

I/354917/2023

Government of West Bengal

Labour Department

I. R. Branch

N.S. Building, 12<sup>th</sup> Floor

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

No.Labr/. 25 ./(LC-IR)/22015(16)/1/2023 Date: 09-01-2023

**ORDER**

WHEREAS an industrial dispute existed between M/s. Tempcon, F.R.S. 4/5 & 6, Kasba Industrial Estate (Phase-1), E.M. By Pass (East), P.O.- East Calcutta Township, P.S. Tiljala, District: South 24Pgs, Kolkata - 700107 and Sri Dina Nath Ghosh, S/o. Late Nandalal Ghosh, 44/4A/15, C.N. Roy Road, P.O. Tiljala, P.S. Tiljala, District-South 24Pgs, Kolkata - 700039 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. 1899- L.T. dated - 28/12/2022.

**ANNEXURE**

( Attached herewith )

By order of the Governor,

Salt  
Joint Secretary  
to the Government of West Bengal

I/354917/2023

: 2 :

No. Labr/25/1(5) (LC-IR)

Date:..... 2023

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

1. M/s. Tempcon, F.R.S. 4/5 & 6, Kasba Industrial Estate (Phase-1), E.M. By Pass (East), P.O.- East Calcutta Township, P.S. Tiljala, District: South 24Pgs, Kolkata - 700107.
2. Sri Dina Nath Ghosh, S/o. Late Nandalal Ghosh, 44/4A/15, C.N. Roy Road, P.O. Tiljala, P.S. Tiljala, District-South 24Pgs, Kolkata - 700039.
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, (11<sup>th</sup> 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.

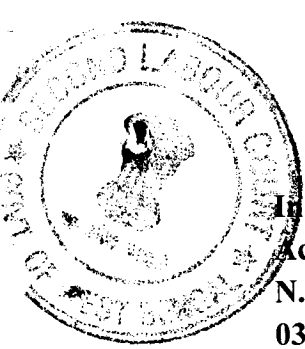
Joint Secretary

Date : ..... 2023

Copy forwarded for information to: -

1. The Judge, Second Labour Court, West Bengal, with respect to his Memo No. 1899 -L.T. dated 28/12/2022.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Join Secretary



In the matter of an application under section 10 (1B)(d) of The Industrial Disputes Act, 1947 filed by Shri Dina Nath Ghosh, s/o Late Nandalal Ghosh of 44/4A/15, C. N. Roy Road, P.O. Tiljala, P.S. Tiljala, District: South 24 Parganas, Kolkata – 700 039 against M/s. Tempcon at F.R.S. 4/5 & 6, Kasba Industrial Estate (Phase-1), E.M. By Pass (East), P.O.- East Calcutta Township, P.S. Tiljala, District: South 24 Parganas, Kolkata – 700 107.

Case No. 33/09 u/s 10(1B)(d)

Before the Second Labour Court, West Bengal, Kolkata

Present: Shri Argha Banerjee, Judge  
Second Labour Court  
Kolkata

Dated: 20.12.2022.

### 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

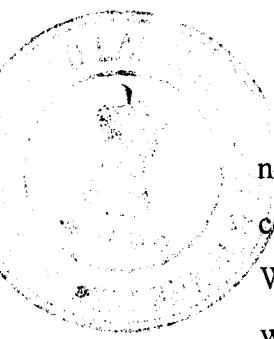
That Shri Dina Nath Ghosh, hereinafter called the applicant had joined his present employment on 2<sup>nd</sup> January, 1987 as “Accountant-Cum-Taxation Executive” with “M/s. TEMPCON” dealing with engineering business relating to manufacturing and repairing of air conditioning machines and refrigerators, equipments and general order supply along with such other products/ business as per the parties/ clients industries and/ or offices. That, thereafter due to the said Workman’s (Shri Dina Nath Ghosh’s) efficient performance of working capability the said proprietor Shri Tapan Roy on and from the year 1988 had promoted the said applicant to as “Taxation Executive and Financial Controller.” That the said Proprietor Shri Tapan Roy being the Employer as well as “GURU-BHAI” (Guru-Brother) with the said applicant Shri Dina Nath Ghosh having their “GURU-DIKHIT” from Ram Krishna Mission at Belur Math Ashram had requested to the said applicant to work as “Accountant” for the gain of Opposite Party to represent the said Company for considerable time on mutual consent basis for the benefit of the said concern.

That on and from 01-09-2006 the aforesaid proprietorship concern was transferred and made as a Partnership Engineering Company being duly represented by its partners

*Sd/-*

Judge

Second Labour Court W.B.



namely Shri Tapan Roy, Smt. Papri Roy and Shri Soumo Roy and had registered the said concern (Firm No. 270052 dated 16.02.2007) before the Registrar of Firm, Government of West Bengal. That this applicant was performing his usual duties till 23<sup>rd</sup> April, 2008 when the said workman performed his usual duties and thereby had went back to the Office of the said Company and had duly reported the matter to Shri Tapan Roy, the Chief Executive Partner of the said Company whereupon as per his direction, in his presence the said workman kept all the relevant documents in the safe custody of the said Company Office and had duly performed all other official pending jobs. That thereafter The Chief Executive Partner of the said Company Shri Tapan Roy at 7:00 P.M. on 23.04.2008 without having any cogent reason directed orally the said workman that he did not required /allow to perform service with the said Company, without due process of law by a flimsy ground without any payment to the said workman terminated service with the Company orally by way of "Refusal of Employment on and from 24<sup>th</sup> April, 2008." That the said applicant had severally requested for resumption to join his service before the management of the said company and was refused. That the said workman had prayed for immediate resumption of his usual duties by his Letter/Representation dated 20.05.2008 which was duly received on 23.05.2008 by management of the said company and the management of the said company vide letter dated 28.05.2008, denied the said workman for not being a permanent employee of the company. That, thereafter the said applicant was compelled to raise an Industrial Dispute individually on 01.12.2008 for outstanding dues salary from February, 2008 after putting 21 years of unblemished service.

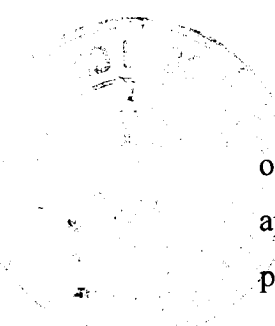
That, on 10.12.2008 The Conciliation Officer and Deputy Labour Commissioner, Kolkata, New Secretariat Buildings had started conciliation proceedings in Industrial Dispute Case No. s/153 of 2008/L.C./Kolkata whereupon the Management of the said Company appeared and held several meetings in the said conciliation proceedings but such resulted in miserable failure to arrive at a settlement.

That having no alternative the applicant had filed an application dated 12.08.2009 before Smt. Sharmila Khatua, W.B.H.L.S., the Conciliation Officer and Deputy Labour Commissioner at Kolkata, Government of West Bengal, under section 10(1B)(d) of the Industrial Disputes Act, 1947 as amended corresponding to Rule 12-A(2) of the West Bengal Industrial Dispute Rules, 1958 for Issuance a Certificate of the instant Dispute Case for reference and further adjudication before this the Learned Court for seeking Justice to in accordance with Law.

