

I/203440/2022

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

No. Labr/. 650 ./(LC-IR)/22015(16)/31/2022

Date: 29-06-2022

ORDER

WHEREAS an industrial dispute existed between M/s. Hidusthan Club Limited, 4/1, Sarat Bose Road, Kolkata - 700020 and Sri Bimal Kumar Sharma, 69, Salkia School Road, Bandhaghat, Howrah - 6 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 (14 of 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 (14 of 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 (14 of 1947) on the said Industrial Dispute.

Now, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14 of 1947), the Governor is pleased hereby to publish the said Award dated 19/05/2022 as shown in the Annexure hereto vide memo no. 930- L.T. dated - 21/06/2022.

ANNEXURE

(Attached herewith)

By order of the Governor,



Joint Secretary
to the Government of West Bengal

I/203440/2022

: 2 :

No. Labr/ ^{650/1(5)}/(LC-IR)Date: ²⁹⁻⁰⁶⁻ 2022

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

1. M/s. Hidusthan Club Limited, 4/1, Sarat Bose Road, Kolkata - 700020.
2. Sri Bimal Kumar Sharma, 69, Salkia School Road, Bandhaghat, Howrah - 6.
3. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Buildings, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata - 700001.
- ✓ 5. The Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.



Joint Secretary

No. Labr/ ^{650/2(2)}/(LC-IR)Date : ²⁹⁻⁰⁶⁻ 2022

Copy forwarded for information to: -

1. The Judge, Second Labour Court, West Bengal, with respect to his Memo No. 930 -L.T. dated 21/06/2022.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Join Secretary

An application u/s. 10(1B)(d) of The Industrial Disputes Act, 1947 filed by Sri Bimal Kumar Sharma, 69, Salkia School Road, Bandhaghat, Howrah-6 against M/s. Hindusthan Club Ltd., 4/1, Sarat Bose Road, Kolkata-700 020.

(Case No. 28/08 u/s. 10(1B)(d) of The Industrial Disputes Act, 1947)

BEFORE THE SECOND LABOUR COURT, WEST BENGAL, KOLKATA

**PRESENT: SRI ARGHA BANERJEE, JUDGE
SECOND LABOUR COURT
KOLKATA.**

Date: 19.05.2022

AWARD

Case of the applicant



The brief fact of the instant case of the applicant is that the same was an employee of the opposite party company who had joined the company on 01.07.1989 as a 'Cashier' on a monthly salary of Rs. 1,100/-. That during his service period the applicant workman have been discharging his duties with sincerity and integrity. That though the applicant workman was working as a Finance Manager he did not perform any supervisory duty such as to recommend or sanction leave of any other employee or to take any disciplinary action against any employee or to assign duties and distribute the work. That suddenly vide their letter dated 19.09.2006 the management of the Club brought some false, baseless allegation against the applicant and had suspended him from his present post with immediate effect.

That the applicant workman had replied to the said charge-sheet vide his letter dated 26.09.2006 and requested the opposite party to allow him to take necessary inspection of the documents as raised in the said charge-sheet in presence of his legal advisor. The applicant had further requested the management to supply the copies of such documents in order to make effective reply to the charge-sheet. The applicant alleged the fact that without considering the request of the applicant Club authority vide their letter dated 28.09.2006 (received by the workman on 06.10.2007) had given the instruction to inspect the documents alone on 07.10.2006 in between 5:30 P.M. to 6:30 P.M. but no documents were supplied to the workman in such regard. That the applicant workman vide his letter dated 07.10.06 requested the management to fix any other date with proper intimation giving a reasonable time to inspect the documents for the ends of justice and the Club authority without considering the request of the applicant workman had terminated the service of your applicant vide their letter dated 17.10.2006 with immediate effect violating the provisions of law of the land. It is the contention of the applicant that before terminating the service the Club authority had not given any opportunity of hearing to the same neither any enquiry had been held against the workman. The Club also had not given any compensation complying the provision of Section 25F of The Industrial Disputes Act, 1947. That the applicant is still unemployed from the date of his termination.

That the applicant workman protested his said illegal and unjustified termination vide his letter dated 11.01.07 and requested the management to withdraw the said termination order and allow him to resume duty within 15 days but the Club authority did not pay any heed. Thus, under this compelling circumstances the workman requested the Labour Commissioner to look into the matter vide his letter dated 12.02.2007 but the said application letter as contended by the applicant was misplaced and no conciliation proceeding was started on the basis of said application. That this applicant vide his letter dated 15.11.2007 raised another dispute with the Labour Department, Government of West Bengal and a conciliation proceeding thereafter started having no. 142 of 2007.

That the opposite party Club had participated in the said conciliation proceeding and had submitted their written submission. However, owing to the non-co-operation of the management the dispute was not settled before the Conciliation Officer and the

applicant had filed an application in the prescribed format for a certificate about the pendency of conciliation proceeding and accordingly after receipt of such certificate the applicant had filed this instant application for adjudication.

