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

No. Labr/.995. /(LC-IR)/11L-96/15 Date: 18-11-/2022

ORDER

WHEREAS an industrial dispute existed between M/s. Joy Balaji Industries Ltd., Unit-IV, Vill. – Banskopa, P. O. Rajbandh, Dist. Burdwan, Pin - 713212 and Sri Dulal Sarkar, Vill – Sagarbhanga, P.O. – Gopinathpur, P.S. – Coke Oven, Dist-Burdwan, Pin - 713219 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 filed an application under section 10(1B) (d) of the Industrial Dispute Act, 1947 (14of 1947) to the Second Industrial Tribunal specified for this purpose under this Deptt.'s Notification No. 1085-IR/12L-9/95 dated 25.07.1997.

AND WHEREAS, the Ninth Industrial Tribunal heard the parties under section 10(1B) (d) of the I.D. Act, 1947 (14of 1947) and framed the following issue dismissal of the workman as the "issue" of the dispute.

AND WHEREAS the Ninth Industrial Tribunal has submitted to the State Government its Award dated 28/09/2022 under section 10(1B) (d) of the I.D. Act, 1947 (14of 1947) on the said Industrial Dispute vide memo no. 86 - I.T. dated 29/09/2022.

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 as shown in the Annexure hereto.

ANNEXURE
(Attached herewith)

By order of the Governor,

sdl
Joint Secretary
to the Government of West Bengal

I/338481/2022

: 2 :

No. Labr/995/. 1/(3)/(LC-IR) Date 16-11-/2022

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

1. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
2. The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Building, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata – 700001.
3. The Sr. Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

Joint Secretary

No. Labr/995/.2/(2)/(LC-IR) Date 16-11-/2022

Copy forwarded for information to:-

1. The Judge, Ninth Industrial Tribunal West Bengal, Durgapur, Administrative Building, City Centre, Pin – 713216 with respect to his Memo No. 86 - I.T. dated 29/09/2022.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata – 700001.

Joint Secretary

In the matter of an Industrial dispute between Sri Dulal Sarkar, S/O-Late Habu Sarkar, Vill.-Namo Sagarbhanga, P.O-Gopinathpur, Durgapur-19,P.S-Coke Oven, Dist.-Paschim Bardhaman, PIN.- 713219 AND M/S. Joy Balaji Industries Ltd.. Unit IV, Vill.-Banskopa, P.O-Rajbandh, P.S- Kanksa, Dist.-Paschim Bardhaman, PIN.- 713212

SEAL OF THE 9TH INDUSTRIAL TRIBUNAL DURGAPUR GOVT. OF WEST BENGAL

Case No.X-18 of 2016

BEFORE THE 9TH INDUSTRIAL TRIBUNAL,

DURGAPUR, WEST BENGAL, KOLKATA.

PRESENT :- SHRI SUJIT KUMAR MEHROTRA,

JUDGE, 9th INDUSTRIAL TRIBUNAL,

DURGAPUR.

Ld. Advocate for the Workmen: - Mr. Saradendu Panda &Asit Koner.

Ld. Advocate for the O.P./Employer :- Mr. Debashis Mondal.

The award dated:- 28th day of September,2022.

A W A R D

The instant case has the foundation upon the written representation/petition U/S10(1B)(d) of the West Bengal Amendment of the Industrial Disputes Act,1947 – hereinafter referred to as the Act of 1947, alongwith Form-S under Rule 12A(III) of the Industrial Disputes Rules,1958 filed by the above -named petitioner/workman/employee.

After filing of the written representation/application by the workman notice was issued upon the O.P/employer and in consequence thereof the employer appeared.

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However, CR reveals that due to inadvertence the then Ld. P.O of this Tribunal instead of framing of issues, as required U/S 10(1B)(d) of the West Bengal amended provision, directed the parties to file their respective WS and accordingly, the parties filed their respective WS alongwith list of documents after serving copies of the same. But, when the said matter was detected and brought to the knowledge of the parties by this tribunal the parties submitted

that they have no objection if the issues are framed at this stage as they have already adduced complete evidence from their side on the core issues. Accordingly, by virtue of order no.78 dated 06.09.2022 issues have been framed with the consent of the parties.

Applicant's/workman's WS case, in a nutshell, is that he is a permanent employee of the O.P and he rendered his unblemished service towards the employer since the date of his employment but on 28.05.2016 all of a sudden the employer illegally dismissed / terminated him from his service without any reason. Applicant further averred that his service has been terminated illegally by the O.P/employer without following the rules and regulations of standing orders as well as in gross violation of the principle of natural justice.

He also averred that he made several representation before the management requesting for his reinstatement in his service but as the same yielded no result, so he approached the Deputy Labour Commissioner(DLC), Durgapur by sending a letter dated 11.07.2016 for conciliation and accordingly, the Asstt. Labour Commissioner (ALC) conducted a conference on 02.08.2016 but the conciliation proceeding yielded no result and subsequently, on his application the ALC issued Form -S on 20.10.2016.

In the light of his such WS case, the applicant prays for his reinstatement in service with full back wages from the O.P/employer.

On the other hand, the O.P/employer in its WS although admits that the applicant/workman was its employee but denies all other averments of the applicant's WS.