#### **CASE OF THE OPPOSITE PARTY**

The O.P had appeared in this instant case and had filed its written objection in regard to the claims and allegations made by the applicant. The O.P had stated in his written


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objection that the instant application filed by the applicant is not maintainable as the said applicant was never an employee of the O.P concern and does not comes under the purview of Section 2(s) of the Industrial Disputes Act, 1947. There was no relation of employer and employee in between the applicant and the O.P. Thus, the question of refusal of employment cannot arise. The Opposite Party concern is a partnership firm engaged in the running business of manufacturing and repairing of air-conditioning machines and refrigerators. That, the applicant Sri Dina Nath Ghosh was a self-employed person and the same used to look after the work relating to taxation matters mainly sales tax, professional tax, commercial taxes, income taxes of different companies like M/s. Tempair, M/s. Supercool, M/s. Sonolight, M/s. SAARAC countries SSI Meet-2005, M/s. Minti Plastic, M/s. Krishna Enterprises, M/s. Refrico etc. and also individual's personal files on a contractual basis. It is the contention of the O.P that this applicant had independent business of photo-copy, telephone booth, repairing and recharging of mobile phones and their respective connections etc. The applicant as contended by the O.P was not only involved in easy bill collection and depositing respective telephone and mobile bills of different parties through electronic media but also had a driver operated cab having registration no. WB 19A – 6691. The opposite party stated the fact that same was in need of a financial consultant and had engaged Sri Dina Nath Ghosh, (the present applicant in this case) on a contractual basis for preparation of accounts and maintaining tax files of its business. He was also engaged to take care of lawful financial interest of the company as a part of his responsibility. That, it is the contention of the O.P. that this applicant used to perform the aforesaid accounting jobs in his residence and used to visit the factory if required in regard to any information desired for. The opposite party further states that occasionally Sri D. N. Ghosh was also authorised to appear before the concerned Tax Authorities for hearing of the cases.

The opposite party stated the fact that in consideration of the above service provided by the applicant the same used to pay remunerations to this applicant under the head "Accounting Charges" alongwith the conveyances for appearing before the different tax authorities. That the opposite party company stated that the same had been maintaining the attendance register, salary register and other relevant registers for the entire period for its employees/ workmen and used to issue appointment letters to its workers/ employees. The opposite party further submitted that as per the recommendation of applicant the opposite party had engaged an Auditor to prepare and audit the balance sheet of its company. The said Auditor also used to prepare and audit and the balance sheet of the applicant. It came to the knowledge of the opposite party that this applicant had prepared two (2) separate balance sheets of the company and had got the same signed for blackmailing and squeezing money from the opposite party. That, when the applicant was asked about the existence of two balance sheets the same was unable to explain the same and had expressed his willingness to discontinue the work. The opposite party

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further highlighted the fact that this applicant had sent a letter to the O.P wherein the same had showed his unwillingness to work for the O.P. on and from 31.03.2006 wherein he had the responsibility to complete and submit various accounts alongwith other allotted work of the O.P. concern. The applicant in such regard had to complete his work up to 23/04/2008.

Thus, the opposite party submitted that there was/is no employer and employee relationship in between the opposite party and the applicant and the question of termination of service by way of refusal employment does not and cannot arise at all. The O.P thus prays for dismissal of the prayer of the applicant.

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

### **ISSUES**

1. **Is the written statement u/s 10(1B)(d) of the I.D. Act, 1947 (W.B. Amendment) filed by the applicant maintainable in law & facts?**
2. **Whether the applicant is a workman as contemplated u/s 2(s) of the I.D. Act, 1947?**
3. **Whether the termination of service of the applicant w.e.f. 23.04.2008 as alleged was proper & justified in Law?**
4. **Is the applicant entitled to get any relief / reliefs as prayed?**

### **EVIDENCE ON THE RECORD**

In order to substantiate the case the applicant had adduced himself as the sole witness to the case. That the O.P no. 1 had cross examined the P.W. 1. in full. The documents produced before this Court were marked in the following manner:

#### **Exhibits on behalf of the applicant**

Exhibit 1 – Notarised General Power of Attorney dated 01.08.1995.

Exhibit 2 – A copy of letter dated 20.05.2008 sent to the Company M/s. TEMPCON by the workman Shri Dina Nath Ghosh.

Exhibit 3 – A letter to the workman Shri Dina Nath Ghosh by Company dated 28.05.2008.

Exhibit 4 – A Resignation Letter written by Shri D. N. Ghosh.

Exhibit 5 – A letter dated 25.07.08 to O.P. by Advocate.

Exhibit 6 – A letter dated 04.08.08 to Shri Abani Bhusan Maity, Advocate of the workman by O.P. Company.

Exhibit 7 – Para wise comments of the O.P. dated 21.01.09 to The Deputy Labour Commissioner, Government of West Bengal.

Exhibit 8 – A copy of Letter dated 27.04.09 to The Deputy Labour Commissioner, Government of West Bengal by O.P. Company.

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Exhibit 9 – A copy of Letter dated 18.02.2009 to The Deputy Labour Commissioner by workman Shri Dina Nath Ghosh.

Exhibit 10 – Bonus sheet of 2006-07.

Exhibit 11 – A copy of letter dated 22.06.2006 by Indian Overseas Bank to the applicant.

**Exhibits on behalf of the O.P.**

Exhibit A – Photocopy of the application before the 1<sup>st</sup> Civil Judge, Alipore vide Title Suit No. 394 of 2009.

Exhibit B – Photocopy of telephone bill.

Exhibit C – Photocopy of bill of Xerox shop.

Exhibit D – Photocopy of leaflet issued by the applicant.

Exhibit E – Photocopy of applicant's letter to the Proprietor of O.P.

Exhibit F – Photocopy of applicant's letter dated 05.04.2006.

Exhibit G – Photocopy of voucher for I.T. filing for assessment year 2007-2008.

Exhibit H – Photocopies of documents to show that the applicant used to work in another concern. (collectively)

Exhibit I & Exhibit I/1 – Photocopies of two balance-sheets of Mr. D. N. Ghosh which are drafted by A. K. Roy & Co.

Exhibit J & Exhibit J/1 – Certain rows in balance sheets i.e. Ext. I & I/1 where taxi, pick-up van expenses are mentioned.

Exhibit K – Photocopy of plaint in connection with Title Suit No. 394/09.

Exhibit L, Exhibit L/1 – Photocopies of letters dt. 02.06.2009, 19.05.2009 and 27.04.2009 written to The Deputy Labour Commissioner by O.P.

Exhibit M – Photocopy of O.P.'s letter dt. 28.05.2008 to the applicant.

Exhibit N – Photocopies of three payment vouchers issued in favour of the applicant for accounting charges. (collectively)

Exhibit O – Photocopy of O.P.'s letter dt. 21.1.2009 to the Deputy Labour Commissioner.