Case of the opposite party

That the Opposite Party had appeared in the instant proceeding and had contested the matter. The Opposite Party contended the fact that the present applicant was not a workman within the meaning of Section 2(s) of The Industrial Dispute Act, 1947 and as such had no locus standi to file the instant application. The applicant was functioning as Manager, Finance and Administration and was holding Managerial post and was not an employee of the concern within the ambit of section 2(s) of the Industrial Disputes Act, 1947. The applicant had caused serious irregularities while working in the Managerial capacity regarding financial transactions and accordingly the suspension was justified. The applicant as contended by the O.P was given opportunity to inspect the documents on a specified date but the same had failed to cause such inspection. The requirement of section 25F of the Industrial Disputes Act, 1947 was not found necessary as the applicant had not responded to the show cause of this O.P and does not fall under the category of 'workman' as defined in section 2(s) of the Industrial Disputes Act, 1947.

ISSUES

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

1. Whether the petition u/s. 10(1B)(d) of the Industrial Disputes Act, 1947 filed by the applicant is maintainable in law and facts?
2. Whether the applicant was functioning as Manager Financial & Administration is a "workman" within the meaning of sec. 2(s) of the I.D. Act, 1947?
3. What other relief or reliefs, if any, is the applicant entitled to get as per law and equity?

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. had cross examined the P.W. 1. in full. The documents produced before this Court were marked in the following manner:-

1. Exhibit 1 – Photo copy of O.P's letter dated 19.09.2006 levelling certain allegations
2. Exhibit 2 – Photo copy of letter dated 26.09.2006 sent to the O.P
3. Exhibit 3 – Photo copy of letter dated 28.09.2006 to the applicant
4. Exhibit 4 – Photo copy of letter dated 07.10.2006 to the O.P
5. Exhibit 5 – Photo copy of termination letter dated 17.10.06
6. Exhibit 6 – Photo copy of applicant's letter dated 11.01.2007 to the O.P
7. Exhibit 6/a – Photo copy of A/D Card and postal slip
8. Exhibit 7 – Photo copy of applicants letter dated 12.02.2007 to the Labour Commissioner
9. Exhibit 8 – Photo copy of letter dated 15/11/2007 to the Labour Commissioner
10. Exhibit 9 & 9/a– Photo copy of forwarding letter dated 09.01.08 sending comments of O.P and Photocopy of comments of O.P before the Deputy Labour Commissioner dated: 25/12/2007
11. Exhibit 10 – Photo copy of applicants letter dated 14/02/2008 to the DLC
12. Exhibit 11 – Photo copy of letter dated April 08, 2008.
13. Exhibit 12 – Photocopy of Memorandum and Articles of Association of O.P
14. Exhibit 13 – Photocopy of Audit Report and Balance Sheet for the year 2003-2004
15. Exhibit 14 – Photocopy of Audit Report and Balance Sheet for the year 2004-2005
16. Exhibit 15- Photocopy of Audit Report and Balance Sheet for the year 2005-2006
17. Exhibit 16 – Photocopies of letters issued by Pawan Jain, Honorary Treasures of O.P dated 15/03/2004, 16/03/2004 and 04/06/2004
18. Exhibit 17 – Photocopy of letter dated 07/06/2004 issued by Pawan Jain to the President of O.P club



19. Exhibit 18 – Photocopies of letter dated 08/06/2004 issued by Pawan Jain along with enclosures
20. Exhibit 18/1 - Photocopy of letter dated 10/06/2004 issued by Pawan Jain
21. Exhibit 18/2 - Photocopy of letter dated 15/06/2004 issued by Pawan Jain to the President of the O.P club
22. Exhibit 19 – Photocopies of Letter dated 11/06/2004 and 23/08/2004 issued by Pawan Jain to Bimal Sharma
23. Exhibit 20 – Photocopies of letters dated 22/06/2004 and 23/08/2004 issued by Pawan Jain to Mr. Mahesh Anand

The Opposite Party on the other hand had adduced one Surakanta M. Damani as O.P.W. 1 and one J.R. Sethia as O.P.W. 2 in this case who were examined-in-chief, cross examined and discharged. The documents were produced and marked in the following manner: -

1. Exhibit A – A letter written by Mr. S. K. Sonthalla, Hony. Secretary of M/s. Hindusthan Club Limited dated 1st July, 1989 to Shri Bimal Kumar Sharma;
2. Exhibit B – A letter written by Hony. Secretary M/s. Hindusthan Club Limited dated 26.12.2005 to Shri Bimal Kumar Sharma;
3. Exhibit C – A letter written by Shri Bimal Kumar Sharma dated 28.01.2006 to the Hony. Secretary of Club.
4. Exhibit D – Photo copy of Debit Voucher of Rs. 10,000/- only.
5. Exhibit E – Photo copy of Voucher of Rs. 5,000/- only.
6. Exhibit F – A letter dated 19.09.2006 written by Mr. J. R. Sethia, Hony. Secretary of M/s. Hindusthan Club Limited to Shri Bimal Kumar Sharma.
7. Exhibit G – A letter dated 28.09.2006 written by Mr. J. R. Sethia, Hony. Secretary of the Club to Shri Bimal Kumar Sharma.
8. Exhibit H (Series) – Photo copies of Debit Vouchers.
9. Exhibit I – A letter dated 17.10.06 written by Hony. Secretary of the Club to Shri Bimal Kumar Sharma.
10. Exhibit J – A letter dated 10.12.2007 written by Mr. Jiwraj Sethia, Hony. Secretary of the Club to Shri Bimal Kumar Sharma.
11. Exhibit K (series) – Photocopies of O.P's letters dt. 25.12.2007, dt. 08.04.2008 & dt. 09.05.2008 to the Deputy Labour Commissioner.
12. Exhibit L – A letter dated 10.06.08 written by Smt. S. Khatua, Dy. Labour Commissioner, Govt. of W.B.
13. Exhibit M – A letter dated 11.12.2004 written by Shri Bimal Kumar Sharma to The Manager, Allahabad Bank.