O.P/employer's positive WS case is that on 24.05.2016 the applicant/workman was on general shift duty and was deployed in the Rolling Mill Kata (Weigh Bridge) and that one empty trailer bearing registration no.BR-01GE/0138 came at the plant for loading TMT Bar from the factory premises and before loading the said vehicle was weighed in empty stage and loading stage under the supervision of the applicant/workman but the Security officer found that the said vehicle's empty weight was 40 Kgs. less from its previous empty weight. Immediately, after detection of such anomalies, the management was informed.

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It is further the WS case of the employer that preliminary enquiry was conducted as per company's service policy and on 25.05.2016 Security officer enquired thoroughly and he being the enquiry officer, called for written explanation from the applicant/workman and the driver of the said vehicle wherein driver Lalu Shaw confessed his guilt and admitted that he in connivance with the applicant/workman's conspiracy the defalcation of goods in lieu of money was being done since a long time.

After finding the applicant/workman guilty of accusation of cheating he was dismissed from his service as per service rules / policy.

O.P/employer in his \WS further averred that the matter was taken up for conciliation by the ALC, Durgapur but as the applicant/workman did not appear, it could not be held on 19.08.2016 and it prays for dismissal of the instant case against it.

To adjudicate the dispute between the parties the following issues have been framed by this tribunal:-

1) *Whether there exists relationship of workman and employer between the parties?*
2) *Whether the dismissal /termination of the concerned workman is justified and /or in accordance with the provisions of the Industrial Disputes Act,1947?*
3) *What relief, if any, is workman entitled to get?*

Argument from the side of the applicant/workman

The Ld.Sr.Lawyer verbally argued the instant case and he also submitted short notes of his argument in a typed copy after serving copy of the same to the other side.

He submitted that the allegation as brought against the applicant/workman by the O.P/employer has been cooked up just to justify illegal termination of service of the applicant workman by the O.P/employer. He further contended that no such incident ever took place in the service career of the applicant/workman.

The Ld. Lawyer also submitted that no domestic enquiry has ever been conducted by the O.P/employer before terminating the service of applicant. It

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has further been contended by the Ld. Sr. Lawyer that from the evidence of the O.P/employer it would be seen that the principles of natural justice in conducting alleged preliminary enquiry has not at all been followed by the enquiry officer, which it is legally bound to follow.

He further submitted that since it has neither been pleaded nor any evidence has been adduced from the side of the O.P/employer to establish that it complied with the provisions of Sec. 25F of the Industrial Disputes Act, 1947, so it cannot be said that the O.P/employer has legally terminated the service of the applicant/workman and he is required to be reinstated in his service with full back wages.

Argument from the side of the O.P./Employer

In refuting such argument, it is argued from the side of the O.P/employer that the instant case under West Bengal Amendment provisions of Sec.10(1B)(d) of the Act of 1947 is not maintainable as the conciliation proceeding has been concluded and it was not pending when the Form-S under the rules was issued by the concerned ALC.

The Ld. lawyer further submitted that the O.P/employer duly followed the procedure of conducting enquiry after issuance of show-cause notice to the applicant/workman and accordingly, it cannot be said that the service of the applicant/workman was illegally terminated without following the principles of natural justice.

He further argued that question of applicability of the provisions of Sec.25F of the Act of 1947, does not arise as the applicant/workman's service was terminated and he was not retrenched by the O.P/employer. To fortify his such contention he emphasised on the words "otherwise than as a punishment inflicted by way of disciplinary action" as provided in the definition of retrenchment in Sec.2(oo) of the Act of 1947.

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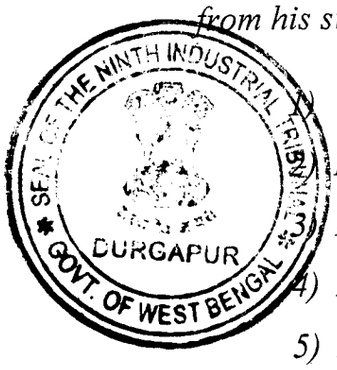
Ld. Lawyer further argued that if for the sake of argument it is considered that no enquiry has ever been conducted before termination of service of the applicant/workman, then too, in the light of confession of guilt by the applicant/workman and the driver of the concerned vehicle / trailer, the same is not required under the Act of 1947. He ultimately prayed for dismissal of the instant case against it.

Decisions with Reasons

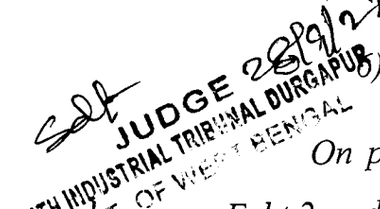
To establish his pleading case, the applicant/workman only examined himself as P.W-1 and the following documents have been admitted in evidence from his side:-



1) *Gate pass --- Exbt.1,*
2) *Letter of Assurance dated 28.10.2013--- Exbt.2,*
3) *Letter of show-cause dated 25.05.2018 ---- Exbt.3,*
4) *Letter of dismissal dated 28.05.2018 --- Exbt.4,*
5) *Letter of ALC --- Exbt.5,*
6) *Form- S --- Exbt.6,*
7) *Postal receipt dated 11.07.2016 --- Exbt.7,*
8) *Letter dated 11.07.2016 --- Exbt.8 of the applicant/workman,*
9) *Letter dated 02.08.2016 of the applicant/workman addressed to the ALC, Durgapur (receipt copy) --- --- Exbt.9*
10) *Letter dated 02.08.2016 of the applicant/workman addressed to the ALC, Durgapur (receipt copy --- --- Exbt.10.*

