed by the applicant with suppression of material facts essential for proper adjudication of the case and is liable to be dismissed in limine.

That the Opposite Party emphatically denies and disputes the allegations made in para 2 of the written statement that the Management has indulged itself in any kind of unfair labour practice or that the Management has victimised any of its workman or that the Management has discriminated any of the workman from others. All such allegations are false, frivolous, baseless.

That the Opposite Party emphatically denies and disputed the statements and allegations contained in paras 3, 4, 5 of the written statement filed by the workman. The Management states that at no point of time, the Applicant Shri Hari Shankar Bharatia was appointed as an employee of M/s. Metro Garage. That the fact is that, the father of the said Hari Shankar Bharatia, Late Munnilal Bharatia was an employee of the Management and employed in the post of "Darwan". The said Late Munnilal Bharatia was given accommodation for residence of himself and his family inside the premises of the M.s. Metro Garage. The said Late Munnilal Bharatia continued to occupy and reside in the quarter provided to him by the Management till his death. The instant applicant Shri Hari Shankar Bharatia, also resided with his father, and is continuing the possession and occupation of the same. The accommodation is not given to him by the Management as condition of service as the same was not an employee of the Management. The statements

Sd/-
Second Labour Court



that Hari Shankar Bharatia was employed by the management or that he worked for 24 hours in the post of "Darwan" or that he drew salary of Rs. 2,300/- per mensem was categorically denied.

That the Opposite Party emphatically denies and disputes the allegations contained in paras 6, 7, 8, 9 of the Written Statement filed by the Applicant and makes no comment regarding taking membership of Employees' Association of the said Hari Shankar Bharatia, as the same is not known to the Management. The allegations that on receiving Charter of Demand, the Management behaved wrongly is baseless. It is also emphatically denied that the service of the said Hari Shankar Bharatia was terminated on flimsy ground, because, at no point of time, he was employee of M/s. Metro Garage.

That the O.P had not attended the conciliation proceedings as because the notice of conciliation proceedings did not reach the Management, and the Management was in utter darkness about proceeding of the same. That the Opposite Party further submits that the instant case is glaring example of abusing the process of the Learned Court for wrongful gain and illegal purpose. That, the said Hari Shankar Bharatia, has been putting in pressure on the O.P for employing him in the service of the Management, in the place of his deceased father but the O.P was not interested and also does not adopt the policy of compassionate employment. That, the O.P. further submits that it is not the policy of the same that the services and posts in the O.P concern shall be filled up only from the families of the erstwhile employees. There is no legal compulsion on the O.P to employ only the sons of the erstwhile employees. There is no legal compulsion on the part of the O.P to employ only the sons of the erstwhile employees. It is open to it to employ any person of its choice. That the applicant for some time had been putting pressure upon the O.P concern, either to employ him in the post of his deceased father Late Munnihal Bharatia or to pay him certain sum of money. That, the O.P had only denied such proposal but also had asked the applicant to vacate the residential accommodation allotted to his father, which is still being occupied by him. That the said applicant had asked the O.P, either to pay him with a substantial sum of money in lieu of which he would vacate the premises, or to employ him as "Darwan" and both the proposals were refused by the O.P concern. That the O.P prays for dismissing the instant application filed by the applicant.

The following issues were framed to come to a decision of this instant matter.

ISSUES

- Whether the application u/s. 10(1B)(d) of the Industrial Disputes Act, 1947 filed by the applicant is maintainable in the present form?
- Whether the termination order of the workman was proper and justified in facts & Law?
- What other relief or reliefs in any is the applicant workman entitle to get as per law & Equity?

EVIDENCE ON THE RECORD

Sd/-



In order to substantiate the case the applicant had adduced himself alongwith Meghnad Josh as P.W. 2; Dr. Sajal Basu as P.W.3; Dilip Hui as P.W. 4; Chotelal Bhartiya as P.W. 5. That the O.P had adduced three witnesses namely O.P.W. 1 Sainen Sen; O.P.W 2 Kesab Giri and O.P.W 3 Tapas Kuma Sahoo. The documents produced before this Court were marked in the following manner:

EXHIBITS ON BEHALF OF APPLICANT

Exhibit 1 – Copy of Notice issued by Assistant Labour Commissioner dated 20.12.2007.

Exhibit 2 – Xerox Copy of Notice issued by Assistant Labour Commissioner dated 31.10.2006.

Exhibit 3 –The receipt copy of Employees Association.

Exhibit 4 – The copy of letter of Employees Association addressed to the Labour Commissioner dated 10.08.2006.

Exhibit 5 – Copy of Memo issued by the Labour Commissioner dated 31.10.06.

Exhibit 6 – The copy summon of the City Civil Court, Calcutta(with objection).

Exhibit 7 – Copy of Form H

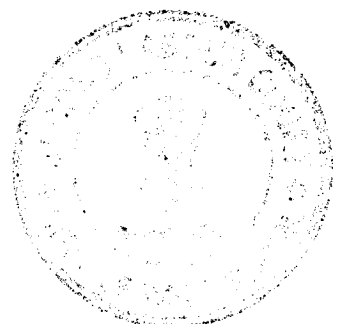
Exhibit 8 – Copy of Identity Card of Dr. Sajal Basu.

Exhibit 9 – Identity Card of Dr. Sajal Basu as Press Reporter.

Exhibit 10 – Ration Card of Hari Shankar Bhartia (applicant)

Exhibit 11 - Copy of Memorandum of Settlement dated 07.03.2017

Exhibit 12 - Copy of order No.100 dated 29.09.2014.



Sd/-
[Signature]
[Name]
[Designation]

EXHIBITS ON BEHALF OF O.P. COMPANY

Exhibit A – Copy of salary register for the month of April, 1991 May 1993 and another.

Exhibit B – Copy of Salary Register for the year July, 1996-2006.

Exhibit C – Copy of Investigation Report dated 26.03.2014.