Evidence of the parties

From the substantive evidence of the P.W. 1 Shri Bimal Kumar Sharma who happens to be the applicant of this instant application it is clear that: -

a) The same was appointed as a cashier in the O.P. concern in the finance department on and from 01/07/1989 vide the Exhibit-A and thereafter as Manager (Finance and Administration). The work of the applicant was to make payment of cash along with other persons, draw cheques along with sending the same for encashment. The applicant was also entrusted to issue cash receipts, prepare vouchers and also to issue cheques to third parties on behalf of the Club and further to deposit cheques issued by third parties in the name of the O.P. to the bank for encashment, etc. No formalities were being maintained by the O.P in regard to the payment of cash and sometimes the payment was made in cash without issuance of any voucher and sometime on the basis of the slip. The applicant as stated in some occasions used to make payments on the basis of verbal order of the O.P concern over the telephone. In regard for making payment to a person the same had to accept it in a receipt in lieu of the payment being made. The applicant used to make vouchers and as stated by the applicant the vouchers can be issued without any number.

b) The applicant was given a supervisory nature of job and had no subordinate staff under him. The O.P had issued one letter dated 26/12/2005 which was marked as exhibit-B to this applicant stating the fact that there were certain discrepancies in his work and such



fact was being acknowledged by the applicant vide his letter dated 28/01/2006 which was marked as exhibit-C. The applicant had admitted the fact that there was no proper receipt in the voucher of Anwar Ali marked as exhibit-D which was tendered to him at that time. That, subsequently the applicant had admitted the payment to be a genuine one as the same had been realized from the bills of the concerned person. The applicant had admitted his signature and handwriting upon the exhibit-E which is a debit voucher and had admitted his duty for preparation of vouchers.

c) The O.P subsequently had issued one letter dated 19/09/2006 the Exhibit-1 leveling the allegation that there were certain financial irregularities in regard to which the same was asked to refrain from performing his work. That on the basis of the exhibit 1 the applicant had sent the exhibit 2 from his end denying the allegations and prying thereby to inspect the documents in regard to which the allegations were being made.

d) That on the basis of the exhibit 2 the O.P concern had issued the exhibit 3 wherein the same was asked to inspect the documents on 07/10/2006 in between 5:30 PM to 6:30 PM at the club premises. The applicant was unable to inspect the document on the date given as the time allotted was not sufficient for the same to inspect 240 vouchers and had requested the O.P to provide him another date with sufficient allotted time vide letter dated 07/10/2006 which was marked as exhibit - 4. The applicant had admitted the fact that even after expiry of one hour time the O.P had given him opportunity to inspect the documents.

e) The O.P had not provided any further opportunity to the applicant to inspect the documents and rather had issued the exhibit - 5 wherein the same was terminated from the service with immediate effect from 17/10/2006. The applicant had further stated that neither any show cause was being issued nor any domestic enquiry was being held by the O.P; no termination compensation was also given by the O.P in regard to the sudden termination. The applicant had admitted the fact that terminal benefits were being given to the same but the same had refused to accept the same.

f) The applicant had raised an industrial dispute before the Management vide his letter dated 11.01.2007 and requested the Management to reinstate the same vide exhibit 6 and 6/a. However, the Management had failed/neglected to reinstate the applicant in the service and thereafter, on 12.02.2007 the applicant had raised an industrial dispute before The Labour Commissioner, Kolkata, vide his letter of representation which was marked as Exhibit-7. That, thereafter on 15.11.2007, the applicant had sent a second representation to The Labour Commissioner, Kolkata which was marked as Exhibit-8 and on receipt of Exhibit-8, the Deputy Labour Commissioner, Kolkata, had issued the Exhibits-9 & 9/a addressed to the applicant and which was a forwarding letter and the letter received by the Deputy Labour Commissioner from the O.P.

g) That after the receipt of the Exhibit 9 & 9/a the applicant had sent his reply to the Deputy Labour Commissioner, Kolkata, on 14.02.2008 which was marked as exhibit-10. The applicant had also filed a photocopy of the reply sent by the O.P in response to the exhibit-10 which was marked as exhibit 11. Since, the dispute was not settled before the Labour Commissioner, Kolkata the applicant had obtained a pendency certificate in the prescribed Form "S" under Rule 12A(3) of the West Bengal Industrial Disputes Rules, 1958 and had moved before this Court. The applicant further stated that since his termination from the service the same is unemployed and prayed thereby for reinstatement with full back wages.