On the other hand, in support of their WS case, the O.P examined its authorised representative Mr. Alok Pandey as O.P.W-1 and one Sailendra Kr.Singh as O.P.W-2 and the following documents have been admitted in evidence from its sideC:-

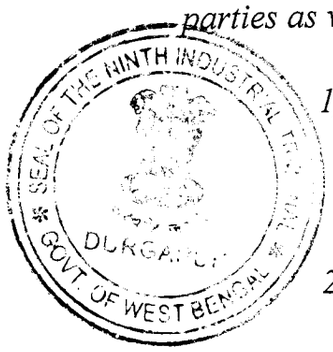
1) *Certified copy of resolution of the 3rd meeting of the Board of Directors dated 13.08.2018. Exbt....A,*
2) *Photo copy of letter of assurance dated 28.10.2013..Exbt....B,*
3) *Copy of show-cause dated 25.05.2016..... Exbt....C,*
4) *Reply of applicant/workman dated 27.05.2016.... Exbt....D,*
5) *Copy of letters of dismissal from service dated 28.05.2016 ....Exbt.E*
6) *Letter of O.P.W-2 (S.K.Singh) dated 25.05.2016...Exbt.F.*



On perusal of the documentary evidence of both the parties I find that Exbt.2 and Exbt. B, Exbt.3 & Exbt. C. Exbt. 4 & Exbt. E are the same set of documents aa-s one is the original and other is the copy of the same.

Before setting motion to our discussion of evidence of both the parties with respect to the framed issues it would be very much pertinent to mention

about the undisputed fact of this case, as emerging from the pleading case of the parties as well as from their evidence, which are as follows:-



1) *The applicant/workman was employed as Security Supervisor vide Letter of Assurance dated 28.10.2013 i.e. Exbt.1 corresponding to Exbt. B,*
2) *That service of the applicant/workman was terminated on 28.05.2016 vide Exbt.4 corresponding to Exbt. E.*

Issue No.1 :-

During the course of argument it was argued from the side of the O.P/employer that the instant case is not maintainable as per amended provisions of sec. 10 (1B) (d) of the I.D Act,1947 as conciliation proceeding was completed, as is evident from Form-S".

On the other hand, the ld. lawyer for the applicant/employer argued that from the contents of the Form-S it is crystal clear that the conciliation proceeding initiated at the instance of the applicant/workman could not be completed within the stipulated period of 60 days and accordingly, the same was issued by the concerned ALC being the conciliation officer under Act of 1947and such argument from the side of the O.P/Workman has got no merit.

Applicant/workman in his WS clearly stated that as his repeated representation to the management of the O.P/employer did not yeild any result. so he approached the DLC ,Durgapur for conciliation vide his letter dated 11.07.2016 but the ALC did not pay an heed, so he applied for pending certificate under the rules and accordingly he was provided with the Form-S on 20.10.2016.

O.P/employer in its WS unequivocally stated that it participated in the conciliation proceedings before the ALC., Durgapur but the applicant/workman did not appear on the date of proceeding i.e on 19.08.2016 and nowhere he has stated that the conciliation proceeding has ever ended.

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Applicant i.e P.W-1 in his examination-in-chief clearly stated in the line of his such pleading case of approaching the ALC vide his letter dated 11.07.2016 and that as the proceeding was not concluded, so he obtained the pending certificate in the form of Form–S on 20.10.2016 and thereafter he filed

the application before this tribunal.O.P./Employer while cross-examining P.W.1 did not put any question suggesting that conciliation proceeding has ever been completed by the ALC, Durgapur.

Moreover, it is evident from Exbt.8, which is the letter of the applicant/workman received by the officer of the DLC, Durgapur on 11.07.2016 that the applicant/workman's made prayer for initiation of conciliation from the side of the DLC, Durgapur on the matter of his alleged illegal termination of his service by the O.P/employer.

*On perusal of Form-S i.e Exbt.6 it is evident that the same has been issued by the conciliation officer i.e. ALC on 20.10.2016 stating therein that "**AND WHEREAS the conciliation proceeding in respect of the aforesaid dispute was started but no settlement could be arrived at as yet**". From plain reading of those words there remains no ambiguity that the conciliation proceeding remained pending and no settlement could be arrived at in between the parties till 20.06.2016 but the same does not mean, by stretch of any imagination that the conciliation proceeding has been completed.*

Moreover, Rule 12(A) of the West Bengal Industrial Dispute Rule,1958 speaks about the procedure to be adopted for settlement of dispute on representation from individual workman. It provides that:-

1) The Conciliation Officer on receipt of a representation relating to an individual workman shall investigate the matter and if he is satisfied that an industrial dispute exists, he shall take all such steps as he thinks fit and proper for the purpose of inducing the parties to come to a speedy, fair and amicable settlement of the dispute.

2) If no settlement of the industrial dispute mentioned in sub-rule (1) is arrived at within a period of 60 days from the date of raising of the dispute, the party raising the dispute may apply to the Conciliation Officer personally or by registered post with acknowledgement due in Form-P-4 for a certificate about the pendency of the conciliation proceedings before such Conciliation Officer.

3) The Conciliation Officer, on receipt of the application referred to in sub-section (1B) of section 10 shall within 7 days from the date of receipt of such application, issue a certificate about the pendency of conciliation proceedings to the applicant in Form-S.