EVIDENCE OF THE WITNESSES

EVIDENCE OF THE APPLICANT

From the substantive evidence of the P.W. 1 Sri Hari Shankar Bharatia : it is clear that

- 1) That the father of the same used to work for the O.P concern and used to reside in the quarters provided by the O.P concern. That neither any appointment letter was given to the father of the applicant nor the applicant was provided with any appointment letter and the same used to do the duties of a "Darwan". However not documents were provided by the witness to substantiate the fact that his father or himself used to work for the O.P concern as "Darwan".
- 2) That after the demise of the father of the applicant the same used to reside in the quarters provided by the O.P concern and had not vacated the said quarters. That apart from him 4 to 5 persons who were outsiders used to reside in the said premises. The applicant as contended used to draw a salary of Rs. 2,300/- per mensem however such fact was not substantiated by producing documents to that effect.
- 3) That one Chotolal Bhartia and one Meghnath Josh used to work along with the applicant and the same used to stay inside the garage. The applicant was terminated from the service because as the same had participated in the union activity with effect from 01.10.2006 and was not given even one month's notice pay or any other compensation. However not documents were provided by the witness to substantiate the fact that the same was terminated from the service.
- 4) The same after his termination from the service had raised a protest against the O.P concern and had attended the conciliation proceeding before the Labour Commissioner, Kolkata

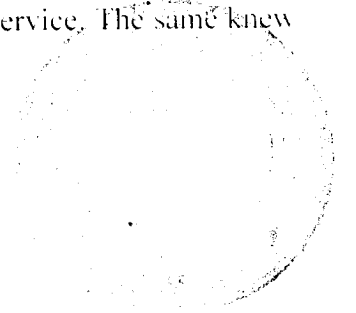
From the substantive evidence of the P.W. 2 Sri Meghnath Josh it is clear that

- 1) That the same used to work as a sweeper for the O.P concern and the P.W. 1 used to work as a "Darwan" alongwith one Chatulal Harishankar Bhartia and Motilal Bharatia; however not documents were produced to substantiate such facts.
- 2) The same had no witness to substantiate the facts that all of them were workers of the O.P concern and used to draw monthly salary from the said concern.

From the substantive evidence of the P.W. 3 Dr. Sajal Basu it is clear that: -

- 1) The same knew the applicant and happened to be the President of the Employees' Association and was also acting as a press reporter of Indian News Service. The same knew

Sd/-



the applicant and his father to be a "Darwan" who worked and resided in the O.P concern. However, no appointment letter was issued to the applicant and his father. His father had worked for more than 30 years in the garage. The applicant and his father were the members of the union. Though it has been contended by the applicant that the same had joined the service of his father yet no documents were produced to substantiate such fact.

2) The witness had identified the receipt of the Association which was marked as exhibit-3 and the letter given to him on behalf of the Employee's Association dated 01/08/2006 which was marked as exhibit-4. The copy of memo. issued by the Labour Commissioner. was marked as Exhibit-5. The copy of the summon issued by the Learned City Civil Court. Calcutta, was marked as Exhibit-6. The Form-H which was marked as exhibit-7 tends to show that the above mentioned association was a registered one. The identity card of the witness was belonging to the union was marked as Exhibit-8 and that of the Press was marked as Exhibit-9.

3) The Exhibit A which happens to be the attendance register tends to show the fact that the father of the applicant used to work in the O.P concern. However, no other documents were produced by the applicant to substantiate the fact that the same was appointed after his father by the O.P concern.

From the substantive evidence of the P.W. 4 Sri Dilip Hui it is clear that: -

1) The same knew the applicant of this case and was the General Secretary of the Employees 'Association (Affiliated to Hind Majdoor Sabha). The P.W. 3 was the President of the union. The applicant at present resided at Metro Garage. The father of the applicant, Meghnath Josh and others resided there with the applicant.

2) The Exhibit-6 tends to show the fact that in the cause title of the summon of the City Civil Court the name of the father of the applicant was shown as Monilal Bhartia appearing on behalf of the union and they had preferred a charter of demand to the O.P concern. The said charter of demand which was marked as Exhibit-4 was sent to the Labour Commissioner.

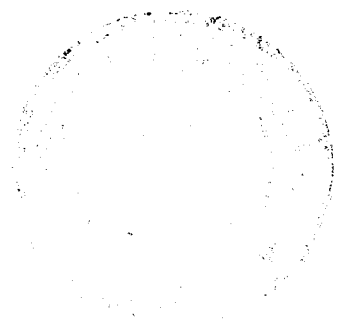
3) The O.P concern had terminated the service of the applicant on 01.10.2006 along with Chotelal Bhartia, Harishankar Bhartia and Meghnath Josh and after termination of service the applicant had raised a dispute before the Labour Commissioner. Thereafter, the Labour Commissioner called for the conciliation meeting and the company had failed/ neglected to attend the meeting. That during the time of the termination the company had not paid any compensation or benefit to the applicant.

4) The applicant though had sent the charter of demands to the company and yet the same had failed to produce the same. The witness had admitted the fact that there were no documents to show that the company had gave appointment to the applicant in the company.

5) In the paragraph paragraph- 6 of the Exhibit - 6 produced by the applicant it is being mentioned that the applicant was a bonafide tenant under the O.P concern. There is also no document in the Court to substantiate the fact that the applicant used to work under the O.P. concern since 1997.

From the substantive evidence of the P.W. 5 Chotelal Bharatia it is clear that: -

Sd/-



1) The same used to work in the O.P concern as a "Darwan" and knew the applicant of this case who also used to work in garage and was also a member of the same union. The service of this witness and Meghnath Josh was also terminated. However no documents were produced by this witness the substantiate such fact.

2) That at the time of the termination of service of the applicant no charge sheet was issued against him or no domestic enquiry was conducted against him. Neither any compensation was paid to the same at the time of his termination. The father of this witness and the father of the applicant used to work together previously in the O.P concern. During the illness of the father of the applicant the same had joined in the service and the applicant and this witness are still residing in the garage.

3) That no documents were produced in order to substantiate the fact that the applicant had joined in the service during his father's illness.

EVIDENCE ON BEHALF OF O. P. COMPANY

From the substantive evidence of the O.P.W. 1 Sainen Kumar Sen it is clear that: -

1) The same being the proprietor of the O.P concern which was engaged in the business of parking the cars of different business and car owners inside the garage premises on specific charges. The same was maintaining the attendance register which was marked as Exhibit B and the salary register of the employees which was marked as Exhibit- C. The witness had denied the existence of any employer and employee relationship in between the applicant and the O.P concern.