Exhibit P – Photocopies of application for registration and registration certificate of O.P.

Exhibit Q – Photocopies of duplicate application for registration and duplicate registration certificate of O.P.

Exhibit R – Photocopy of authorisation given to the applicant by the O.P.

Exhibit S – Photocopy of O.P.'s letter dt. 04.08.2009 to the Additional Chief Inspector, Shops & Establishment, Government of West Bengal (without enclosures).

Exhibit T – Photocopy of O.P.'s letter dt. 21.01.2009 to the Deputy Labour Commissioner (Same as Ext. O)

*sd/-*

*Judge*

Second Labour Court W.B.

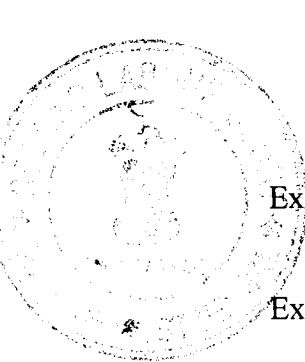


Exhibit U – Photocopy of order dt. 18.08.2006 of Assistant Commissioner, Commercial Taxer in appeal Case No. A-109/AC/BG/05-06.

Exhibit V – Photocopy of O.P.'s letter dt. 28.05.08 to the applicant (same as Ext. M).

Exhibit W – Photocopy of O.P.'s letter dt. 27.04.2009 to the Deputy Labour Commissioner (Same as Ext. L/2).

Exhibit X – Attendance register for the period 1992-1993.

Exhibit Y – Pay register for the period April, 1993 to 1996.

Exhibit Z – Conciliation file before the Deputy Labour Commissioner bearing file No. 153 of 2008.

Ext. AA – Photocopies of documents of Shri Dina Nath Ghosh (Applicant) for opening SB A/C with UBI alongwith Bank's Sr. Manager's forwarding letter.

### **EVIDENCE OF THE WITNESSES**

From the substantive evidence of the P.W. 1 Dina Nath Ghosh it is clear that: -

a) The applicant had joined the O.P concern as Taxation Executive and Financial Controller and the same used to prepare the accounts of the O.P concern; he was also authorised to assist the Auditor for accounts of the company and prepare draft in such regard. That neither any appointment letter was being issued by the O.P nor this applicant had produced any document to show that the same was working under the aforesaid concern. That, even after several requests from the applicant no action was initiated by the opposite party concern in this regard.

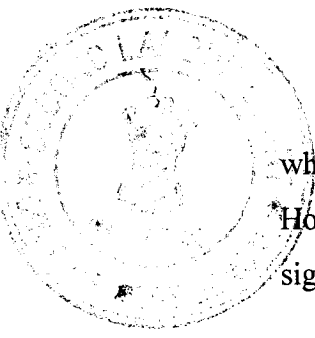
b) The exhibit-1 was being executed by the O.P which was a General Power of Attorney on 01/08/1995 whereby this applicant was designated as 'Accountant' entrusted to assist the respective Learned Advocates before various authorities and assist them as a Clerk. It has been alleged by the applicant that his name had never transpired in the attendance and salary register of the O.P concern yet from the Exhibit -10 (Bonus sheet for 2006-2007) it is clear that the same used to get 'Bonus' in lieu of salary/wages from the O.P concern. That apart from the outdoor job the applicant was also assigned to assist the authorised auditor in regard to the accounts of the company and the same used to get remuneration from the O.P concern under the Head of **Accounting charges** for rendering his services.

c) The applicant was the 'Gurubhai' of the Proprietor Sri Tapan Ghosh and as such the job of looking over the accounts, tax-affairs and other related clerical job of the O.P concern was given to the same. That the owing to the inability/ negligence of the O.P concern to issue an appointment letter in regard to the applicant the same had issued the Exhibit-4

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18.08.2006  
18.08.2006





which is letter addressed to the Proprietor for leaving the O.P concern dated 13/03/2006. However, such letter was not accepted by the Proprietor, Sri Tapan Roy who had put his signature upon the exhibit-4.

d) That subsequently on 23/04/2008 the Chief Executive Partner of the O.P concern had verbally terminated his service from the said concern without assigning any proper reason with effect from 24/04/2008. That this applicant was intimated by the O.P concern vide **Exhibit-3** that the same had expressed his intention to discontinue the service in April 2008 and accordingly his service was terminated by the O.P concern as per his own request.

e) The Learned Advocate for the applicant had sent the **Exhibit-5** dated 25/07/2008 claiming thereby for reinstatement of the same to the O.P concern and in reply to such letter the Learned Advocate for the O.P concern had sent the **Exhibit-6** wherein the same had denied the allegation made in the Exhibit-5 and had denied the service of the applicant under the O.P.

f) That thereafter the applicant had sent a letter to the Deputy Labour Commissioner vide **Exhibit- 8** and **Exhibit-9** praying thereby seeking necessary reliefs and in regard to such letter the O.P had sent the **Exhibit- 7** dated 21/01/2009 to the Deputy Labour Commissioner. The applicant had thus prayed for reinstatement in the service with full back wages.

From the substantive evidence of the **O.P.W. I Sri Tapan Roy** it is clear that

1) The same was the proprietor of the O.P concern and subsequently the proprietorship concern had changed to a partnership firm dealing in repairing maintenance and manufacturing air conditioner. The O.P concern was duly registered under the Shops & Establishments Act and renewed their registration yearly giving the particulars of the employees. The wife of the O.P was running a separate business under the name and style M/s Refrico which was providing air-conditioning machines on hire basis that had no connection with the O.P rather was a sister concern of the same.

2) The applicant used to work on behalf of the O.P concern as an '**Authorised Representative**'. That, owing to the performance of the applicant the same was paid fees and there was no written agreement between the applicant and the O.P concern in regard to the performance of the applicant in lieu of fees which is clear from the **Exhibit- N**. There was also no contract of employment between the O.P concern and the applicant in regard to the nature of work performed by the same. The applicant used to look after the

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Income Tax matters as well as Tax matters and other matters relating to Accounts of the O.P concern and the same had executed the authorization that is the **Exhibit-1** in favour of the applicant on a stamp paper to represent the company. The applicant used to perform the works of accounts not only in the office of the O.P concern but also in his home. The applicant was paid remuneration on contract basis out of the head **"Accounting Charges."**

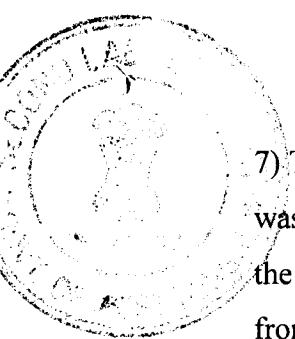
3) The **Exhibit-4** was given by the applicant on and from 31.03.2006, and the same was received by the O.P concern however the same was not accepted owing to the fact that at the relevant point of time the applicant was dealing with sales tax matters and was asked to complete the job and then leave the office. The applicant had abandoned his service and had informed the O.P. concern vide two letters informing the date from which the same had declared his discontinuance to render service in the O.P. concern and accordingly no letter was sent to the applicant asking his show cause.