From the substantive evidence of the O.P.W. 1 Sri Suryakanta M. Damani it is clear that:

a) The same was a member of the O.P concern and had held the post of Honorary Secretary when the existing Secretary had expired for one year, he had personal knowledge about the instant case and knew the applicant who was working in the O.P concern as Manager (Administration and Finance). That the present written statement was filed by his successor in office J.R.Shethia. The applicant was discharging the duty of dealing cash along with the financial affairs of the O.P concern independently; the same was also performing other managerial and administrative duties. No documents



could be produced by the O.P to show that this witness was the then Honorary Secretary of the O.P concern.

b) No documents were also produced to substantiate the fact that this applicant had workers under him since the same was the Finance Manager having other employees working under the applicant in the cash section. Neither any document was filed to show that this applicant used to take decisions on behalf of the management of the O.P. The O.P had also not produced any document that this applicant had to authority to assign duties, grant and recommend leave of the workers and initiate disciplinary actions against the same. The applicant used to recommend the necessary papers to the Secretary or Treasurer for approval as the President, Secretary and the Treasurer of the O.P concern were the competent authority to take any decision regarding the affairs of the accounts of the Club.

c) The discrepancy found by the Accounts Department was not discussed in the meeting of the Executive Committee and no proper complaint was given to this witness by the Ex-President and the Ex-Secretary of the O.P concern.

d) The witness had identified the exhibit-B which was issued by him and the signature thereon which was marked as exhibit-B/1 owing to the irregularities and discrepancies in regard to the performance of the applicant. The applicant had admitted his guilt and had tendered his apology vide the exhibit-C which was identified by this witness. The witness had identified the show cause notice marked as exhibit-B filed by the O.P concern and after submission of exhibit-C the witness had came to the management of the O.P concern.

e) That no further show caused notice was issued from the end of the O.P during the tenure of this witness and the said file was again reopened by his successor in office which was not within the knowledge of this witness. The witness had admitted the fact that neither any charge-sheet nor any domestic enquiry was held for the alleged misconduct of the applicant.

From the substantive evidence of the O.P.W. 2 Sri J.R. Sethia it is clear that:

a) That the same was the Secretary of the O.P club and knew the applicant of this case who was working as Manager (Administration & Finance) and used to handle the finance matter of the club along with the cash section where some persons were working under him; however no documents were being produced to that effect by the O.P concern.

b) It was admitted by this witness that the applicant had no power to take any disciplinary action to issue any show-cause notice, charge-sheet etc. to any employees of the OP Club. The applicant had only the power to report to the management about any misconduct done by the employees.

c) The witness had identified the exhibit-F and some vouchers which are being mentioned in Serial No. 1 to 13 and were marked as exhibit-H series. The witness had identified the letter dated 7.10.2006 issued by the O.P. Club to Bimal Kumar Sharma which was marked as exhibit-I. The letter dated 10.12.2007 issued by the O.P. Club stating the to Bimal Kumar Sharma was marked as exhibit-J.

d) The witness had identified three letters containing four pages dated 25.12.2007, 08.04.2008 and 09.05.2008 respectively that were addressed to the Deputy Labour Commissioner and issued by this witness on behalf of the O.P. Club which were marked as exhibit- K series. The memo which was received by the O.P. Club from the Dy. Labour Commissioner was marked as exhibit-L. The witness had also identified a loan application dated 11.12.2004 made by the concerned applicant to the Allahabad Bank and the same was marked as exhibit-M.

e) The witness had admitted the issuance of the exhibit F asking the applicant to show-cause as to why his service should not be terminated. The exhibit-G as stated by the witness was issued by the same directing the applicant to inspect the documents. The applicant had replied to the show-cause. The exhibit-2 was being received by this



witness. He failed to state the exact date when the exhibit-G was delivered to the applicant and had admitted the exhibit-4 which was received by the same.

f) It is being admitted by this witness that after receiving exhibit-4 the same had not issued any letter to the applicant informing him that his prayer for further time for inspection the document was turned down but had personally called him to the office. He had filed the suspension letter which already was marked as exhibit-F. The date of inspection of document was fixed on 07.10.2006 and on the same date (ie. on 07/10/2006) the applicant had prayed for further time as mentioned in exhibit 4. This witness had not fixed any further date for inspection of documents.

g) The witness had admitted the fact that Mr. Govardan Das Bhaiya was not the President of the O.P. Club when the same was the Secretary. He had identified the memorandum and Articles of Association of the O.P. Club which was marked as exhibit-12; the Audit report-cum-Balance Sheet for the year 2003-2004 which was marked as exhibit-13, the Audit report-cum Balance Sheet for the year 2005.-2006 which was marked as exhibit-15. The witness further stated that Pawan Jain was the Hony. Treasurer of the club had issued three letters dated 15.03.2004, 16.03.2004 & 04.06.2004. which were marked as exhibit-16 collectively (five pages).

h) The witness had identified the letter dated 07/06/2004 issued by Pawan Jain, Hony. Treasurer to the President of the O.P. concern G.D. Bhaiya alongwith enclosure which was marked as exhibit-17 collectively(two pages). The witness had also identified the letter dated 08.06.2004 issued by Pawan Jain, Hony. Treasurer to the President of the O.P. Club, G. D. Bhaiya along with an enclosure which was marked as exhibit-18 collectively (eight pages) and the letters dated 10.06.2004 and 15.06.2004 which was issued by Pawan Jain, Hony. Treasurer to the President of the O.P. Club, G. D. Bhaiya which were marked as exhibit 18/1 & 18/2. The witness had identified the letters dated 11.06.2004 & 23.08.2004 issued by Pawan Jain to Mr. Bimal Sharma which contained three pages and were marked as exhibit-19 (collectively). The witness had also identified the two letters dated 22.06.2004 and 23.08.2004 which were issued to Mr. Mahesh Almal by Mr. Pawan Jain and were marked as exhibit-20 collectively (two pages).

i) The witness had admitted the fact that no enquiry proceeding was held against the applicant before the termination and the fact that the O.P. club had paid all the dues to the applicant.