2) The father of the applicant was an employee of the O.P concern and an appointment letter was issued in such regard. The O.P had never appointed Sri Hari Shankar Bhartia the applicant at the O.P concern nor even in the year 1997. The applicant's father late Munnilal Bhartia was an employee of the company and worked as darwan till 2006. Occasionally the applicant came to see his father and resided with his father at the garage premises for a few days. The O.P had categorically denied the fact that Sri Hari Shankar Bhartia worked for 24 hours a day in the post of darwan or he drew salary for a sum of Rs. 2,300/- per mensem.

3) The witness had categorically denied the fact that the applicant had joined the O.P concern in place of his father and was an employee of the O.P concern. Owing to the reason that the applicant was not an employee there was no question of issuance of termination letter from the same.

4) The witness had failed to state from which date the father of the applicant took retirement from service and the retirement age of in the O.P concern is 65years. The father of the applicant used to suffer from ailments and the same had not issued any letter to the father of the applicant informing him that his retirement age was 65 years. The father of the applicant occasionally used to visit his native village quite often and the O.P had denied the fact that during the period of absence of the father the applicant used to work in the O.P concern. Chotelal Bhartia and Meghnath Josh also used to work along with the father of the applicant.

5) The witness had identified the Memorandum of settlement entered into the O.P. Company and Meghnath Josh in Case No.09/2008 which was marked as Exhibit -11. The same had identified the certified copy of order No.100 dated 29.09.2014 passed by the 1st



Industrial Tribunal in case No. VIII-107/2007 that was marked as Exhibit-12. The O.P had not challenged the said order and the same had not filed any document in order to show that the applicant was working as Darwan at M/s. Shaw Bros (Wine) Pvt. Ltd.

From the substantive evidence of the the OPW-2 Sri Keshab Giri it is clear that: -

- 1) The witness was the Manager of the O.P concern which was engaged in the business of parking the cars of different business and car owners inside the garage premises on specific charges. The same was maintaining the attendance register which was already marked as Exhibit – B and the salary register of the employees which was already marked as Exhibit- C. The witness had denied the existence of any employer and employee relationship in between the applicant and the O.P concern.
- 2) The father of the applicant was an employee of the O.P concern and an appointment letter was issued in such regard. The O.P had never appointed Sri Hari Shankar Bhartia the applicant at the O.P concern nor even in the year 1997. The applicant's father late Munnikal Bhartia was an employee of the company and worked as darwan till 2006. Occasionally the applicant came to see his father and resided with his father at the garage premises for a few days. The O.P had categorically denied the fact that Sri Hari Shankar Bhartia worked for 24 hours a day in the post of darwan or he drew salary for a sum of Rs. 2,300/- per mensem.
- 3) The father of the applicant was an employee who had taken superannuation and he did not knew how much the same was drawing salary. The witness failed to remember the last drawn salary of the father of this applicant and the father of the applicant had retired in the year 2006 and at that time his age was more than 60 years.
- 4) The witness failed to state as to whether the applicant Hari Shankar Bhartia had his ration card at the address of 37, Motisil Street, Kolkata-13 and had denied the fact that Hari Shankar Bhartia was working under the O.P concern as "Darwan" or that the same is continuing his service till day.

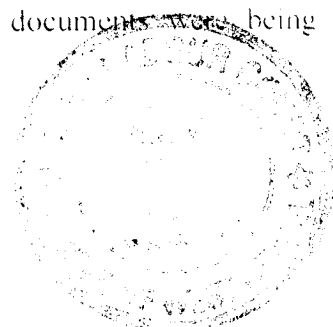
From the substantive evidence of the OPW-3 Tapas Kumar Sahoo it is clear that: -

- 1) The same being attached with M/s Detectives Bureau was appointed for causing one investigation over the matter of Mr. Hari Shankar Bhartia and had performed the investigation. The same had identified the report which was marked as Exhibit- C.
- 2) The investigation agency was a proprietorship concern wherein Soumitra Banerjee was the proprietor. The exhibit- C did not contain the name of the team which had participated and conducted the investigation. No supporting documents were produced alongwith the exhibit- C to show the basis of the conclusion of the investigation.
- 3) The same had failed to produce any document to show the fact that Mr. Sailen Kumar Sen had given written instructions to cause investigation into the matter.

ARGUMENTS MADE BY THE PARTIES

Argument on behalf of the Applicant

The applicant had argued upon the fact that the same was appointed long back in the year 1997 as Durwan and used to stay inside the room of the Metro Garage premises like his father. The last drawn salaries of the applicant was Rs. 2300/- plus other benefits. That owing to the policy of the company no statutory papers or documents were being



maintained for keeping the records of its workmen in clean and transparent manner. This fact was revealed from the evidence recorded before the learned Labour Court (Para 3 & 4 of the written statement of the workman).

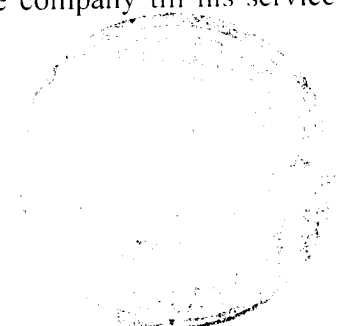
The applicant was the member of Employee's Association affiliated to Hind Mazdoor Sabha and it happened that union had submitted a character of Demand to the management of the company the management simply because of applicant's being member of that union terminated him from service w.e.f. 1st October, 2006 verbally on flimsy and imaginary ground, without issuing a charge sheet and providing him any opportunity to explain any reason behind his termination from service. It argued by the Ld. Counsel for the applicant that the same had been denied his wages since 2006 and other benefits and other legitimate dues of his father late Monilal Bhartia who were also workman in this company, (Para 6,7,8 of the applicants written statement).

That, after termination of service the applicant had made an appeal to the management for withdrawal the termination order but while no fruitful result could be found. That, even after the legal intervention of the Labour Commissioner and series of conciliation proceeding no proper solution could be arrived at. That as a result a request was made before the conciliation officer who had issued certificate vide No. 111/165/07/LCC dated 18.01.2008, keeping in mind that the instant dispute is an industrial dispute and a fit case for allowing the same for hearing before the Learned Labour Court, Calcutta (Para 9,10,11,12,13 of the applicants written statement).

The applicant further argued upon the fact that the termination w.e.f. 1.10.2006 of the applicant is illegal, invalid and inoperative in the eye of law and the termination of the workman concerned is contravention of section 25F of I.D. Act read with Section 2 (00). (Para 14 of the written statement of the applicant). The workman concerned is not gainfully employed and has been passing the days with tremendous hardship (Para 15 of the written statement of the applicant).