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(4) The party may, within a period of 60 days from the date of receipt of such certificate or when such certificate has not been issued within 7 days under sub-rule (3) within a period of 60 days commencing from the day immediately after expiry of 7 days as aforesaid; file an application in Form T to such Labour Court or Industrial Tribunal as may be specified by the State Government by notification in the Official Gazette.

On perusal of the aforesaid provisions and especially 12A(2) (3) it is clear that if no settlement is arrived at within the period of 60 days from the date of raising of dispute by the individual workman then he has the right to approach the conciliation officer for issuance of pending certificate and on receipt of the same, the conciliation officer has to issue a certificate about pendency of the conciliation proceeding before him in Form-S. Thus it is clear the Exbt.6 has been issued by the conciliation officer in accordance with said provisions of law.

To consider the argument of the ld. lawyer for the parties on the issue of maintainability we are to also look into the relevant provisions under which the applicant/workman filed the instant case.

Sec.10(1B)(d) has been incorporated in the original Sec.10 of the Act of 1947 by virtue of West Bengal Act(33) of 1989, Sec.4.

In section 10, after sub-section (1A), the following be inserted;

(1B) (a) Notwithstanding anything contained elsewhere in this Act, where in a conciliation proceeding of an industrial dispute relating to an individual workman, no settlement is arrived at within a period of 60 days from the date of raising of the dispute, the party raising the dispute may apply to the Conciliation Officer in such manner and in such form as may be prescribed, for a certificate about the pendency of the conciliation proceedings.

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(b) The Conciliation Officer shall, on receipt of the application under Clause (a) issue a certificate within 7 days from the date of receipt in such manner, in such form and containing such particulars as may be prescribed. A copy of the certificate shall also be sent to the appropriate Govt. for information.

(c) The party may, within a period of 60 days from the receipt of such certificate or, where such certificate has not been issued within a period of 60

days from the receipt of such certificate or where such certificate has not been issued within 7 days as aforesaid, within a period of 60 days commencing from the day immediately after the expiry of 7 days as aforesaid, file an application in such form and in such manner and with such particulars of demands as may be prescribed, to such Labour Court or Tribunal as may be specified by the appropriate Govt. by notification. Different Labour Courts or Tribunals may be specified for different areas or different classes of industries.

(d) The Labour Court or Tribunal specified under clause(c) shall, within a period of 30 days from the date of receipt of an application under clause (c) give a hearing to the parties and frame the specific issues in dispute, and shall thereafter proceed to adjudicate on the issues so framed as if it were an industrial dispute referred to in sub-section (1)-W.B. Act (33 of 1989, section-4).

From the above provisions, it is clear that by virtue of such amendment a right has been conferred upon an individual workman to approach the tribunal or Labour Court, as the case may be, for determination of the industrial dispute after fulfilment of mandatory criteria of approaching the conciliation officer for settlement of the industrial dispute by way of conciliation within a stipulated period. And it also confers a right to the workman to approach the tribunal or the labour court, as the case may be, if the conciliation proceeding remains pending for 60 days and after obtaining pending certificate in Form-S.

This West Bengal Amendment is an exception to the general scheme of I.D Act,1947 which empowers the tribunal to adjudicate on any industrial dispute on the issue referred to it by the appropriate Govt. for adjudication.

Similarly, amended provision 2A of the Act, 1947 also speaks about conferring jurisdiction upon tribunal to adjudicate on the industrial dispute under some circumstances.

It is evident from the materials of this case that the instant case has been filed on 03.11.2016 by the applicant/workman, so the same has been filed well within the period of 60 days from the date of issuance of Exbt.5 i.e. Form-S. Accordingly, it cannot be said that the approach of the applicant /workman in knocking the door of this tribunal under West Bengal Amended provisions of 10(1B) (d) of the Act 1947 suffers from any sort of legal deficiency and or any legal impediment under the Act of 1947.

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Consequently, I find no merit in such argument of the ld. lawyer for the O.P/employer and decide this issue in favour of the applicant/workman.

Issue No.2 :-

In order to adjudicate this issue we are to first consider whether the applicant comes within the definition of 'workman' as provided in Sec.2(s) of the I.D Act,1947.

During the course of argument it was contended from the side of the O.P/employer that since the applicant was appointed as Security Supervisor, so he does not come within the definition of workman and accordingly, this tribunal is not vested with the power under the Act,1947 to decide the alleged industrial dispute. Curiously enough, WS of the O.P/employer is absolutely silent about its such argument.

On the other hand, it is argued by the ld. lawyer for the applicant that although the appointment letter reveals about appointment of applicant as Security Supervisor but the nature of job of the applicant clearly reveals that he was not entrusted with any supervisory work and he was only entrusted with the duty of looking after weighing of vehicles empty or loaded at the weighing bridge of the O.P's premises.

P.W-1 in his examination-in-chief simply stated that he was appointed as workman and he discharged his duties in unblemished manner till the date of his illegal termination on 28.05.2016. No question has been put to him in his cross-examination by the O.P/employer from which it could be inferred that the nature of duty entrusted upon him is actually supervisory in nature. Not only that, no denial has been given to P.W-1 regarding his such evidence-in-chief. As a result of which his such ocular testimony remains unchallenged and consequently, intact.

Moreover, it is further evident from the letter of assurance/appointment letter i e.Exbt.2 that the applicant was appointed as Security Supervisor on 28.10.2013 but it has nowhere mentioned that he would be entrusted with the work of any supervisory nature which would authorise him to take decisions for and on behalf of the management with respect to any matter of the O.P. concerned.