Argument of the applicant

The Ld. Counsel for the applicant herein had filed his written argument in regard to the instant application and had stated that the instant applicant was filed against the opposite party company on 10.09.2008 under section 10(1B)(d) of the Industrial Disputes Act, 1947 challenging his illegal termination from service with effect from 17.10.2006 (Exbt. - 5). In the instant case after being received notice from this Learned Court the Opposite Party Club appeared before this Ld. Court to contest the case. The respective parties had filed their written statements, documents on which they have relied upon and had also adduced their evidences.

The applicant was an employee of the opposite party club and had joined the club on 01.07.1989 as Cashier on a monthly salary of Rs. 1,100/-. During his service tenure the applicant had been serving his duties with sincerity and integrity. The applicant acted according to the normal practice / convention as adopted by the club authority and oral/written approval/instruction of the authorities. Though the applicant was working as a Manager (Finance & Administration) he did not perform any supervisory duty such as recommend or sanction leave of any employee or to take any disciplinary action against any employee or to assign duties and to distribute of work amongst the employees.

The management of the club by their letter dated 19.09.2006 brought some false and baseless allegations against the applicant and suspended with immediate effect. The applicant replied to said so called charge sheet vide his letter dated 26.09.2006 and requested the management to allow him to take necessary inspection of the documents as



relied in the said alleged charge sheet in presence of his legal advisor. He also requested the management to supply the copies of such documents in order to make effective reply to the charge sheet.

The club authority by their letter dated 28.09.2006 received by the applicant on 06.10.2007 had given the instruction to inspect the documents alone on 07.10.2006 in between 5:30 pm to 6:30 pm but no documents were supplied to the applicant. The applicant by his letter dated 07.10.2006 requested the management to fix any other date with proper intimation giving a reasonable time to inspect the documents for the ends of justice but without considering his request the management of the club terminated the applicant by their letter dated 17.10.2006 with immediate effect violating the provisions of law of the land.

That before terminating his service the applicant was not given any opportunity of being heard. No enquiry was held. No compensation was paid in terms of section 25F of the Industrial Disputes Act, 1947. That, being aggrieved the applicant had protested against his illegal termination and vide his letter dated 11.01.2007 and requested the management to withdraw the said termination order and allow him to resume his duty within 15 days but the club authority did not pay any heed. That his request was not considered and the applicant had raised one industrial dispute by his letter dated 12.02.2007 but unfortunately the said letter was misplaced and for that the applicant again filed one application dated 15.11.2007 and on the basis of that one conciliation proceeding was started being no. 142 of 2007. That in the said conciliation proceeding, the management duly participated and submitted their written comment but dispute could not settled and for that after obtaining pendency certificate the applicant has filed the instant application for adjudication of the dispute.

Argument of the opposite party

The present/adjudicatory proceeding arises out of the action of the management of the club in terminating the applicant Shri Bimal Kumar Sharma. Administrative & Finance Manager vide its letter dated 17th October 2008. The applicant was not a workman within the meaning of section 2(s) of the Industrial Disputes Act, 1947 and as such, the applicant has no locus standi to invoke the provisions of the Industrial Disputes Act, 1947 to seek relief under the said Act. The applicant was functioning as Manager – Finance and Administration and he was holding managerial post and as such, by no stretch of imagination he can be termed as workman within the meaning of section 2(s) of the I.D. Act, 1947 and as such, the provisions of the I.D. Act, 1947 have no application at all. The applicant in his written statement has admitted that he was working as a Finance Manager in the Club. In his evidence recorded on 30.06.11, the applicant admitted that as a Manager (Finance and Administration) his nature of job amongst others was to issue cheque on behalf of the Club.

That, the OPW-1, Suryakanta M. Damani in his evidence on 17.01.2014 has stated that he knew the applicant who was working in the club in the post of Manager (Administration & Finance) and he was holding cash. He was discharging the Managerial and Administrative duties. He used to maintain the financial affairs of the Club independently. He used to deal with the cash section and the same being the Finance Manager, other employees were working under him in the cash department. In cross examination on 19.06.2014, OPW-1 has stated that the same had personal knowledge regarding the present case and has further stated in his cross examination held on 24.02.2015 that the same had filed relevant papers in order to show that the applicant at the relevant point of time used to take independent decision in respect of the affairs of the accounts of the club.

OPW-2, J R Sethia in his evidence on 15.07.2015 has categorically stated that the same knew Bimal Kumar Sharma who was working as Manager (Administration and Finance) in the O.P Club. His nature of job was to look after Administration and Finance matter. He was aware that Bimal Kumar Sharma handled the finance matter of the club independently. He used to work in Cash Section. Some persons were also working under him in the cash section OPW-2 has further stated in his evidence on the same date i.e. on 15.07.15 that while acting as Finance Manager, he used to make payment without approval, without supporting recommendations, without any signature from the Management side.



OPW-2 J R Sethia in his cross examination on 10.12.2016, has stated that being a Manager (Finance & Administration) his principal job was to look after the cash transaction, arrange the finance and taking care of the administration job. He had 3 (three) Assistants under him for doing all these jobs. OPW-2 also in his cross examination on 10.12.16 has stated that the applicant had no power to take any disciplinary action, to issue any show cause notice, charge sheet etc. to any employee of the OP Club. The applicant had the power to report to the management any misconduct done by the employee.