The evidence of the applicant above named was recorded on 10.02.2011, 22.03.2011 where in it was affirmed that he used to work with Chotolal Bhartia and Meghnath Josh the sweeper of the company and the applicant had raised with them inside the garage. The applicant confirmed the fact that he was in employment of the company till his service

Sd/-
[Signature]
[Name]
[Designation]



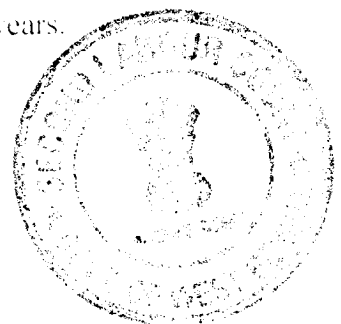
was terminated verbally on 01.10.2006 by the management without issuing any letter of termination. According to applicant he was in service from the year 1997 till his service was terminated on 01.10.2006. That the PW-2 Meghnath Josh affirmed the fact in examination-in-chief on 12.12.2011, that the applicant was his co-employee and he used to work in the garage as a darwan. PW-2 further added that after formation of union they were told by the management for not coming into office. That, Dr. Sajal Basu in examination-in-chief recorded evidence on 30.05.2013 and 10.09.2013 as PW-3 as President of the Employees Association. PW-3 further confirmed the fact that PW-1 the applicant was not only the member of their association but he used to work in the garage. PW-3 proved the documents Ext.3, Ext-4 and Ext-5 which are receipt of Association. letter sent from Association Dated 01.08.2006 and memo issued by The Labour Commissioner. PW-3 further stated that the O.P. company did not attend conciliation proceeding. The PW-3 further confirmed the fact that both father of applicant as well as he himself used to work in the garage along with Chotelal another co-employee was also in the employment but later he was also terminated from service.

Mr. Dilip Hui PW-4 in examination in chief on 29.01.2014 stated that he was working in the garage and used to reside inside the garage with the applicant and identified the applicant as workman under the management of the company PW-4 added that the applicant was working under the O.P. company since 1997. Due to illness of his father the applicant joined the company and used to reside inside the garage. PW-4 proved the charter of demand Ext.4 which was the triggering factory against terminating the services of the applicant along with other workmen namely Chotelal Bhartia, Maghnath Josh. PW-4 further stated that after termination of service of the applicant an industrial dispute was raised before the Conciliation Officer and company did not meet the conciliation proceeding. That, PW-5 Sri Chotelal Bhartia on 15.05.2014 recorded his evidence of examination in chief and stated that the service of the applicant, himself and Meghnath Josh was terminated by the management of the company. He further confirmed the fact that the applicant was not issued any charge sheet nor any domestic enquiry was initiated against him, no letter of termination was issued against the applicant and no statutory compensation U/s.25F of I.D. Act read with Section 2 (00) was offered or paid to the applicant at the time of termination of service.

That, OPW-1 Sri Sailen Kumar Sen in his deposition dated 07.03.2017 in cross examination admitted the following facts.

- The father of applicant retired from the company at the age of 65 years.

Sd/-



- Chotelal Bhartia (PW-5) and Maghnath Josh (PW-2) were with the father of the applicant in the company.

- Meghnath Josh as workman of the company entered into settlement with the company in case No. 09/2008 (Ext.11).

From the above fact it is very much transparent that those regular workmen on oath reaffirmed the fact that the applicant was their co-worker and in absence of his father the applicant was engaged in the service and delivered service till his illegal termination of service. While the company did not maintain any service related papers at their disposal then it was wholly unexpected matter to get any documents related service from the applicant.

It is not to be out of place to mention that when in one hand Chotelal Bhartia PW-5 was asked by management to produce document regarding his working in the company then ultimately management witness OPW-1 in cross-examination stated "Chotelal Bhartia and Meghnath Josh also used to work along with father of applicant" (Cross examination dated 07.03.2017).

In cross examination OPW-2 on 22.08.2017 and 02.02.2018 admitted the following facts:-

- "I am deposing in this case against Shri Hari Shankar Bhartia. His father was also employed under the O.P. Company. I do not know how long his father had been working in the company. I cannot remember as to whether the appointment letter of the father of Hari Shankar Bhartia is filed in this case or not (Cross 22.08.2017).

- The father of the applicant retired in the year 2006, and at that time his age was more than 60 years. Chotelal Bhartia stilling I am employee under the above company (cross on 22.08.2017).

- Meghnath Josh was also an employee in our company. I cannot say as to whether Meghnath Josh was issued appointment letter from our company or not. I do not know as to whether any appointment letter was issued in favour of Chotelal Bhartia by our company or not (Cross examination of OPW-2 dt. 02.02.2018).

- The OPW-2 alleged that the applicant was in the employment of one so called company named Shaw Brothers. But he admitted in cross examination that "I did not submit any document to that effect that he was working there" (Cross examination of OPW-2 dt. 02.02.2018).

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[Signature]



•OPW-3 was the summoned witness who was from an investigating company named M/s. Detective Bureau. Appeared to prove the alleged fact that the applicant employee was in employment of so called company named Shaw Brothers. It is peculiar enough to notice that no; summon was issued to so called Shaw Brothers to appear before the Learned Labour Court to justify the allegation of the management of M/s Metro Garage that the applicant was the employee of the aforesaid company. Hence entire statement of investigation agency presumed to be a fake one. Besides that if the entire cross examination of OPW-3 is referred dated 28.03.2019 is scrutinized then entire hollowness of total investigation process will be unfolded in the reality. Relevant portion of the cross examination of OPW-3 is referred below:

“In the report already marked as (Ext.C) here is no note to the effect upon whose instruction the investigation was held and report was prepared. There are no names of the members of the team who participated in the investigation. Save and except (Ext.C) there is no other report separately to our proprietor, but our report was submitted to the management of the proprietor. The said report is not submitted in the record. The date of investigation and the date of submission of report to our management are not noted in Ext.C. No supporting documents were produced before this Court on whose basis the report (Ext.C) was prepared.

It is fact that the authorized signatory of Ext-C was not with our team for investigation. In respect of second paragraph of Ext-C, we did not submit any document. There is no date on report upon which the fact revealed. It is fact that in Ext.C there is no note of the company, except Mr. Sailen Kumar Sen. There is no endorsement on Ext-C that Mr. Sailen Kumar Sen instructed us for investigation. I do not know about the status of Mr. Sailendu Kumar Sen” (Cross examination of OPW-3) dated 28.03.2019.