4) The **Exhibit-10** which tends to be the bonus statement of the O.P concern was the distribution of bonus amongst certain persons at the time of puja and as per the contents of the **Exhibit-10** Naresh Sardar, Sukumar Sardar, Subrata Kundu, Prasanta Dalui, Sanjoy Das, Debabrata Chakraborty and Mehatab Hussain were the employees of the O.P. Concern.

5) The **Exhibit-C** and the **Exhibit-D** tends to show that the applicant was having a Photocopy shop which was also in the business of providing services like paying of telephone and mobile bills; instant mobile connection; mobile recharge alongwith repairing of mobile phone handset in his name that was being run by his wife and the applicant used to attend such shop for purpose of running their business. That the said shop was established within the premises of the O.P. concern which is clear from the **Exhibit- K**. However, such documents though containing the name of the applicant does not bear his signature.

6) The **Exhibit-H and Exhibit-I** though did not bear the signature of the Auditor yet tends to highlight the fact that the applicant not only used to work for other concern but also had a separate audit done by one A.K. Roy and Co. who happened to be a Chartered Accountant; however such documents did not bear any signature of the applicant. That from the **Exhibit-J** it is also clear that this applicant had one taxi and a pickup-van in his name. The said **Exhibit-J** also tends to show the fact that the applicant was also receiving professional fees.

Sd/-



7) The **Exhibit – K** which is the copy of the plan in connection with T.S. No. 394/09 that was filed by the applicant against the O.P. wherein the applicant had admitted the fact that the same left the service under the O.P. Company and had taken certain property on lease from the O.P. Company. The said document was sent to the Labour Commissioner on 02.06.2009 which was marked as **Exhibit L series** (containing three pages). The **Exhibit-M** tends to show that the applicant had left the job and his resignation was duly accepted and the applicant was requested not to correspond with the O.P. in any other manner in future.

8) The **Exhibit- L** further tends to highlight the fact that the same was the letter given to the Labour Commissioner and in support of that letter the document was sent to the office of the Labour Commissioner. However, the details of the annexed documents could not be verified. That in the Page-3 of the **Exhibit- L** “willingness” means “willingness of the applicant”. Though the letter showing the willingness of the applicant for the relinquishment of service was sent to the Labour Commissioner being annexed with the **Exhibit- L**, but was not annexed with the **Exhibit- L** before the Court.

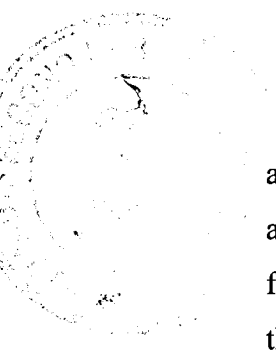
9) The **Exhibit- N** does not contain any revenue stamp, bears the signature of the applicant and tends to show the fact that the applicant was being paid on the basis of payment vouchers for rendering his services for accounting charges. However, there was no written agreement in between the parties in such regard. The amount of cash disbursement was duly entered in the cash disbursement book and the balance sheet. The **Exhibit- N** contains two signatures; one is of Shri Dina Nath Ghosh the applicant in this case and another signature is of the Chartered Accountant of the O.P. concern. The **Exhibit-X and Exhibit-Y** tends to show the attendance register of the O.P. concern for the period 1992-1993 and the period April 1993 to 1996.

10) The **Exhibit- P** and **Exhibit- Q** which happens to be the application for registration tends to show the name of the employees who were presently working in the O.P concern at that relevant point of time.

11) That from the **Exhibit- G** it is clear that the same was the voucher on the basis of which the applicant had taken payment as per the permission of the wife of the O.P. as the company belonged to the same and had no connection with the O.P. Company. The O.P. concern was running the business of refrigerating servicing and repairing of A.C. machines, and other allied services whereas the business of M/s Refrico was to provide A.C. machines on hire basis.

12) That from the **Exhibit- S** that is letter which was sent to the Additional Chief Inspector (Shops & Establishment Authority) by the O.P concern it is clear that the

Sd/-



applicant was appointed on contractual basis for rendering his respective services as an authorised representative of the O.P concern twice in a week. That, no professional tax from the pay was deducted on behalf of the applicant as the same was not an employee of the O.P. concern. That the said applicant had shown his unwillingness to carry on the contract as the same had failed to adopt with upgradation of computerisation in the O.P. concern. That, thereafter the same had started a photocopy shop without the permission of the O.P concern on top of the water tank and had not paid any rent or electricity charges. That on request of the O.P to quit vacate the premises the applicant had initiated several cases against the O.P. concern however no legal action was initiated by the O.P. against the applicant.

From the substantive of the O.P.W. 2 – Sri Asit Basu it is clear that: -

- a) That the same was the Assistant Labour Commissioner and was the carrier of the Exhibit- Z which happens to be the conciliation file bearing no. 153 of 2008 containing seventy three (73) pages.
- b) That the same had no personal knowledge about the subject matter present in the file and according to the Exhibit- Z four (04) meetings were held. The last meeting was held on 12.08.2009.

From the substantive evidence of the O.P.W.-3, Sri Naresh Sardar it is clear that: -

- 1) The same was working in the O.P. concern since the year 1983 as an air-conditioner mechanic. The O.P had issued an appointment letter not only in regard to the same but also in regard to all other employees who were appointed in the said concern. There were about seven to eight employees working for the O.P concern and an attendance register was being maintained in that regard. That all the employees used to take salary by signing upon the attendance register.
- 2) That the witness knew Dinanath Ghosh the applicant of this case who had filed this case before this Court claiming himself to be the employee of the O.P. Company. That Dinanath Ghosh alongwith some other person (whose name was not known to him) used to examine the documents of the company. The applicant and the other person used to work either inside the office or outside the office and the applicant used to get money in lieu of his work.
- 3) The witness was told by the O.P to depose in this case about the true facts about ten to twelve (10-12) days ago by the owner of the O.P. concern.

Sd/-

From the substantive evidence of the O.P.W-4 Sri Anupam Das it is clear that:-

- a) The same being the Single Window Operator-A in the Entally Branch: was authorised by the Chief Manager, UBI to depose in this case in lieu of the summons sent from this Court. The same had brought the original documents regarding the Savings Bank A/c of Sri Dinanath Ghosh the documents containing fourteen (14) pages were marked as Ext.-AA Series (objected to).
- b) That the declaration made by the applicant for opening S.B. A/c No. 1435010003760 was being asked for by this Court to produce. The documents filed before this Court were not sent to the applicant for his perusal.