It is to be submitted here that as a Manager (Finance & Administration), the applicant was discharging administrative and managerial duties. The sanction of leave or conducting disciplinary action is independent function and all the managerial staff are not supposed to discharge such function of disciplinary action or staff matters. All the above evidences show that Bimal Kumar Sharma was working as Manager (Finance & Administration) in the Club and his nature of duties was managerial and administrative nature which includes issuing cheque on behalf of Club independently as admitted by him in his evidence on 30.06.11. The applicant has failed to demolish the above evidences of the OPWs.

It is further submitted that as the applicant was functioning as Manager-Finance and Administration and he was holding Managerial post and as such, he is not coming under the definition of workman under section 2(s) of the Industrial Disputes Act, 1947 and not being the workman, the applicant has no locus standi to invoke the provisions of the Industrial Disputes Act, 1947 and as such, his application u/s 10(1B)(d) of the I. D. Act, 1947 cannot be entertainable not being the workman and deserves to be dismissed in limine.

It is further submitted that the concerned Conciliation Officer, West Bengal, has issued the pendency Certificate in form-s mechanically without any investigation as to the existing of present dispute in spite of several letters addressed to the conciliation officer inter alia raising such objections regarding the maintainability of the application filed before him by the applicant but without hearing the same, the Conciliation Officer in a mechanical manner and without any investigation and in sheer non application of mind had issued by the Conciliation Officer is without jurisdiction and no cognizance can be taken thereof.

In view of the aforesaid, it is most humbly submitted that the applicant being a Manager (Finance & Administration) and was doing managerial and administrative function in the Club including issuing cheque on behalf of the company independently and also handling cash independently is not coming under the definition of workman u/s 2(s) of the Industrial Disputes Act, 1947, and as such, he cannot invoke the provisions of the Industrial Disputes Act, 1947 to seek any remedy and /or relief as prayed for, but to seek remedy in proper forum. It was further prayed by the Learned Counsel for the O.P. that the Ld. Court be pleased to reject /dismiss the application of the Applicant u/s 10(1B)(d) of the I.D. Act, 1947 as the same is not maintainable at all.

Decision with reasons

For proper adjudication of the matter all the issues are taken up separately for coming to a just decision of the instant matter: -

1) Whether this application u/s 10(1B)(d) of the Industrial Disputes Act, 1947 is maintainable in its present form and prayer?

2) Whether the applicant was functioning as Manager Financial & Administration is a "workman" within the meaning of section 2(s) of the Industrial Disputes Act, 1947?

In order to determine whether this application is maintainable u/s 10(1B)(d) of the Industrial Disputes Act, 1947 the fact that whether this applicant is a "workman" as defined under section 2(s) of the Industrial Disputes Act, 1947 is to be determined first. Accordingly both the above mentioned issues are taken up conjointly to arrive at a just decision of the instant matter.

In accordance with section 2(s) it is clear that: - "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.

On a fair reading of the provisions in section 2(s) of the Act it is clear that 'workman' means any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward including any such person who has been dismissed, discharged or retrenched.

The latter part of the section excludes 4 classes of employees including

a) a person employed mainly in a managerial or administrative capacity.

b) a person employed in a supervisory capacity drawing wages exceeding Rs.1600/- per month or exercises functions mainly of a managerial nature.

The Hon'ble Apex Court in Sharad Kumar -vs- Govt. Of NCT of Delhi reported in 2002(93) FLR 826 had opined that: - It has to be taken as an accepted principle that in order to come within the meaning of the expression 'workman' in section 2(s) the person has to be discharging any one of the types of the works enumerated in the first portion of the section. If the person does not come within the first portion of the section then it is not necessary to consider the further question whether he comes within any of the classes of workmen excluded under the latter part of the section.

The question whether the person concerned comes within the first part of the section depends upon the nature of duties assigned to him and/or discharged by him. The duties of the employee may be spelt out in the service rules or regulations or standing order or the appointment order or in any other material in which the duties assigned to him may be found. When the employee is assigned a particular type of duty and has been discharging the same till date of the dispute then there may not be any difficulty in coming to a conclusion whether he is a workman within the meaning of section 2(s).

If on the other hand the nature of duties discharged by the employees is multifarious then the further question that may arise for consideration is which of them is his principal duty and which are the ancillary duties performed by him. While deciding the question, designation of the employee is not of much importance and certainly not conclusive in the matter as to whether or not he is a workman under section 2(s) of the Act.

A similar question came up for consideration before a Bench of three learned Judges of the Hon'ble Apex Court in Burmah Shell Oil Storage and Distribution Company of India Ltd. vs. The Burma Shell Management Staff Association and others 1970(3) SCC 378, wherein it was held, inter alia that if a person is mainly doing supervisory work and incidentally or for a fraction of the time also does some clerical work, it would have to be held that he is employed in a supervisory capacity, and conversely, if the main work done is of clerical nature the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity.