Ext.1 to Ext-II are the undisputed documents proved by the applicant and on his behalf from which it became apparent that the applicant himself and union on behalf of applicant raised dispute in different stages challenging the illegal termination of service of the applicant. The management by any contra evidence against the statements of PW-1, PW-2, PW-3, PW-4, PW-5 could establish that the applicant was not in the employment of M/s. Metro Garage nor the so called investigation report (Ext-C) could help them much. Because the said report from itself became an invalid statement having no legal basis at all.

Besides that the order No 100 dated 29.09.2014 of this Learned Labour Court has already expressed the fact prima facie in favour of the applicant impliedly holding that on the basis of primary inference the applicant was in the employment of the company. Under reference

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M/s. i.e. Metro Garage. It is curious enough to note that no challenge was made from the side of the management against the afore said order for dialoguing its legal effect. Lastly from the view of period of limitation, cause of action there are no infirmities caused by the applicant which may be noted case was instituted before the Learned Tribunal according to law.

Hence from the above facts and circumstances it is humble submitted that the an award be passed in favour the applicant holding the termination of service of the workman from 01.10,2006 as illegal invalid and inoperative in the eye of law and further hold that the termination was effected in contravention of section 2(00) read with Section 25F of Industrial Disputes Act, 1947 and the applicant is entitled to reinstatement with full back wages along with all consequential benefits.

ARGUMENT ON BEHALF OF THE OPPOSITE PARTY

The O.P. argued upon the fact that the nature of business of M/s Metro Garage is to park the cars of different owners inside the garage with certain parking charge per month. The company appointed two darwans/Security Guards to take care of the said cars as well as to look after the security of the said garage. There is no employer and employee relationship by and between Sri Hari Shankar Bhartia and the opposite party company Metro Garage at no point of time. The same was never employed by the company. His father late Monnilal Bhartia was a Darwan of the company and he stayed inside the garage. Occasionally his son Sri Hari Shankar Bhartia came to Kolkata and resides with his father inside the garage. Sri Hari Shankar Bhartia was never an employee of the company. Therefore, there was no question of payment of salary for a sum of Rs. 2,300/- per month. The applicant examined five witnesses and the company examined only three witness in this case.

Issued framed on 26.10.2009

Issue No. 1 was whether the application is maintainable?

The company used to maintain Attendance Registers and Salary Registers for its employees since inception of the business. The names of all the employees are borne in the said Salary Registers. Ext-B is the Salary Register for the period from July, 1996 to 2006. There are two darwans i.e., Munnalal Bhartia, father of Sri Hari Shankar Bhartia and Sri Chotelal Bhartia and they have received their salary after putting their thumb impression and put signature on the said Register. The witness of the company OPW-1 Sri Sailen Kumar Sen

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Judge

stated in his statement that the company maintains the Attendance Register and the Salary Regisster for its employees and there is no dispute about it. He also said that there is no employer and employee relationship by and between the company and Sri Hari Shankar Bhartia. He was never appointed by the company and nor even in the kyear 1997. Another witness of the company Sri Tapas Giri, OPW-2 stated in his statement thkat he is working in the Metro Garage as Manager. He said that the company never appointed Sri Hari Shankar Bhartia in the garage. His father was an employee. Occasionally Sri Hari Shankar Bhartia came to see his father and resides with his father at the garage premises. There is not a single piece of documents filed by Sri Hari Shankar Bhartia to show that he received the alleged salary for a sum of Rs. 2,300/- per month and even not a single document in the Court that he was appointed by the company as darwan in the year 1997 or thereafter. From the Ext-C i.e. the Confidential Investigation Report dated 26.03.2014, wherein your Honour will find that Sri Hari Shankar Bhartia has been working at Shaw Bros (Wine), 1A.J. L. Nehru Road, Kolkata- 700 013 for the last 15 years as darwan. Not only that Sri Hari Shankar Bhartia came to attend his case by wearing the uniform of Shaw Bros (Wine).

Sri Hari Shankar Bhartia was never an employee of M/s Metro Garage. The Exhibit- 6 that is the (Title Suit), in paragraph- 6 of the Mise. Case No. 869 of 2009 Sri Hari Shankar Bhartia claimed himself as bonafide tenant of suit premises by way of inheritance i.e. premises No. 37, Motisil Street, Kolkata- 7000d13 (address of the company). The applicant had not claimed that he is an employee of Metro Garage. The Exhibit- 4, i.e. Charter of Demands, the letter dated 01.08.2006 addressed to the Labour Commissioner, it is seen that the President of the Association mentioned three names in the said letter as their members i.e., Munnilal Bhartia, Chotelal Bhartia and Meghnath Josh. The name of Sri Hari Shankar Bhartia is not mentioned there. The O.P had argued upon the question that if the applicant is an employee his name ought to have reflected in Exhibit -3 dated 10.12.2005 it is mentioned about his subscription 2004-05 for a sum of Rs. 250/-. This is a manufactured document.

The applicant in his statement stated that O.P. company did not issue appointment letter to him and he verbally requested the company for issue appointment letter. This is totally false and beyond his pleadings. In cross-examination applicant failed produce any document in support of his contention. P.W.2 Sri Meghknath Josh stated in cross-examination stated that "It is a fact that Munnilal Bhartia was an employee under the company and the applicant used to live with me". He also admitted that he has no document to show that they are the employee of the company P.W.3 stated in his statement that the applicant joined the service in place of his father, which is beyond pleadings. This statement is totally false. The applicant stated that he joined the company in the year 1997. But the witness (P.W-3) stated in his statement **the applicant joined the service in place of his**

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father. I again draw your Honour's kind attention to the Exhibit -B i.e. the Salary Register. Your Honour will find that his father Munnial Bhartia worked upto September, 2006. The question arises that if his father worked upto September, 2006 then how he can worked in place of his father. In cross examination the witness admitted that in Exhibit -4 there is no mention of the name of Hari Shankar Bhartia. Another witness of the applicant Sri Dilip Hui (P.W.4) also stated in his statement that due to illness of his father the applicant joined the company. Exhibit -B shows that his father worked upto September, 2006 and received the salary. In cross examination the witness admitted that the applicant is a bonafide tenant. Prima facie there is no mention that he was the employee of the company. Another witness of the applicant Chotelal Bhartia (P.W.5) stated in his statement that he has not filed any document in the court to show that the applicant used to work under the O.P. garage. On the other hand your Honour will find that the company maintains the Salary Registers wherein the names of the employees are mentioned. The applicant never challenged the authenticity of the above said document. So from the above it is clear that the applicant was never been an employee of the opposite party company. Ext-C shows that the applicant is the employee of Shaw Bros.(Wine) Pvt. Ltd.