### ARGUMENTS MADE BY THE PARTIES

#### Argument on behalf of the Applicant

The Learned Counsel appearing on behalf of the applicant argued upon the following points: -

1. The workman had joined the firm w.e.f. January.02. 1987 as Taxation Executive & Financial Controller, even though no appointment letter was issued to him. The workman being in the services of the Firm proved by the Exhibit-1, the 1<sup>st</sup> page whereof depicts the workman as "our Accountant Sri D. N. Ghosh" and the same is executed by the proprietor of the Firm. The veracity of the said document is admitted by the OPW-1 in his Examination-in-Chief on 08.07.2013. Thus, the claim of the Firm that the workman was not an employee of the Firm has no legs to stand upon.
1. The workman had discharged the duties of an Accountant as averred in Examination-in-Chief of the workman at Page-2 thereof and proved from various exhibited documents. The duties performed by the workman is admitted by the OPW-1 in his Examination-in-Chief on 08.07.2013 even though his status is not. Nothing in the contrary could be proved by the Firm. Thus it can be safely deducted that the workman falls within the definition of Section-2(S) of the I.D. Act, 1947.
2. Termination by way of refusal of employment on April 23, 2008. Industrial Dispute immediately raised before Employer through all communication channels including Exhibit-2 but the said just and genuine grievances were never even considered in its rights perspective.
3. Reply of the Firm (Exhibit-3) is contradictory to Power of Attorney (Exhibit-1) hence ought to be disregarded and the same furthermore fanned the industrial dispute instead of giving kind consideration to the just and genuine prayers of the workman.

*Sd/-*

Judge

Second Labour Court W.B.



Demand of Justice (Exhibit-5) and Reply thereto (Exhibit-6) failed to resolve the industrial dispute at bi-partite level, which could have resolved the issue at that stage.

5. Industrial Dispute could not be resolved at tri-partite level due to adamant and non-conciliatory attitude of the Firm, proved by Exhibit-7, 8 and 9. Further, the various contradictory stands adopted by the Firm are clear from 6<sup>th</sup> bullet point of Exhibit-7 (service on contractual basis) and 1<sup>st</sup> bullet point of Exhibit-8 (.... as a professional individual).
6. Bonus is only payable to its workmen by the Firm under the Payment of Bonus Act, 1965, proved by Bonus Sheet (Exhibit-10).
7. Even Indian Overseas Bank acted upon the requests of the Firm (Exhibit-11) considering the workman as an employee of the Firm thus it is beyond any iota of doubt that the workman was an employee of the Firm.

The services of the workman was dispensed with without any disciplinary proceedings (which has not even been claimed), which is an industrial dispute within the meaning of Section 10(1B) and the same is illegal and ought to be interfered with and declared so And relief of reinstatement with full back-wages and consequential relief ought to be granted.

Judgments relied by the workman:

1. 1969(18) FLR 186, ABP(SC) @ Page 187.
1. 1985 (11) LLJ 401, Arkal Govind Raj(SC) @ para 11 & 16.

(both the above judgment postulates that the actual discharge of duties of workman is the determining factor, which in this case proves that the workman falls within the ambit of Section 2(s) of the Industrial Dispute Act, 1947).

2. 1981(14) LIC 806, Mohan Lal (SC) @ para-17.
3. 2013 LIC 4249, Deepali (SC) @ para-33(i).

(both the above judgment postulates that the relief to be granted in cases of illegal termination is reinstatement with back-wages and consequential reliefs).

4. 1978(1) LLJ 322, KCP (SC) @ para-6, postulates the benefit of doubt in law and fact has to be given to the workman.

**ARGUMENT ON BEHALF OF THE OPPOSITE PARTIES**

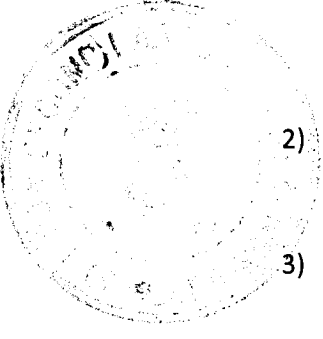
The Learned Counsel for the O.P argued on the following points: -

Three points of argument in respect of the claim by the applicant i.e.

- 1) Whether Sri Dina Nath Ghosh is a workman under Section 2(s) of the Industrial Disputes Act, 1947?

Sd/-

Second Labour Court

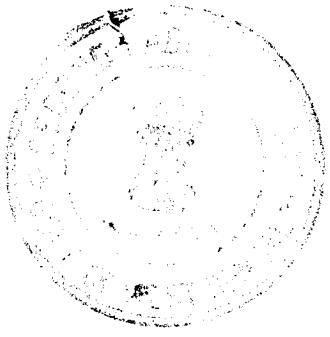
- 
- 2) Whether there is any employer and employee relationship by and between the applicant and the opposite party company?
  - 3) Whether there is any termination of service by way of refusal of employment ?

**With regard to point Nos. 1 and 2**

The applicant is denied to be a workman as he is a self employed person. He used to do the join of taxation matters of different company as well as the opposite party company. He was never appointed by the opposite party company. On the need of financial consultant the company has engaged Sri Dina Nath Ghosh on contractual basis for preparation of accounts and Tax files of its business and also to take care of lawful financial interest of the company as a part of his responsibility. Sri D.N. Ghosh used to do the said accounting jobs in his residence and if required for any information he visited the factory. Occasionally Sri D.N. Ghosh was also authorized to appear before the concerned Tax Authorities for hearing of the cases just like an advocate acting in the Court.

The company issued the appointment letters to its workers as well as maintains the Attendance Registers and Salary Register for the workers (Ext-X and Ext.-Y). His name has not borne in the said registers. He has not placed a single document from where it will be found that he has demanded to the management for issuance of appointment letter. Sri D. N. Ghosh admitted in his evidence on 22.03.2012 in the last paragraph that *"It may be possible that all other employee of the company is being issued appointment letters by the company. It may be possible that the other employees of the company do have Attendance Registers and Salary registers"*. He has also admitted in cross-examination dated 18.06.2012 in last paragraph *"The company used to maintain the attendance register and salary register etc. I cannot show my name in the attendance register or salary register of the company."* He has also admitted in Cross-examination dated 30.07.2012 *"During the pendency of my service i cannot produce any document as regards my claim for the appointment or for my confirmation."* O.P.W.-1 Sri Tapan Roy in his evidence on 08.07.2013 stated *"The employees of the O.P. company have appointment letters, attendance Register, salary/wages register etc. according to the Shops & Establishments Rules"*. If it is assume on argument shake but not admitting, Sri Ghosh in his cross-examination on 14.02.2012 has admitted in paragraph 3 *".....I was in the post of Senior Manager Category Cadre.....I was in the post of Senior Executive Management Category"*. Therefore he is also not coming under purview of workman as defined in Section 2(s) of the Industrial Disputes Act, 1947. O.P.W. 3 stated in his evidence on 29.05.2015 that there are 7/8 employees working in the company. Attendance register is maintained for the employees and they took their

