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

No. Labr/687/(LC-IR)/7L-03/17 Date: 15-07.....2022.

ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. 537 – I.R /7L – 01/2004(Pt) dated 06.05.2008 the Industrial Dispute between M/s Ludlow Jute Mills, Prop. M/s. Ekta Limited, Village & Post – Chengail, Howrah, Pin. - 711308 and Ali Mallick, Vill. & P.O. Chengail, (Madhyapara), P.S.: Uluberia, Dist. Howrah, Pin. - 711308 regarding the issue mentioned in the said order, being a matter specified in the Second Schedule to the Industrial Dispute Act, 1947 (14 of 1947), was referred for adjudication to the Judge, Third Industrial Tribunal, West Bengal.

AND WHEREAS the Third Industrial Tribunal, West Bengal, has submitted to the State Government its award dated 05/07/2022 on the said Industrial Dispute vide memo no. 1000/ L.T. dated 06/07/2022.

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 as shown in the Annexure hereto.

ANNEXURE

(Attached herewith)

By order of the Governor,

Sd/

Joint Secretary
to the Government of West Bengal

I/207023/2022 File No. LABR-22015(12)/2/2018-IR SEC- Dept. of LABOUR

No. Labr/687/1(5)/(LC-IR) Date: 15-07-/2022.

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

1. M/s Ludlow Jute Mills, Prop. M/s. Ekta Limited, Village & Post – Chengail, Howrah, Pin. – 711308.
2. Md. Rafique Ali Mallick, Vill. & P.O. Chengail, (Madhyapara), P.S.: Uluberia, Dist. Howrah, Pin. - 711308.
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B. New Secretariate Buildings, 1, K. S. Roy Road, 11th Floor, 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/687/2(2)/(LC-IR) Date: 15-07-/2022.

Copy forwarded for information to:

1. The Judge, Third Industrial Tribunal, West Bengal with reference to his Memo No. 1000 - L.T. dated - 06/07/2022.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Joint Secretary

BEFORE THE THIRD INDUSTRIAL TRIBUNAL, WEST BENGAL.

Present - Sanjeev Kumar Sharma,
Judge, 3rd Industrial Tribunal,
Kolkata.

Case No. VIII-133/2005

Award

Date - 05.07.2022

In the matter of an Industrial Dispute between Messrs Ludlow Jute Mills, Prop. M/s. Ekta Limited, Village & Post – Chengail, Howrah and their workman Md. Rafique Ali Mallick, Vill. & P.O. : Chengail, (Madhyapara) P.S.: Uluberia, Dist. Howrah, referred to this Tribunal vide Reference order No. 1466-I. R./ I.R./7L-01/2004 (Pt.) dated 22.11.2005 read with Government Order No. 537-IR/ IR/7L-01/2004(Pt) dated 06.05.2008 of the Labour Department, I.R. Branch, Govt. of West Bengal.

I S S U E S

1. Whether the management is justified in terminating the services of Md. Rafique Ali Mallick by way of refusal of employment with effect from 08.10.2002 ?
2. From which date the date of joining of Md. Rafique Ali Mallick is to be counted?
3. What relief, if any, is he entitled to ?

Issue included in terms of Hon'ble High Court's Order dated 07.02.2018 in W.P. N o.20314 (W) of 2006.

Whether the workman has abandoned employment or refused to take up engagement / employment ?

The case of the workman, in short, is that he had been working in the Ludlow Jute Mills, Prop. M/s. Ekta Limited, Village & Post – Chengail, hereinafter referred to as the company, since 07.09.1988 but the mill management had recorded his name as Hasibul Hasan Mallick son of Barkat Ali Mallick instead of Md. Rafique Ali Mallick son of Md. Robjel Ali Mallick and he was given ESI card No. 09711339,

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Provident Fund No. 012387 and Token No. VC 0108. He continued to work in the name of Hasibul Hasan Mallick till 1997, but thereafter, the mill management got his and his father's name corrected under inter-departmental memorandum dated 28.12.1996. The workman further states that the company made communication with the ESI authority and got his name corrected/changed in the ESI records. He further alleges that though the correction of his name prima facie appeared to be at his instance but the reality is that there was agitation in the mill and pursuant to the discussions between the mill management and labour union the inter departmental memo dated 28.12.1996 was issued. The workman alleges that the mill management got his name corrected with intention to eat away his past service since 07.09.1988 and thereby get benefited by less payment of gratuity, provident fund and pension at the time of retirement. He further alleges that though the correction of his name prima facie appeared to be at his instance, it was actually at the behest of the mill management particularly the personnel department which innovated such plan to cause prejudice to him. After the correction of name, he continued to work under the corrected name till 06.10.2002. 07.10.2002 being holiday he was refused employment on 08.10.2002. He further states that his fellow workmen, though not concerned with the instant reference, raised the matter of unfair labour practice on the part of the mill management and a representation was made to the Hon'ble Chief Minister, Government of West Bengal through representation dated 09.01.2003. The workman further pleads that Hasibul Hasan Mallick and Md. Rafique Ali Mallick are the same and single person working since 07.09.1988. He alleges that he was refused employment by the company only to cut the roll strength without giving any terminal benefit to him. He states that the refusal of employment to him has caused hardship to him and he has remained unemployed. Such refusal of employment is contrary to the provisions of the I. D. Act and the same is an illegal retrenchment for which he is entitled to reinstatement with all back wages and other benefits. He further submits that challenging his termination / retrenchment Ram Janam Majhi, MLA General Secretary of the National Union of Jute Workers raised industrial dispute espousing his case before the Labour Commissioner, but the same being fruitless he raised individual industrial dispute. The workman further pleads that due to inaction on the part of the office of the Labour Commissioner in the matter of the dispute raised by him, the workman along with the other workmen moved a writ petition being No.