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From my above discussion, it is crystal clear that O.P/employer miserably failed to establish that the applicant was employed in a supervisory capacity by virtue of Exbt.2. Accordingly, such argument on the part of the ld. lawyer for the O.P is devoid of any merit.

It was further argued from the side of the O.P/employer that since the service of the applicant was terminated as a punishment inflicted by way of disciplinary action, so such termination does not come within the ambit of 'retrenchment' as defined in Sec.-2(oo) of the Act,10947.

Ld. lawyer also argued that such termination cannot be said to be unjustified because of alleged non-compliance of Sec.25F of the Act, 1947 as because the said provision speaks about conditions precedent to retrenchment of a workman and not about termination of a workman.

On the other hand, it was argued from the side of the applicant/employer that the termination of service of the applicant/workman certainly amounts to retrenchment as no preliminary enquiry or domestic enquiry was conducted from the side of the employer prior to issuance of the termination letter.

Ld. lawyer contended that as no material is placed before the tribunal from the side of the O.P/employer showing due compliance of the requirement of Sec.25F of the Act,1947, so the Exbt.2 corresponding to Exbt. B has got no legal sanctity.

In my considered view, to consider merit of such argument we are to first deal with the definition of retrenchment as provided in the Act, 1947.

Now, let us discuss the relevant provisions of law under the ID Act,1947 concerning retrenchment / termination of employee under the I D Act of 1947. Section 2(00) of the ID Act,1947 defines the term retrenchment in the following manners :

2[(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include -

a) voluntary retirement of the workman: or

b) retrenchment of the workman on reaching the age of superannuation if the contract of employment between the

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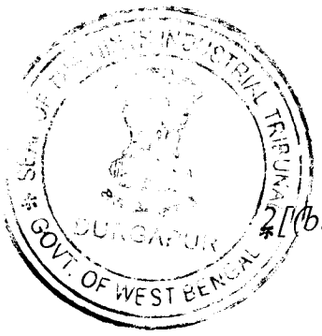
GOVT. OF WEST BENGAL



employer and the workman concerned contains a stipulation in that behalf, or

2[(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

c) termination of the service of a workman on the ground of continued ill-health;].

WEST BENGAL

In clause (oo)-

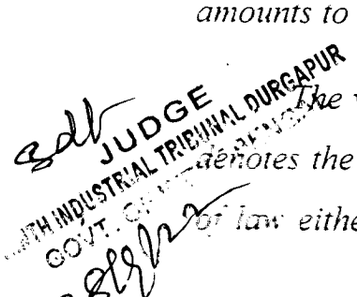
i) after the words "termination by the employer" the words "by notice or otherwise" shall be inserted.

ii) Sub-clause (c) shall be omitted [vide West Bengal Act No.57 of 1980] (w.e.f. 30.11.1981)].

On perusal of the above definition of retrenchment I am of the view that the term "retrenchment" leaves no manner of doubt that the termination of the service for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary actions, is termed as retrenchment with certain exception and it is not dependent upon the nature of employment and the procedure pursuant to which the workman has entered into service.

From plain reading of the above provisions of law it is also clear that retrenchment means termination of service of a workman by the employer for any reason whatever, save and accept termination of service as punishment inflicted by way of disciplinary action. In other words, termination of service of a workman does not come within the ambit of retrenchment for determination of an industrial dispute, if the employer can establish that the service was terminated as a punishment by way of disciplinary action taken as per provisions of law and not otherwise. In all other cases, termination of service amounts to retrenchment.

The words "punishment inflicted by way of disciplinary action" certainly denotes the disciplinary action must be taken in accordance with the provisions of law either as per the Industrial Employment (standing orders) Act 1946 or



under the by-laws of the employer concerned. In any case, the onus is on the employer to establish the same.

Besides that, the disciplinary action must be based upon enquiry as contemplated under the standing orders Act, 1946 or the case laws pronounced by the Hon'ble Apex Court and other Hon'ble High Courts on this aspect.

The very purpose of domestic enquiry is to contain arbitrary and whimsical exercise of power of hire. It is also necessary to mainly find out the truth of the allegations made against the workman. By holding such enquiry the delinquent workman is provided with an opportunity to place his case against the charges and also to examine the witnesses and providing opportunity to the delinquent workman to cross-examine the witnesses.

In holding enquiry either preliminary or domestic the employer has to follow the principle of natural justice, namely, first that the person who holds enquiry must be impartial and disinterested, and secondly, the person whose interests is going to be affected ought to be given an opportunity of having say or explanation before the order is passed against him.

In this regard we may refer the case of ***Sur Enamel and Stamping Works Ltd Vs Workman, AIR 1963 SC 1914*** *wherein the Hon'ble Court discussed the prerequisites of a valid enquiry and held as follows:- " An enquiry cannot be said to have been properly held unless, (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined-ordinarily in the presence of the employee-in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the enquiry officer records his findings with reasons for the same in his report."*

In other words, before initiating the process of enquiry the delinquent person should be informed in writing about accusation against him for inviting him reply on the same and after receiving the said reply the same is to be considered by the employer and if the employer finds the same to be unsatisfactory, then articles of charges are to be framed and the same is to be communicated alongwith the documents to be relied upon in proving the charges to the delinquent person. At the same time, an enquiry officer and

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presenting officer are to be appointed for holding such enquiry to find out the truth of the accusation against delinquent person. After fulfilment of such requirement of law it can be said that the principles of natural justice have been followed in conducting such enquiry.