Sd/-



salary by signing on the salary register. Sri Dina Nath Ghosh is not an employee of the company, which has clearly corroborates with the Attendance register and salary register maintained by the company (Ext- X and Ext-Y). Sri Dina Nath Ghosh admitted in his evidence on 22.03.2012 that *"It is a fact that the management used to give the remuneration under the head of Accounting Charges for the service which I have rendered. It is a fact that I used to get the conveyance facility from the company for carrying out the service"*. Ext.- N series established the same that he was not paid any salary but he was paid remuneration for his accounting job on the Head Accounting Charges. Sri Dinanath Ghosh also made a declaration before the United Bank of India (Ext- AA, 31 sheets) wherein he has made a declaration in page 18 in column **Principal Economic Activity-Businessman**. He has not stated that he is a salaried person. In page 22 of Ext-AA he has stated in column **Principal Economic Activity – Professional**. In Customer Profile dated 10.12.2005. He has mentioned in the reverse page (Business Profile) Businessman. He has not also stated there that he is a salaried person. So he is well aware that he not an employee of the company. If he was an employee he should mentioned the same. In other places of the exhibit-AA he has mentioned in the column Principal Economic Activity as Businessman. Not only that he has not shown any single document to establish that during the period of his contractual engagement he has claimed appointment letter or allow him to sign on the Attendance Register and paid salary through Salary Register. Because he was very well aware that he was not the employee of the company and as such he has not made any such claim. Not only that Sri Ghosh done the same Accounting jobs of different companies like M/s. Tempair, Minti Plastic, Krishna Enterprise, Refrico etc. which will evident from the exhibits "G" series. In Ext.- I series i.e. Balance sheet he has mentioned his income as "Professional Fees". The witness of the management O.P.W. 1 in his examination on 28.11.2013 as professional fees. He has not stated that he is a salaried person. So in view of the above it is crystal clear that he was not a workman but he was a professional person just like an advocate. O.P.W. 1 stated in his evidence on 08.07.2013 that Ext. I is the letter of Authority given to the applicant to represent the company in the case of taxation etc. There is no need to give any authorization to the employee for appearing before the Tax Authority. By showing the Ext.-10, the applicant tried to establish that the applicant was paid bonus, so he is an employee. The company stated in paragraph 15 at page 9 of its written statement that *".....That during the ensuing Puja the company paid the bonus to its employees/ workers and also other persons those are associated with the company like pujari, ESSIC- Saha, Car Cleaning, and Telephone Cleaning etc. under the accounting head as Bonus though the same are not construed as bonus. So Sri Dinanath was paid the same as employee but for the good gesture. OPW. 1 in his statement on 08.07.2013*

Sd/-

Judge





also confirmed the same. Exts.- 7 and Ext.- 8 also confirm the same that he was a professional person and not as a workman.

The applicant tried to establish that Sri Dinanath Ghosh was an employee of the company by showing the Ext.- 1 wherein it has been mentioned as our Accountant. Yes it is correct. He had been doing the job of accounts of the company on contractual basis. So considering his knowledge and experience he was authorized to appear before the tax Authorities to conduct the case just like advocates who are given authorization by the client to appear before learned Court.

**With regard to point No. 3.**

There is no employer and employee relationship by and between the applicant and the opposite party. So there is no question of termination of service by way of refusal of employment. The applicant was a professional person. Considering his experience in taxation matters he was engaged by the opposite party company on contractual basis to do the accounts jobs on certain remuneration on the head of account "Accounting Charges". The applicant by his letter dated Nil (Ext. 4 and Ext-E) wrote to the management that "..... I like to leave your office from 31<sup>st</sup>, March 2006".....From 31<sup>st</sup>, March, 2006 I have no responsibility after 31<sup>st</sup>, March, 2006". He has not said that he is resigned from the service of the company as he was well aware that he was not the employee of the opposite party company. By the above letter he has informed different Government Authorities. From the above document it is clear that he has only informed the same to the tax authorities not any Labour Department. The said letter was not accepted by the opposite party because he has not completed his contractual job. So he was advised to complete the said pending jobs. Sri Ghosh has also written another letter dated April 5, 2006 (Ext-F) to the company as final reminder for leaving the office of the company. In the said letter he has stated that ".....I like to close the account with proper way). So it is crystal clear that he was engaged for the account job on contractual basis. When he completed the said job the opposite party by its letter dated 28.05.2008 (Ext- 3) released him from all duties and responsibilities of the company. O.P.W. 1 in his evidence dated 08.07.2013 stated " Ext-4 tendered to the witness..... So we asked to complete the job and then leave the office". In Ext. K i.e. Title Suit the applicant himself accepted that he has tendered resignation. So question of refusal of employment does not arise at all.

**DECISION WITH REASONS**

**Issue No. 1: - Is the written statement u/s 10(1B)(d) of the I.D. Act, 1947 (W.B. Amendment) filed by the applicant maintainable in law & facts?**

**Issue No. 2: - Whether the applicant is a workman as contemplated u/s 2(s) of the I.D. Act, 1947?**

All 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

Sd/-

Second Member



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 working for the O.P. concern on a mere contractual basis. It is also seen that: -

a) The applicant had joined the O.P concern as Taxation Executive and Financial Controller and the same used to prepare the accounts of the O.P concern; he was also authorised to assist the Auditor for accounts of the company and prepare draft in such regard. That neither any appointment letter was being issued by the O.P nor this applicant had produced any document to show that the same was working under the aforesaid concern. That, owing to the performance of the applicant the same was paid fees and there was no written agreement between the applicant and the O.P concern in regard to the performance of the applicant in lieu of fees which is clear from the Exhibit- N. There was also no contract of employment between the O.P concern and the applicant in regard to the nature of work performed by the same.

b) The applicant used to look after the Income Tax matters as well as Tax matters and other matters relating to Accounts of the O.P concern and the same had executed the authorization that is the Exhibit-1 in favour of the applicant on a stamp paper to represent the company. The applicant used to perform the works of accounts not only in the office of the O.P concern but also in his home. The applicant was paid remuneration on contract basis out of the head "Accounting Charges."

c) The exhibit-1 was being executed by the O.P which was a General Power of Attorney on 01/08/1995 whereby this applicant was designated as 'Accountant' entrusted to assist the respective Learned Advocates before various authorities and assist them as a Clerk. It has been alleged by the applicant that his name had never transpired in the attendance and salary register of the O.P concern yet from the Exhibit -10 (Bonus sheet for 2006-2007) it is clear that the same had received 'Bonus' from the O.P concern. That the Exhibit- 10 does not show clearly whether and what regard the 'Bonus' was being paid to this

Sd/-



applicant. Furthermore, it is also to be taken into consideration that apart from the **Exhibit- 10** no other documents were produced by the applicant to corroborate that fact that neither the same was receiving 'Bonus' since his inception in the O.P. concern nor did the applicant receive 'salary/wages' from the O.P. concern. It is also seen from the above mentioned Exhibit that 'Bonus' was also being paid for Telephone Cleaning, Room Cleaning, Pujari, Car Cleaning and many others and such persons who are rendering their services does not fall under the purview of this act. Thus, payment of bonus to a particular person on a single occasion does not make him an employee or a workmen of that concern.