In Management of M/s May and Baker (India) Ltd. vs. Their Workmen AIR 1967 SC 678 a Bench of three learned Judge of this Court construed the provision of section 2(s) (as it stood before the Amendment of 1956) in order to ascertain whether the manual



or clerical work done was merely of an incidental nature and whether the employee was not a workman as defined under the section. The Court made the following observations:

".....9. The company's case is that Mukerjee was discharged with effect from April 1, 1954. At that time the definition of the word "workman" under Section 2(s) of the Industrial Disputes Act did not include employees like Mukerjee who was a representative. A "workman" was then defined as any person employed in any industry to do any skilled or unskilled manual or clerical work for hire or reward. Therefore, doing manual or clerical work was necessary before a person could be called a workman. This definition came for consideration before industrial tribunals and it was consistently held that the designation of the employee was not of great moment and what was of importance was the nature of his duties. If the nature of the duties is manual or clerical then the person must be held to be a workman. On the other hand if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work which is not manual or clerical, then such a person would not be workman. It has, therefore, to be seen in each case from the nature of the duties whether a person employed is a workman or not, under the definition of that word as it existed before the amendment of 1956....."

The Hon'ble Apex Court in Anand Regional Co-Op Oil Seeds Growers Union Ltd. Vs Shailesh Kumar Harshad Bhai Shah the Hon'ble Court held that: -

The ingredients of the definition of 'workman' must be considered having regard to the following factors: -

- i) Any person employed to do any skilled or unskilled work, but does not include any such person employed in any industry for hire or reward;
- ii) There, must exist a relationship of employer and employee;
- iii) The persons inter alia excluded are those who are employed mainly in a managerial or administrative capacity.

For determining the question, as to whether a person employed in an industry is a workman or not; not only the nature of work performed by him but also terms of the appointment in the job performed are relevant considerations. An undue importance need not be given for the designation of an employee or the name assigned to, the class to which he belongs. What is needed to be asked is as to what are the primary duties he performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work is required to be supervised.

The words and phrases 'Supervisor' meaning and expression

Supervision contemplates direction and control. While determining the nature of the work performed by an employee, the essence of the matter should call for consideration.

A person disputably carries on supervisory work if he has power of control or supervision in regard to recruitment, promotion, etc; The work involves exercise of tact and independence.

In S.K. Maini vs Carona Sahu Co. Ltd reported in AIR 1994 SC 1824 The Hon'ble Apex Court had opined that ".....whether or not an employee is a workman under Section 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any straitjacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases.

When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organisations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it



In the present scenario it is seen from the application filed by the applicant u/s 10(1B(d), the written statement filed by the opposite party, the evidence and the exhibits adduced by the parties to the proceeding and all other matters in the record it is seen that:

- a) This applicant was appointed as a 'cashier' in the O.P. concern in the finance department on and from 01/07/1989 vide the Exhibit-A and thereafter promoted as Manager (Finance and Administration). The work of the applicant was to make payment of cash along with other persons, draw cheques along with sending the same for encashment after obtaining proper authorisation. The applicant was also entrusted to issue cash receipts, prepare vouchers and also to issue cheques to third parties on behalf of the Club and further to deposit cheques issued by third parties in the name of the O.P. to the Bank for encashment, etc.
- b) The O.P subsequently had issued one letter dated 19/09/2006 the Exhibit-1 leveling the allegation that there were certain financial irregularities in regard to which the same was asked to refrain from performing his work. That on the basis of the exhibit 1 the applicant had sent the exhibit-2 from his end denying the allegations and prying thereby to inspect the documents in regard to which the allegations were being made. That the applicant vide the exhibit-2 had stated that the same had acted according to the normal practice/convention as adopted by the O.P and with due necessary approval of the then Managing Committee and nothing was beyond the knowledge of other office bearers.
- c) The O.P had not produced any document to substantiate the fact that this applicant had authority to assign duties, grant and recommend leave of the workers and initiate disciplinary actions against the same; on the contrary the applicant used to recommend the necessary papers to the Secretary or Treasurer for approval as the President, Secretary and the Treasurer of the O.P concern were the competent authority to take any decision regarding the affairs of the accounts of the Club.
- d) That subsequently on the basis of the exhibit 2 the O.P concern had issued the exhibit-3 wherein the same was asked to inspect the documents on 07/10/2006 in between 5:30 PM to 6:30 PM at the club premises. The applicant was unable to inspect the document on the date given as the time allotted was not sufficient for the same to inspect 240 vouchers and had requested the O.P to provide him another date with sufficient allotted time vide letter dated 07/10/2006 which was marked as exhibit-4.
- e) The alleged discrepancy found by the Accounts Department was not discussed or placed in the meeting of the Executive Committee and no proper complaint was given to the applicant by the Ex-President and the Ex-Secretary of the O.P concern. That, the exhibit-17 (letter dated 08.06.2004), exhibit-18, exhibit-19 tends to show that the practice in the account department since long back and support the statement of the applicant that all the payments had been made on verbal instruction of the then President, Shri G. D. Bhaiya. That even after such communications being made the management had falsely implicated the present applicant. Moreover, the exhibit-15 that is the Balance Sheets for the year 2003-04, 2004-05 and 2005-06 clearly substantiates the fact that there were no irregularities in accounts.
- f) The O.P had not provided any further opportunity to the applicant to inspect the documents and rather had issued the exhibit-5 wherein the same was terminated from the service with immediate effect from 17/10/2006. The applicant had further stated that neither any show cause was being issued nor any domestic enquiry was being held by the O.P; no termination compensation was also given by the O.P in regard to the sudden termination.
- g) The applicant had raised an industrial dispute before the Management vide his letter dated 11.01.2007 and requested the Management to reinstate the same vide exhibit 6 and 6/a. However, the Management had failed/neglected to reinstate the applicant in the service and thereafter, on 12.02.2007 the applicant had raised an industrial dispute before The Labour Commissioner, Kolkata, vide his letter of representation which was marked as Exhibit-7. That, thereafter on 15.11.2007, the applicant had sent a second representation to The Labour Commissioner, Kolkata which was marked as Exhibit-8 and



on receipt of exhibit-8, the Deputy Labour Commissioner, Kolkata, had issued the Exhibits-9 & 9/a addressed to the applicant and which was a forwarding letter and the letter received by the Deputy Labour Commissioner from the O.P.