The next step comes after filing of the enquiry report by the enquiry officer. After submission of the same and before acting upon it, the employer has to see whether the enquiry officer arrived at his findings based upon the some cogent and reliable evidence or not and his findings are based upon reasons or not. After being satisfied with all those requirements of law the employer has to give an opportunity to the delinquent workman inviting his explanation regarding the proposed punishment which he intends to inflict as disciplinary action. After receiving explanation from the delinquent workman the employer can take disciplinary action either by way of termination of service or by imposing any other punishment proportionate to the nature of proved charge/s.

In my considered view only after fulfilment of above discussed mandatory requirements of holding valid enquiry the punishment of termination of service is the consequence of a disciplinary action and it does not amount to retrenchment under the Act of 1947.

But, if O.P/employer fails to prove that the enquiry has not been conducted in the manner, as discussed herein above, so its alleged disciplinary action as punishment has got no legal sanctity and/or cannot be said that the termination of service of a delinquent workman does not amount to retrenchment.

In the light of the above settled proposition of law we are to analyse the evidence of the O.P/employer to see how far it has succeded to prove that the alleged punishment is based upon legal disciplinary action.

O.P/employer's pleading case is that on detection of alleged illegal activity of the delinquent workman on 24.05.2016 the employer entrusted security officer Mr.S.K.Singh (O.P.W-2) conducted a preliminary enquiry as per Company's service policy and accordingly O.P.W-2 took up enquiry on 25.05.2016 and after examining eyewitnesses and considering written explanation of the applicant/workman and driver of the concerned trailer vehicle he found that the delinquent workman is a habitual offender of

defalcation of O.P's property in connivance with the truck drivers by showing excess weight of the empty trucks.

O.P/employer in its WS nowhere averred how security officer Mr.S.K.Singh has been appointed as enquiry officer and who was appointed as the presenting officer by the management.

It is although stated by the employer in its WS that the preliminary enquiry was conducted as per company's policy but during the course of entire trial no copy of such policy of the Company or any by-laws have been brought to the record.

O.P/employer examined its authorised representative Mr.Alok Pandey as O.P.W-1 in this case. But, after having gone through all contents of his examination-in-chief and cross-examination I find that he joined the O.P's concern on 26.6.2017 i.e. much after the occurrence of the alleged incident of 24.05.2016 involving the applicant/workman. His such evidence clearly reveals that he did nothing for and on behalf of the Company with respect to the impugned matters and whatever he has stated in his examination–in-chief is nothing but the replica of the WS of the O.P/employer.

In my considered view, oral testimony of O.P.W-1 stands on the same footing of evidence of a power of attorney holder who does no acts with respect to the matters for and on behalf of his master regarding the matters involving in the case but adduced evidence for and on behalf of his master. Thus, evidence of O.P.W-1 cannot be taken into consideration for and on behalf of the O.P/employer.

I must make it clear that while holding the same I am not unmindful of the fact that all the provisions of C.P.Code 1908 are not strictly applicable in a proceeding under the Act of 1947 but the basic principles regarding competency of a witness to adduce evidence on any relevant fact is to be followed while evaluating his evedentiary value of his evidence. Thus, I am of the view that by virtue of Or.3 R. 1&2 of the C.P.Code 1908 evidence of O.P.W-1 cannot be considered as evidence of the employer regarding the matter in issue as at the relevant point of time he was not associated with the O.P.concerned.

In this regard, we may consider the spirit of the observation of the Hon'ble Apex Court as made in the case of ***Janki Vashdeo Bhojwani and Anoter Vs.***

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Indusin Bank Ltd.Ors. (2005) 2 SCC 217 *wherein Hon'ble Apex observed that power of attorney holder cannot depose for the principal in respect of the matters of which only principal has the knowledge and he did no acts on the matters on which he adduced evidence.*

Considering such settled proposition of law regarding status of the O.P.W.1 only evidence of the O.P.W.2 as enquiry officer remains from the side of the employer to assess how far it has been able to discharge its legal obligation, as discussed herein above..

The said witness in his evidence–in-chief on affidavit stated that on 24.05.2016 he was posted as Supervisor and on checking of the said vehicle/trailer it was detected that the weight of the empty vehicle has been shown less than its actual weight to gain wrongfully by loading 40 kgs. more TMT Bars on the said vehicle by its driver in connivance with the applicant/workman.

The said witness in his examination-in-chief nowhere stated anything about his appointment as enquiry officer for conducting either the preliminary enquiry or domestic enquiry by the employer. But he stated that after submission of his enquiry report management terminated service of the delinquent workman.

He in his first part of evidence-in-chief nowhere reveals about the manner of his conducting the alleged enquiry against the applicant/workman. So, the question of following all the essential ingredients for holding enquiry, as mentioned herein above, by the O.P.W-2 being enquiry officer does not arise although. Moreover, O.P.W-2 although claimed that the service of the applicant/workman was terminated on the basis of his enquiry report, but his so-called enquiry report never saw ray of light as the same has not been produced before this tribunal by the O.P/employer for the reason best known to it. Such conduct on the part of the O.P/employer compels this tribunal to draw an adverse inference u/s 114(g) of the Indian Evidence Act, 1872 against it.

During the course of argument and being asked by the tribunal, about the existence of the enquiry report the ld. lawyer for the O.P/employer very candidly submitted that he does not have any knowledge about the same.