d) The applicant was the 'Gurubhai' of the Proprietor Sri Tapan Ghosh and as such the job of looking over the accounts, tax-affairs and other related clerical job of the O.P concern was given to the same. That the owing to the inability/ negligence of the O.P concern to issue an appointment letter in regard to the applicant the same had issued the **Exhibit-4** which is letter addressed to the Proprietor for leaving the O.P concern dated 13/03/2006.

e) The **Exhibit-4** was given by the applicant on and from 31.03.2006, and the same was received by the O.P concern however the same was not accepted owing to the fact that at the relevant point of time the applicant was dealing with sales tax matters and was asked to complete the job and then leave the office. The applicant had abandoned his service and had informed the O.P. concern vide two letters informing the date from which the same had declared his discontinuance to render service in the O.P. concern and accordingly no letter was sent to the applicant asking his show cause.

f) The **Exhibit-C** and the **Exhibit-D** tends to show that the applicant was having a Photocopy shop which was also in the business of providing services like paying of telephone and mobile bills; instant mobile connection; mobile recharge alongwith repairing of mobile phone handset in his name that was being run by his wife and the applicant used to attend such shop for purpose of running their business. That the said shop was established within the premises of the O.P. concern which is clear from the **Exhibit- K.** That apart from verbal denials no other evidence had been produced by the applicant to show the fact that the **Exhibit- C and D** are false and this applicant had no connection with the shop as alleged by the O.P.

g) That the **Exhibit-H and Exhibit-I** though did not bear the signature of the Auditor yet tends to highlight the fact that the applicant not only used to work for other concern but also had a separate audit done by one A.K. Roy and Co. who happened to be a Chartered Accountant; however such documents did not bear any signature of the applicant. That from the **Exhibit-J** it is also clear that this applicant had one taxi and a pickup-van in his name. The said **Exhibit-J** also tends to show the fact that the applicant was also receiving professional fees. In this context it is to be taken into consideration of the principle that a document which is being prepared by a professional during his usual course of business is presumed to be correct and executed properly. That, in the instant situation it is seen that apart from verbal denials no other evidence had been produced by the applicant to show the fact that the **Exhibit- H and Exhibit- I** are false and this applicant had no connection with the shop and vehicles as alleged by the O.P.

h) That the **Exhibit-X and Exhibit-Y** tends to show the attendance register of the O.P. concern for the period 1992-1993 and the period April 1993 to 1996 wherein the name of this applicant was not present and furthermore the **Exhibit- P and Exhibit- Q** which happens to be the application for registration tends to show the name of the employees who were presently working in the O.P concern at that relevant point of time. That apart

Sd/-

from verbal denials no other evidence had been produced by the applicant to impeach the credit of the documents that were being produced by the O.P concern.

i) That from the **Exhibit- G** it is clear that the applicant had taken payment from M/s Refrico which happened to be the sister concern of the O.P. concern. That the said company is a sister concern of the O.P. company and had no connection with the O.P. Company. The O.P. concern was running the business of refrigerating servicing and repairing of A.C. machines, and other allied services whereas the business of M/s Refrico was to provide A.C. machines on hire basis.

j) That from the **Exhibit- S** that is letter which was sent to the Additional Chief Inspector (Shops & Establishment Authority) by the O.P concern it is clear that the applicant was appointed on contractual basis for rendering his respective services as an authorised representative of the O.P concern twice in a week and no professional tax from the pay was deducted on behalf of the applicant as the same was not an employee of the O.P. concern.

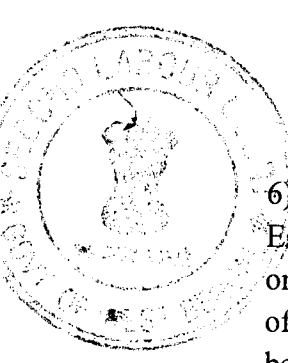
That the said applicant had as stated by the O.P had shown his unwillingness to carry on the contract as the same had failed to adopt with upgradation of computerisation in the O.P. concern. Subsequently, the applicant had started a photocopy shop without the permission of the O.P concern on top of the water tank and had not paid any rent or electricity charges. That on request of the O.P to quit vacate the premises the applicant had initiated several cases against the O.P. concern however no legal action was initiated by the O.P. against the applicant.

Thus, from the above discussion it is clear that: -

- 1) The applicant was authorised by the O.P concern as an Accountant, Taxation Executive and Financial Controller and the same used to prepare the accounts of the O.P concern; he was also authorised to assist the Auditor for accounts of the company and prepare draft in such regard.
- 2) The applicant was the 'Gurubhai' of the Proprietor Sri Tapan Ghosh and as such the job of looking over the accounts, tax-affairs and other related clerical job of the O.P concern was given to the same and no order of appointment was given to the applicant in such regard.
- 3) The applicant had sent the **Exhibit-4** which is a letter addressed to the Proprietor for leaving the O.P concern dated 13/03/2006. The effect of the **Exhibit-4** was given by the applicant on and from 31.03.2006, and the same was received by the O.P concern however the said prayer was not accepted owing to the fact that at the relevant point of time the applicant was dealing with sales tax matters and was asked by the O.P to complete the job and then leave the office.
- 4) The applicant was having a Photocopy shop which was also in the business of providing services like paying of telephone and mobile bills; instant mobile connection; mobile recharge alongwith repairing of mobile phone handset in his name that was being run by his wife and the applicant used to attend such shop for purpose of running their business.
- 5) That the applicant not only used to work for other concern but also had a separate audit done by one A.K. Roy and Co. who happened to be a Chartered Accountant wherein it is seen that this applicant had one taxi and a pickup-van in his name. It is also established that the applicant was also receiving professional fees in lieu of rendering his services.

Sd/-

Judge



6) That from the **Exhibit- S** which was sent to the Additional Chief Inspector (Shops & Establishment Authority) by the O.P concern it is clear that the applicant was appointed on contractual basis for rendering his respective services as an authorised representative of the O.P concern twice in a week and no professional tax from the pay was deducted on behalf of the applicant as the same was not an employee of the O.P. concern.

7) That the said applicant had as stated by the O.P had shown his unwillingness to carry on the contract as the same had failed to adopt with upgradation of computerisation in the O.P. concern. That the applicant had not paid any rent or electricity charges and on request of the O.P to quit vacate the premises the applicant had initiated several cases against the O.P. concern however no legal action was initiated by the O.P. against the applicant.

8) That apart from the above mentioned exhibited documents on behalf of the applicant the same had not produced any other documents which tends to establish the fact that this applicant was working as an employer under the O.P. concern. That the applicant apart from verbal evasive denials in regard to the documents produced by the O.P concern the applicant had not produced any documents to negate the fact stated by the O.P.