Thus, from the above discussions it is clear that this applicant was being appointed as a 'Cashier' and subsequently being promoted as Finance Manger managing the financial affairs along with other related matters was a clerk in the above concern. The said fact becomes evident from the substantive evidences of the parties wherein there is a clear admission that this applicant did not have the authority to assign duties, grant and recommend leave of the workers and initiate disciplinary actions against the same; the applicant used to recommend the necessary papers to the Secretary or Treasurer for approval as the President, Secretary and the Treasurer of the O.P concern were the competent authority to take any decision regarding the affairs of the accounts of the Club.

The term 'Supervision' contemplates direction and control. While determining the nature of the work performed by applicant, the essence of the matter should call for consideration. The applicant disputably carries on supervisory work if he has power of control or supervision in regard to recruitment, promotion, etc; The work involves exercise of tact and independence; however in the present scenario exercise of tact and independence by the present applicant is found absent. Accordingly, it is clear that this applicant comes under the purview of 'workman' as envisaged in section 2(s) of the Industrial Disputes Act, 1947.

Now, the question that is taken up for consideration is **Whether this application u/s 10(1B)(d) of the Industrial Disputes Act, 1947 is maintainable in its present form and prayer.**

Section 10(1B)(d) of the Industrial Disputes Act, 1947 clearly states that

"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 sixty 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 proceeding".

In the present scenario it is clearly seen that the instant case the applicant herein has filed the present application on 10.09.2008 i.e. on expiry of 60 days from the date of application submitted on 15.11.2007 to the conciliation officer. Accordingly, it is clear that the present application is very much maintainable.

Thus, both the issues are decided in favour of the applicant.

3) What other relief or reliefs, if any, is the applicant entitled to get as per law and equity?

a) The applicant was appointed by the O.P. as a 'Cashier' and subsequently was promoted as Finance Manager. That the applicant had joined the service 01.07.1989 as a 'Cashier' on a monthly salary of Rs. 1,100/-.

b) The present applicant was suspended from service of the O.P concern on and from 28/09/2006 and thereafter the service of the applicant was terminated on 17/10/2006.

Section 25B of the Industrial Disputes Act states that *".....a workman is 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 or authorised leave or an accident or a 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 not less than--



- (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
 (ii) two hundred and forty days, in any other case:....."

In the present situation it is seen that this applicant was appointed in the service of the O.P. No. 1 on and from 01/07/1989 and his service was terminated 17/10/2006 and had been in service of the establishment for a period of **seventeen years three months and sixteen days (6317 days)**. Thus, it is proved that the present applicant was a workman who was working permanently under the opposite party Company. No notice was being issued by the O.P. No. 1 in regard to the termination of service by the O.P. No. 1.

Section 25F. Of the Industrial Disputes Act, 1947 clearly lays down the conditions precedent to retrenchment of workmen

" 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 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 or such authority as may be specified by the appropriate Government by notification in the Official Gazette]."

Thus, in accordance to section 25F of the Industrial Disputes Act, 1947 the retrenchment of the applicant Sri Bimal Kumar Sharma is unjustified and in-operative.

The Hon'ble Apex Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., reported in (2013) 10 SCC 324 was of the opinion that

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.

Thus, keeping in mind the present market conditions it will be highly justified to pass an award of full back wages along with other consequential benefits if any to the applicant from the day his service was terminated (31/12/2014). Accordingly the applicant is entitled to get full back wages along with all other consequential benefits (if any) from 01/01/2015.



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”.

Accordingly, this issue is also decided in favour of the applicant.

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

- That this applicant was being employed by the O.P. on and from 01.07.1989 as a 'Cashier' which was not a supervisory post.
- That subsequently the present applicant was promoted as Finance Manager but did not have any control to grant leave or issue any show-cause notice over the other employees
- That the applicant had performed his duties towards the O.P till 17/10/2006 and the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.
- That the Opposite Party Company had failed to comply with the conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.
- The reason for retrenchment of service of the applicant by the Opposite party Company could not be properly justified by the same.
- The applicant was not working for gain for other employer in any other concern.



Hence, it is

ORDERED

The application u/s. 10(1B)(d) of the Industrial Disputes Act, 1947 be and the same is thus **allowed on contest without costs**. The Opposite party was not justified in dismissing the applicant and is thus, directed to cause reinstatement of the applicant **Sri Bimal Kumar Sharma** at once. The applicant shall receive full back wages for the period from 17/10/2006 till the present date along with all other consequential benefits if any. The O.P is directed to comply with the Award.

This is my award.

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

Dictated and corrected by me

Sd/ —
Judge



Sd/ —
(Argha Banerjee)
Judge, 2nd Labour Court
Kolkata
19.05.2022.