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Non-production of the alleged enquiry report itself goes to the question of the legality of termination of service of the applicant/workman by virtue of Exbt.4 corresponding to Exbt.E. Besides that, its non production also curtails the legal right of the applicant/workman to raise question about validity of findings of the enquiry officer against him as well as the manner of holding enquiry.

O.P.W-1 in is cross-examination stated that he does not know anything about the service rules or service condition of the O.P/industry. From his further cross-examination it is evident that he did not issue any written show cause mentioning details of allegations to the applicant and simply verbally asked the applicant/workman regarding enquiry. As I have already mentioned herein above that the alleged enquiry report has not been produced by the O.P/employer before this tribunal, so ocular evidence of O.P.W-2 regarding his claim of holding alleged enquiry is of no use and /or has got no evidentiary value.

From my above discussion of the evidence as adduced from the side of the O.P/employer it is clear that no enquiry either preliminary or domestic has ever been conducted by the O.P/employer which resulted into termination of service of the applicant/workman as punishment of the disciplinary action in accordance with the provisions of the I.D Act,1948. Accordingly, the O.P/employer miserably failed to prove that the termination of service of the applicant/workman is not retrenchment within the ambit of Sec.2(oo) of the I.D.Act,1947.

In view of such findings that the termination of service of the applicant does amount to retrenchment, so the argument of the ld. lawyer for the O.P/employer that non-compliance of Sec.25F does not render the action taken by the O.P/employer as unjustified is devoid of any merit.

So far as the procedure to be adopted for retrenchment of workman under the ID Act, 1947 is concerned, we are to look at the provisions of section 25B and 25F of the Act of 1947.

Section 25 B provides definition of continuous service:- For the purpose of this Chapter :-

(1) A workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service; including service which may be interrupted on account of sickness of authorised leave or an accident or as strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) Where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer –

a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for nor less than-

i) one hundred and ninety days in the case of a workman employed below ground in a mane, and

ii) two hundred and forty days, in any other case;

b) for a period of six months, if, the workman, during a period of six calendar months preceding the date with reference to which calculations to be made, has actually worked under the employer for not less than –

i) ninety-five days, in the case of workman employed below ground in a mine, and

ii) one and twenty days, in any other case.

Explanation – For the purposes of clause (2) the number of days on which a workman has actually worked under an employer shall include the days on which –

i) he has been laid-off under an agreement or as permitted by standing order made under the Industrial Employment (Standing Orders) Act,1946 (20 of 1946), or under the Act or under any other law applicable to the industrial establishment;

ii) he has been on leave with full wages, earned in the previous years;

iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment . and

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iv) in the case of a female, she has been on maternity leave, so, however, that the total period of such maternity leave does not exceed twelve weeks.]

Section 25F speaks about conditions precedent to retrenchment of workmen:-

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of the notice;

b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

c) notice in the prescribed manner is served on the appropriate Government [for such authority as may be specified by the appropriate Government by notification in the Official Gazette].

From above mentioned provisions of law it is clear that the condition precedent for retrenchment has been defined U/S 25F of the Act of 1947 which postulates that workman employed in any nature who has been in continuous service for not less than one year can be retrenched by the employer after clause(a) & (b) of section 25 have been complied with and not otherwise.

The Hon'ble Supreme Court in catena of its decision and recently in the case of ***K.V. Anil Mithra & Another Vs. Sree Sankaracharaya University of Sanskrit &Anr., Civil Appeal No. 9068 of 2014*** *observed that "The scheme of the Act of 1947 contemplates that the workman employed even as a daily wager or in any capacity, if has worked for more than 240 days in the preceding 12 months from the alleged date of termination and if the employer wants to terminate the services of such a workman, his services could be terminated after due compliance of twin clauses (a) & (b) of section 25F of the Act 1947 and to its non-observance held the termination to be void ab initio had and so far as*

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the consequential effect of non-observance of the provisions of section 25F of the Act 1947, may lead to grant of relief of reinstatement with full back wages and continuity of service in favour of retrenched workman, the same would not mean that the relief would be granted automatically but the workman is entitled for appropriate relief for non-observance of the mandatory requirement of section 25F of the Act, 1947 in the facts and circumstances of each case".

Reverting back to the facts of the case in hand, it is the specific case of the applicant/workman that he remained in the continuous service from 28.10.2013 to 28.05.2016 of the O.P/employer and his such claim has not been denied by the O.P/employer. Moreover, Exbt.2 and Excbt.4 also reveal that the applicant/workman was in continuous employment for more than period of continuous service as specified in Sec.25B of the Act of 1947.

No material is placed from the side of the O.P/employer that it complied with the mandatory requirement of Clause (a) (b) Sec.25F of the Act,1947 before terminating service of the applicant/workman by virtue of Exbt.2 corresponding to Exbt. E. Thus, it cannot be said that the O.P/employer was justified in terminating the service of the applicant/workman by virtue of the Exbt.2. In other words, Exbt.2 corresponding to Exbt.E has no legal value in the eye of law.

In view of my such findings regarding not following up the provisions of the Act of 1947 in terminating service of the applicant/employer. I find no reason to carry forward further discussion on the alleged ground of termination as the same would not change fate of this case and would amount to wastage of valuable time. Thus, I decide this issue in favour of the applicant/workman.

Issue No.3 :-

Applicant/workman in his WS prays for relief of his reinstatement in the service with full back wages.