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 an Accountant, 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 same being the 'Gurubhai' of the O.P (the then proprietor) was engaged and authorised the work of accounts of the said concern: to assist the Auditor at the time of Audit and further more look after the matters pending/initiated before any Court of Law or Tribunal. The applicant had been looking after the accounts not only for the O.P but also for other concern and had been receiving professional fees in such regard.*

*The applicant as transpired from the substantive evidences and the materials in the record was not only running a separate business but also owning a pick-up van and one taxi in his name. 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.*

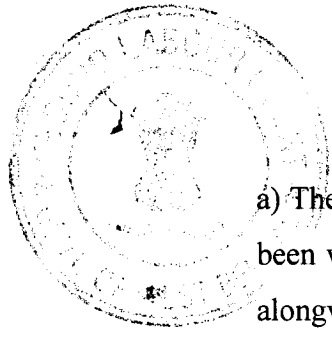
**Thus, the written statement u/s 10(1B)(d) of the I.D. Act, 1947 (W.B. Amendment) filed by the applicant in not maintainable in law & facts as it clearly established that the applicant Dina Nath Ghosh is not a workman as contemplated u/s 2(s) of the I.D. Act, 1947.**

**Issue No. 3: - Whether the termination of service of the applicant w.e.f. 23.04.2008 as alleged was proper & justified in Law?**

From the discussions made herein above it can be clearly said that: -

sd/-

Shree...



a) The applicant Sri Dinanath Ghosh was never an employee of the O.P. concern and had been working on a contractual basis rendering his services for looking after the accounts alongwith other related allied matters.

b) The same had showed his unwillingness to render his service for the O.P concern from a particular date and the same was asked by the O.P. concern to finish up with the work which was being handled by the applicant.

c) That upon completion of the work the applicant was asked to stop the services provided by him towards the O.P. concern and being aggrieved by such decision the applicant had initiated this instant proceeding.

d) It is also clearly proved that this applicant had been rendering his services towards other concern and has also been running other separate business.

e) Since, the applicant was not an employee of the O.P concern the question to determine the fact whether his termination was justified or not does not arise.

**Thus, it is clearly proved that the applicant was never an employee and thus the question whether the same was being terminated from the O.P concern on and from 23.04.2008 does not rise. Accordingly, this fact is decided in favour of the O.P.**

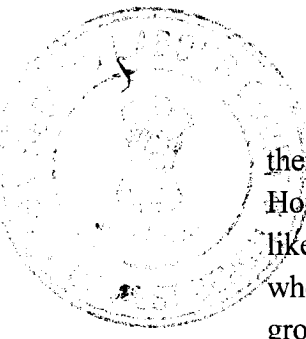
**1991(63) Riaz Ahmed v. M.I. Mohd. of Bom. (Bom. H.C.) (BOMBAY HIGH COURT) B. N. SRIKRISHNA, J. Writ Petition No. 5043 of 1985 August 23, 1991 Between RIAZ AHMED and MUNIR ISMAIL MOHAMMED OF BOMBAY and another** the Hon'ble Apex Court was of the opinion that "...Even if the story of voluntary abandonment 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

Sd/-



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 a permanent employee of the O.P concern and was discharging his function on a contractual manner.

**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.

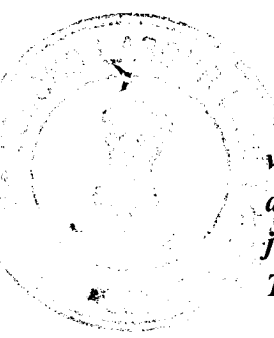
*The propositions which can be culled out from the aforementioned judgements are:*

- 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.*

Sd/-

Judge

Second Labour Court W.B



*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 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 not only had his own business but also was engaged to look after the accounts of other concern. That, his accounts were being duly audited from where it is also clear that the same was not only charging professional fees in lieu of his services but also was the owner of two vehicles. Thus, it is clear that the applicant was not fully integrated into the O.P's concern and had remain apart from and independent from it.

No, other evidences were produced by the applicant to show the fact that the same had the power to select and dismiss, to pay remuneration, deduct insurance contribution, organise the work and supply tools & materials and the mutual obligations in between them.

**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) The applicant was authorised by the O.P concern as an Accountant, Taxation Executive and Financial Controller and the same used to prepare the accounts of the O.P concern: he was also authorised to assist the Auditor for accounts of the company and prepare draft in such regard.

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2) The applicant was the 'Gurubhai' of the Proprietor Sri Tapan Ghosh and as such the job of looking over the accounts, tax-affairs and other related clerical job of the O.P concern was given to the same and no order of appointment was given to the applicant in such regard.

3) The applicant had sent a letter addressed to the O.P for leaving the O.P concern dated 13/03/2006. The effect of the same was given by the applicant on and from 31.03.2006. and the same was received by the O.P concern however the said prayer was not accepted owing to the fact that at the relevant point of time the applicant was dealing with sales tax matters and was asked by the O.P to complete the job and then leave the office.

4) The applicant was having a Photocopy shop which was also in the business of providing services like paying of telephone and mobile bills; instant mobile connection; mobile recharge alongwith repairing of mobile phone handset in his name that was being run by his wife and the applicant used to attend such shop for purpose of running their business.

5) That the applicant not only used to work for other concern but also had a separate audit done by one A.K. Roy and Co. who happened to be a Chartered Accountant wherein it is seen that this applicant had one taxi and a pickup-van in his name. It is also established that the applicant was also receiving professional fees in lieu of rendering his services.

6) That from the letter that was sent to the Additional Chief Inspector (Shops & Establishment Authority) by the O.P concern it is clear that the applicant was appointed on contractual basis for rendering his respective services as an authorised representative of the O.P concern twice in a week and no professional tax from the pay was deducted on behalf of the applicant as the same was not an employee of the O.P. concern.

7) That the said applicant had as stated by the O.P had shown his unwillingness to carry on the contract as the same had failed to adopt with upgradation of computerisation in the O.P. concern. That the applicant had not paid any rent or electricity charges and on request of the O.P to quit vacate the premises the applicant had initiated several cases against the O.P. concern however no legal action was initiated by the O.P. against the applicant.

8) That apart from the above mentioned exhibited documents on behalf of the applicant the same had not produced any other documents which tends to establish the fact that this applicant was working as an employer under the O.P. concern. That the applicant apart from verbal evasive denials in regard to the documents produced by the O.P concern the applicant had not produced any documents to negate the fact stated by the O.P.

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 an Accountant, 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 same being the 'Gurubhai' of the O.P (the then proprietor) was engaged and authorised the work of accounts of the said concern; to assist the Auditor at the time of Audit and further more look after the matters*

Sd/-

Judge

Second Labour Court W.B.

*pending/initiated before any Court of Law or Tribunal. The applicant had been looking after the accounts not only for the O.P but also for other concern and had been receiving professional fees in such regard. The applicant as transpired from the substantive evidences and the materials in the record was not only running a separate business but also owning a pick-up van and one taxi in his name. **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**

*Sd/-*

**Judge  
Second Labour Court**

Second Labour Court W.B.

*Sd/-*

**(Argha Banerjee)  
Judge**

**Second Labour Court  
20.12.2022.**

**Judge  
Second Labour Court W.B.**