For entitlement of any relief the Learned Tribunal has to look on the following points:-

- Whether the concerned person is a workman as per section 2(s) of the Industrial Disputes Act, 1947?
- And balance of convenience is in the favour of the company.

In view of the above it is prayed that your Honour would graciously be pleased to hold that the applicant was/is not a workman of the opposite party company and as such he is not entitled to any relief as claimed.

DECISION WITH REASONS

Issue No. 1: - Whether the application u/s. 10(1B)(d) of the Industrial Disputes Act, 1947 filed by the applicant is maintainable in the present form?

Issue No. 2: - Whether the termination order of the workman was proper and justified in facts & Law?

Both these issues are taken up together for brevity of discussion and taking decision. The first aspect that is to be considered is whether this applicant comes under the purview



of the term "Workman" under the Industrial Disputes Act. Section 2(s) provides the definition as to who will be deemed to be a workman under the Industrial Disputes Act.

".....2(s) 5" workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature...."

In the present situation it is seen that there had been specific denials from the side of the O.P who has highlighted upon the fact that this applicant was never an employee and was never working for the O.P. concern. It is also seen that: -

1) That the father of the applicant used to work for the O.P concern and used to reside in the quarters provided by the O.P concern. That, neither any appointment letter was given to the father of the applicant nor the applicant was provided with any appointment letter and the same used to do the duties of a "Darwan". However, no documents were provided by the witness to substantiate the fact that his father or himself used to work for the O.P concern as "Darwan".

2) That after the demise of the father of the applicant the same used to reside in the quarters provided by the O.P concern and had not vacated the said quarters. That apart from him 4 to 5 persons who were outsiders used to reside in the said premises. The applicant as contended used to draw a salary of Rs. 2,300/- per mensem however such fact was not substantiated by producing documents to that effect.

3) That one Chotalal Bhartia and one Meghnath Josh used to work along with the applicant and the same used to stay inside the garage. The applicant was terminated from the service because as the same had participated in the union activity with effect from 01.10.2006 and was not given even one month's notice pay or any other compensation. However not documents were provided by the witness to substantiate the fact that the same was terminated from the service.

4) The same after his termination from the service had raised a protest against the O.P concern and had attended the conciliation proceeding before the Labour Commissioner, Kolkata.

5) That the P.W. 3 had stated that the applicant and happened to be the President of the Employees' Association and was also acting as a press reporter of Indian News Service.

Sd/-

The same knew the applicant and his father to be a "Darwan" who worked and resided in the O.P concern. However, no appointment letter was issued to the applicant and his father. His father had worked for more than 30 years in the garage. The applicant and his father were the members of the union. Though it has been contended by the applicant that the same had joined the service of his father yet no documents were produced to substantiate such fact.

6) That receipt of the Association which was marked as exhibit-3; the letter given to the P.W. 3 on behalf of the Employee's Association dated 01/08/2006 which was marked as exhibit- 4; the copy of memo, issued by the Labour Commissioner, that was marked as Exhibit- 5; the copy of the summon issued by the Learned City Civil Court, Calcutta, that was marked as Exhibit- 6; The Form-H which was marked as exhibit- 7 that tends to show that the above mentioned association was a registered one and The identity card of the P.W. 3 that belonged to the union was marked as Exhibit- 8 and that of the Press which was marked as Exhibit- 9; the Exhibit- 6 produced by the P.W. 4 which tends to show the fact that in the cause title of the summon of the City Civil Court in the name of the father of the applicant and the charter of demand which was marked as Exhibit- 4 that was sent to the Labour Commissioner does not substantiate the fact that the applicant was an employee of the O.P. concern.

7) The Exhibit A which happens to be the attendance register of the O.P. concern tends to show the fact that the father of the applicant used to work in the O.P concern. However, no other documents were produced by the applicant to substantiate the fact that the same was appointed after his father by the O.P concern.

8) The P.W. 5 used to work in the O.P concern as a "Darwan" and knew the applicant of this case who also used to work in garage and was also a member of the same union. The service of this witness and Meghnath Josh was also terminated. However no documents were produced by this witness the substantiate such fact. That, at the time of the termination of service of the applicant no charge sheet was issued against him or no domestic enquiry was conducted against him. Neither any compensation was paid to the same at the time of his termination. The father of this witness and the father of the applicant used to work together previously in the O.P concern. During the illness of the father of the applicant the same had joined in the service and the applicant and this witness are still residing in the garage. However, no documents were being produced by the same to substantiate such fact.

9) The O.P.W 1 being the proprietor of the O.P concern was engaged in the business of parking the cars of different business and car owners inside the garage premises on specific charges. The same was maintaining the attendance register which was marked as Exhibit - B and the salary register of the employees which was marked as Exhibit- C. The witness had denied the existence of any employer and employee relationship in between the applicant and the O.P concern. The father of the applicant was an employee of the O.P concern and an appointment letter was issued in such regard. The O.P had never appointed Sri Hari Shankar Bhartia the applicant at the O.P concern nor even in the year 1997. The applicant's father late Munnalal Bhartia was an employee of the company and worked as darwan till 2006. That, occasionally the applicant went to the garage to meet his father and resided with his father at the garage premises for a few days.

10) No documents were being produced by the applicant to prove the fact that this applicant had joined the O.P concern in place of his father and was an employee of the O.P concern. That, owing to the fact that the applicant was not an employee there was no question of issuance of termination letter from the same.



11) The Exhibit- C that happens to be a report from Detective Bureau which though tends to show the fact that the applicant was working as 'Darwan' at M/s Shaw Bros (Wine) Pvt. Ltd for 15 (fifteen) years and earning a sum of Rs. 10,000/- per mensem: yet such document is neither substantiated by other documents nor the field investigation report is being produced to prove the authenticity of such document. Accordingly, the exhibit-C could not be taken into consideration.