He in his evidence–in-chief has also stated in the line of his pleading case. He in his cross-examination clearly stated that as per letter of assurance i.e Exbt.2 corresponding to Exbt. B his age of superannuation is 58 years. From those too documentary evidences it is also evident that the age of superannuation is 58 years. During the course of argument the ld.lawyer also admitted the same.

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Applicant/workman in his examination–in–chief supported by an affidavit dated 18.05.2018 mentioned his age as 56 years. No contrary nature of evidence has been adduced from the side of the O.P/employer to rebut such declaration of age by the applicant/workman. It is also evident from the cross-examination of P.W-1 that he is an illiterate person and he somehow can only sign his name in Bengali.

Considering such facts and circumstances, I am of the view the age of superannuation of 58 years is to be computed on the basis of the age as declared on 18.05.2018 by the applicant/workman. Accordingly, the applicant/workman would be deemed to have been superannuated from his service in the month of May, 2020 from his service.

As per applicant/workman's declaration on affidavit dated 18.05.2018 he is unemployed. He in his WS although nowhere stated that he is not gainfully employed.

Recently, the Hon'ble Apex Court in the case of ***Allahabad Bank &Ors. Vs. Avtar Bhushan Bhartiya, Special Leave Petition (Civil) No. 32554 of 2018*** *relying upon the case of* ***Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) &Ors.,(2013) 10 SCC 324*** *observed that "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 the first instance that he/ she was not gainfully employed or was employed on lesser wages..... In the first instance, there is an obligation on the part of the employee to plead that he is not gainfully employed. It is only then the burden would shift upon the employer to make an assertion and establish the same."*

Coming back to discussion on the fact of this case I must mention herein that the workmen nowhere pleaded that that he is not gainfully employed. Besides that, P.W-1 in his entire affidavit-in-chief nowhere stated that after he has been terminated from service by the O.P/employer he is not gainfully employed till this date and /or he is sitting idle/unemployed since the date of termination from his. So, in absence of any pleading on that point by the workman question of shifting burden upon the O.P. employer to make an assertion and establish the same does not arise at all.

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have already mentioned herein above the Hon'ble Apex Court in the case of ***K.V.Anil Mithra and another (Supra)*** *clearly observed that consequential effect of non-observance of the provisions of section 25F of the Act ,1947, may lead to grant of relief of reinstatement with full back wages and continuity of service in favour of the retrenched workman, the same would not mean that the relief would be granted automatically and the workman is entitled for appropriate relief for non-observance of the mandatory requirement of section 25F of the Act of 1947 in the facts and circumstances of each case. Thus, while granting relief the tribunal has taken into consideration the entire facts and circumstances of the case in hand, so while granting the relief the same is to be decided facts and circumstances are to be taken into consideration.*

This apart, Sec.11A of the Act of 1947 also empowers the tribunal that in the adjudication proceeding if it is satisfied that the order of dismissal or discharge was not justified, it may set aside the order of discharge and direct reinstatement of the workman on such terms and conditions as it thinks fit or to give such relief to the workman including..... as the circumstances of the case may require.

This apart, Sec.11A of the Act of 1947 also empowers the tribunal that in the adjudication proceeding if it is satisfied that the order of dismissal or discharge was not justified, it may set aside the order of discharge and direct reinstatement of the workman on such terms and conditions as it thinks fit or to give such relief to the workman including..... as the circumstances of the case may require.

It is an undisputed fact of this case that the workman was entrusted with the duty to supervise the work of taking care of properties of the employer but nature of allegations, although not discussed on merit, against him was his involvement in siphoning of properties of his employer since a long time, as evident from the Exbt. C & D and reply of the driver concerned, so the same can be also one of the circumstance which should be taken into consideration for granting relief.

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Since this tribunal has already decided the Issues No.2 in favour of the applicant workman mainly on technical ground and not on the merit of the charges, so it cannot be said that the charges were baseless. Such nature of allegations against a workman employed for protection of the properties itself a

mitigating circumstances against him especially when the workman has not pleaded for any reason for his being falsely implicated by the employer.

In my considered view, all such facts and circumstances must be considered as mitigating factors while considering granting of relief to the applicant/workman.

Having regard to the above settled proposition of the law as well as the facts and circumstances, I am of the view that justice would be served if some amount of compensation, having parity with his admitted monthly wages of Rs.4200/-, be award to the applicant/workman. Accordingly, the applicant /workman would be entitled to get compensation of Rs.75000/-from the O.P./Employer. Thus, the issueNo.3 is disposed of accordingly.

Thus, both the referred issues are disposed of accordingly.

The instant proceeding succeeds on contest.

Hence, it is

ORDERED

that the proceeding U/S 10(1B)(d) of the I D Act,1947 succeeds on contest against the O.P / Messrs Joy Balaji Industries Ltd. but without cost and the order of termination of service of the workman namely, Dulal Sarkar vide letter dated 28.05.2018 is hereby set aside .

O.P/Messrs Joy Balaji Industries Ltd directed to pay compensation of Rs.75,000/-(Rupees seventy five thousand) to applicant/workman within one month from this award. Accordingly, an award is passed to that effect.

Send copy of this order to the Principal Secretary, Labour Department. Govt. of West Bengal for doing the needful.

Furnish copy of this order to the parties free of cost.

D / C by me,

Judge,

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Judge, 28/9/22

(Sujit Kumar Mehrotra)

9th Industrial Tribunal, Durgapur.

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