It is a settled principle of law that an obligation to prove a fact is upon the party who claims the same to exist. In the instant scenario the obligation to prove the fact that the applicant was an employee of the O.P concern was upon the applicant and the same has failed to discharge such burden.

The applicant has failed to prove the fact that the same was an employee employed in the O.P concern to perform the job of a "Darwan", whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, and was not dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. It can be said that the father of the same was being employed in the O.P. concern who used to reside inside the O.P concern. That, the applicant used to visit his father quite often. No documents were being produced by the applicant to substantiate the fact that the same was working in the O.P concern after the demise of his father

The applicant as transpired from the substantive evidences and the materials in the record that the father of the applicant was an employee of the O.P concern who was appointed as a "Darwan" and this applicant was never an employee of the O.P concern. Thus, it is clearly established that this applicant was not a workman working under the O.P in regard to which an Industrial Dispute under the above mentioned section could be raised

Thus, the written statement u/s 10(1B)(d) of the I.D. Act, 1947 (W.B. Amendment) filed by the applicant is not maintainable in law & facts as it clearly established that the applicant Hari Shankar Bhartia is not a workman as contemplated u/s 2(s) of the I.D. Act, 1947.

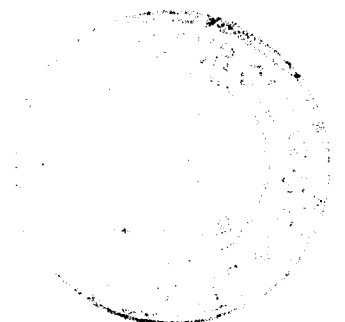
Now the question that comes before this Court is that whether the termination order of the workman was proper and justified in facts and in law.

In view of the discussions herein above it is clear that: -

- a) The father of the applicant used to work as a "Darwan" for the O.P concern and had been residing inside the O.P concern and the applicant used to visit his father at his residence inside the O.P concern;
- b) No document has been produced by the applicant to substantiate the fact that immediately after the demise of his father the same was appointed as a "Darwan" in place of his father;
- c) No letter of appointment has been produced by the applicant to prove the fact that the O.P had appointed the applicant to work as a "Darwan" in the said concern.

Sd/-
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Secy to the Court W.B.



Thus, from the above points it is clear that the O.P had never appointed the applicant as an employee in the O.P concern and hence the question of termination order of the workman does not arise. Accordingly, both these issues are decided in favour of the O.P.

Issue No. 3: - What other relief or reliefs in any is the applicant workman entitle to get as per law & Equity?

To come to the conclusion of the instant matter the following Judgements are taken up for discussion.

1991(63) Riaz Ahmed v. M.I. Mohd. of Bom. (Bom. H.C.) (BOMBAY HIGH COURT) B. N. SRIKRISHNA, J. Writ Petition No. 5043 of 1985 August 23, 1991 Between RIAZ AHMED and MUNIR ISMAIL MOHAMMED OF BOMBAY and another the Hon'ble Apex Court was of the opinion that "...Even if the story of voluntary abandonment of service by workman put by employer is accepted – It was incumbent upon the employer to hold an enquiry – Before treating the service as terminated on this ground – In absence of such an enquiry by the employer the termination of service cannot be held legal and valid.

In the current scenario it is seen from the materials on the record that the applicant was never an employee of the O.P concern and accordingly there is no requirement for holding an enquiry.

(DELHI HIGH COURT) K.S. BHAT, J. C.W.P. No. 1684 of 1991 February 14, 1994 Between MUNICIPAL CORPORATION OF DELHI and SHRI SUKHVIR SINGH and others the Hon'ble Court was of the opinion that "... Once it is held that the employment of workman was not for a specific period – The denial of employment to the workmen by Corporation shall have to be only according to law – If he had abandoned the employment – That could have been a ground for holding an enquiry and passing appropriate order...."

2013 LAB I.C. 4249 (SUPREME COURT) (From: Bombay) * G.S. SINGHVI AND V. GOPALA GOWDA, JJ. The Hon'ble Court was of the opinion that in the case where there is a Wrongful Termination of service reinstatements with back wages is the rule – However, while granting back wages Courts/Tribunals has to keep in view consideration like length in service, nature of misconduct, financial condition of employees – In the case where it is seen that termination of service is an outcome of victimization or is done in gross violation of statutes the employee is entitled to full back wages.

In the current scenario it is seen from the material on the record that this applicant was never an employee of the O.P concern who was discharging his function as a "Darwan" in the same.

In Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., reported in (2013) 10 SCC 324. the Hon'ble Court was of the opinion that "... If after a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, workman whose service has been illegally terminated would be entitled to full wages except to the extent he was gainfully employed during the enforced idleness.

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The propositions which can be culled out from the aforementioned judgements are:

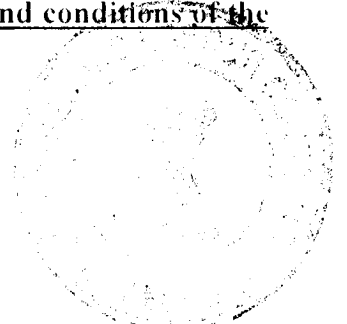
- i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.*
- ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of 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.*
- iii) 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 particular fact lies on the person who makes a positive averments 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.*
- iv. The cases in which the Labour Court / Industrial Tribunal exercises power under Section 11A of the Industrial 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.*
- v. 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 victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages.*

This court now carefully goes through the decisions held by the Hon'ble Courts in AIR 1992 Supreme Court 573 (C.E.S.C Ltd. Vs. Subhash Chandra Bose & Others), 1978 SCR (3) 1073 (Hussain Bhai Vs. Alath Factory Thozhilali Union, Kojhikode & Others), 2004) 1 Supreme Court cases 126 (Ram Singh & Others Vs. Union Territory, Chandigarh & Others).

The Hon'ble Courts were pleased to give emphasis on many factors in determining the relationship of employer and employee. According to those referred decisions, it can be mentioned clearly that

"in determining the relationship of employer and employee, no doubt "control" is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts and circumstances are required to be considered including the terms and conditions of the

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contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole "tests of control". An integrated approach is needed. "Integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remain apart from and independent of it. The other factors which may be relevant are – who has the power to select and dismiss, to pay remuneration, deduct insurance contribution, organize the work, supply tools and materials and what are the "mutual obligations" between them". }

In the present scenario it is seen that the applicant was never an employee of the O.P concern. The father of the O.P concern was an employee and the applicant has failed to prove the fact that the same had the right to be incorporated in the O.P concern after the demise of his father.

No, other evidences were produced by the applicant to show the fact that the same was under the payroll of the O.P concern.

Thus, keeping in view the above discussions and the Principles laid down by The Hon ble Apex Court it can be clearly said that: -

- 1) That the father of the applicant used to work for the O.P concern and used to reside in the quarters provided by the O.P concern. That, neither any appointment letter was given to the father of the applicant nor the applicant was provided with any appointment letter and the same used to do the duties of a "Darwan". However, no documents were provided by the witness to substantiate the fact that his father or himself used to work for the O.P concern as "Darwan".
- 2) That after the demise of the father of the applicant the same used to reside in the quarters provided by the O.P concern and had not vacated the said quarters. That apart from him 4 to 5 persons who were outsiders used to reside in the said premises. The applicant as contended used to draw a salary of Rs. 2,300/- per mensem however such fact was not substantiated by producing documents to that effect.
- 3) That one Chotolal Bhartia and one Meghnath Josh used to work along with the applicant and the same used to stay inside the garage. The applicant was terminated from the service because as the same had participated in the union activity with effect from 01.10.2006 and was not given even one month's notice pay or any other compensation. However not documents were provided by the witness to substantiate the fact that the same was terminated from the service.
- 4) The same after his termination from the service had raised a protest against the O.P concern and had attended the conciliation proceeding before the Labour Commissioner Kolkata.
- 5) That the P.W. 3 had stated that the applicant and happened to be the President of the Employees' Association and was also acting as a press reporter of Indian News Service. The same knew the applicant and his father to be a "Darwan" who worked and resided in



the O.P concern. However, no appointment letter was issued to the applicant and his father. His father had worked for more than 30 years in the garage. The applicant and his father were the members of the union. Though it has been contended by the applicant that the same had joined the service of his father yet no documents were produced to substantiate such fact.

6) That receipt of the Association which was marked as exhibit-3; the letter given to the P.W. 3 on behalf of the Employee's Association dated 01/08/2006 which was marked as exhibit- 4; the copy of memo. issued by the Labour Commissioner. that was marked as Exhibit- 5; the copy of the summon issued by the Learned City Civil Court, Calcutta. that was marked as Exhibit- 6; The Form-H which was marked as exhibit- 7 that tends to show that the above mentioned association was a registered one and The identity card of the P.W. 3 that belonged to the union was marked as Exhibit- 8 and that of the Press which was marked as Exhibit- 9; the Exhibit- 6 produced by the P.W. 4 which tends to show the fact that in the cause title of the summon of the City Civil Court in the name of the father of the applicant and the charter of demand which was marked as Exhibit- 4 that was sent to the Labour Commissioner does not substantiate the fact that the applicant was an employee of the O.P. concern.

7) The Exhibit A which happens to be the attendance register of the O.P. concern tends to show the fact that the father of the applicant used to work in the O.P concern. However, no other documents were produced by the applicant to substantiate the fact that the same was appointed after his father by the O.P concern.

8) The P.W. 5 used to work in the O.P concern as a "Darwan" and knew the applicant of this case who also used to work in garage and was also a member of the same union. The service of this witness and Meghnath Josh was also terminated. However no documents were produced by this witness the substantiate such fact. That, at the time of the termination of service of the applicant no charge sheet was issued against him or no domestic enquiry was conducted against him. Neither any compensation was paid to the same at the time of his termination. The father of this witness and the father of the applicant used to work together previously in the O.P concern. During the illness of the father of the applicant the same had joined in the service and the applicant and this witness are still residing in the garage. However, no documents were being produced by the same to substantiate such fact.

9) The O.P.W 1 being the proprietor of the O.P concern was engaged in the business of parking the cars of different business and car owners inside the garage premises on specific charges. The same was maintaining the attendance register which was marked as Exhibit - B and the salary register of the employees which was marked as Exhibit- C. The witness had denied the existence of any employer and employee relationship in between the applicant and the O.P concern. The father of the applicant was an employee of the O.P concern and an appointment letter was issued in such regard. The O.P had never appointed Sri Hari Shankar Bhartia the applicant at the O.P concern nor even in the year 1997. The applicant's father late Munnilal Bhartia was an employee of the company and worked as darwan till 2006. That, occasionally the applicant went to the garage to meet his father and resided with his father at the garage premises for a few days.

10) No documents were being produced by the applicant to prove the fact that this applicant had joined the O.P concern in place of his father and was an employee of the O.P concern. That, owing to the fact that the applicant was not an employee there was no question of issuance of termination letter from the same.

Sd/-
Judge
Second Labour Court No. 2



11) The Exhibit- C that happens to be a report from Detective Bureau which though tends to show the fact that the applicant was working as 'Darwan' at M/s Shaw Bros (Wine) Pvt. Ltd for 15 (fifteen) years and earning a sum of Rs. 10,000/- per mensem: yet such document is neither substantiated by other documents nor the field investigation report is being produced to prove the authenticity of such document. Accordingly, the exhibit-C could not be taken into consideration.

It is a settled principle of law that an obligation to prove a fact is upon the party who claims the same to exist. In the instant scenario the obligation to prove the fact that the applicant was an employee of the O.P concern was upon the applicant and the same has failed to discharge such burden.

The applicant has failed to prove the fact that the same was an employee employed in the O.P concern to perform the job of a "Darwan", whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, and was not dismissed, discharged or retrenched in connection with or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute. It can be said that the father of the applicant was an employee of the O.P concern and the applicant was never an employee of the O.P concern. Thus, it is clearly established that this applicant was not a workman working under the O.P. in regard to which an Industrial Dispute under the above mentioned section could be raised.

Hence, it is

ORDERED

The application under Section 10(1B)(d) of The Industrial Disputes Act, 1947 be and the same is hereby **DISMISSED** on contest without costs.

This is my award.

Let the copies of this award be sent to the concerned authority of the Government of West Bengal.

Dictated & Corrected by me

ed/-
Judge
Second Labour Court
Judge
Second Labour Court W.B.



ed/-
(Argha Banerjee)
Judge
Second Labour Court
31.01.2023.
Judge
Second Labour Court W.B.