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W.P.13633(W) of 2003 before the Hon'ble High Court seeking direction upon the statutory authorities to take cognizance of the industrial dispute raised by them through letter dated 19.05.2003 which ultimately resulted in the instant reference. The workman alleges that the termination of his service with effect from 08.10.2002 is arbitrary, unfair, unjust and violative of the provisions of the Industrial Disputes Act, 1947 as the juniors have been retained and the seniors were retrenched. The workman prayed for his reinstatement in service to his old post with all back wages and consequential benefits and also to treat his service continuous since 07.09.1988. Workman also filed additional written statement adding that he was refused employment without any show-cause notice, charge-sheet or domestic enquiry and payment of retrenchment compensation and legal dues and that there was no question of abandonment of service his service was the sole bread winner of his family and the management never asked him to join or never issued any show cause and also that since termination of his service he was not gainfully employed anywhere and his last drawn salary was Rs. 173/- per day.

The company contested the case by filing written statement. The case of the company, in a nutshell, is that one Hasibul Hasan Mallick was in budli employment in the jute mill but suddenly he stopped reporting to his duty sometimes in 1996 and thereafter the present applicant started to work in his place by impersonating him in connivance with some unscrupulous staff of the company. Similarly, during the same period, one Sk. Moymur also started working impersonating another budli worker namely Fariduddin Khan and when the company asked for the details of the said Fariduddin in order to elevate him to the status of special budli, the said Sk. Moymur got his details incorporated in the ESI records and got his name enrolled in special budli register of the company fraudulently. Anticipating similar prospect, the applicant and many others impostors of ex-budli workmen got their names and details incorporated in the ESI record in the place of the names and details of the ex-budli workers by unscrupulous means. When a section of the union of the workers of the mill raised the matter of employment of impostors in the mill with the labour authorities the applicant and other impostors sensing trouble and possible police action against them disappeared for months together abandoning their budli employment. When the things settled down over a period of time the impostors reappeared and created a fuss. They raised their purported industrial dispute with the

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Asst. Labour Commissioner, Uluberia alleging refusal of employment without first raising the same with the company. As the conciliation officer kept their pretended dispute under wraps for some time the applicant and his companions moved writ petition being W. P. No. 13633 (W) of 2003 before the Hon'ble Court against the Government, it's officers and the company. Since there was serious labour trouble in the company at that time and its senior officers being busy to meet the crisis the writ petition escaped the attention of the company and it learnt about the same only on receiving a copy of the Hon'ble Courts order dated 13.09.2004 from the learned advocate for the applicant. On 01.12.2004 the Asst. labour commissioner, Uluberia issued notice to the company for holding conciliation proceeding on 13.12.2004. The company wished to prefer appeal against the order in W. P. No. 13633 (W) of 2003 and informed the Asst. Labour Commissioner accordingly urging him to take no further step in the purported conciliation proceeding. By writing a letter to the company on 31.12.2004 the Asst. Labour Commissioner refused to accept the prayer of the company and fixed 10.01.2005 for joint meeting. On 10.01.2005 the company wrote letter to the Asst. Labour Commissioner stating that there were some errors in the order of the Hon'ble Court and the time of two months fixed by the Hon'ble Court was expired. The company preferred appeal against the order of the Hon'ble Court before the Division Bench of the Hon'ble Court which the Hon'ble Court disposed of on 09.02.2005 modifying the Hon'ble Court's order dated 13.09.2003 to the extent that the conciliation officer should give an opportunity of hearing to the parties and decide on the basis of the materials placed before him and submit a report within two months from the date of communication of the order in accordance with law to his own wisdom and discretion without being influenced by any observation made by the Hon'ble Court and he should consider as to the existence of industrial dispute or otherwise on the basis of the materials placed before him and submit his report to the State Government. The Hon'ble Court further directed that on submission of the failure report, if any, by the Conciliation Officer the State Government should form an opinion within a period of two months from the date of submission of report and take appropriate steps as envisaged in law. The company communicated the order of the Division Bench of the Hon'ble Court to the Conciliation Officer on 11.03.2005 by furnishing xerox copy of the certified copy of the Hon'ble Court's order. Despite receiving the xerox copy of the Hon'ble Court's

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order the Conciliation Officer took no step and after a long time on 03.05.2005 he issued memo. calling upon the parties for attending conciliation proceedings on 11.05.2005 before the Deputy Labour Commissioner, Howrah. The company appeared before the Deputy Labour Commissioner on 11.05.2005 and presented a letter to him stating that the dispute raised by the applicant was not an industrial dispute as per law and the applicant and other eight persons had abandoned their budli employment after detection of the fact that they procured the employment by impersonating ex-budli employees. The company also stated in the letter that the applicant did not raise the dispute with the company first in terms of the decision of the Hon'ble Supreme Court in ***Sindhu Resettlement Corporation Limited versus Industrial Tribunal, Gujarat, reported in 1968 Vol. (1) LLJ 834***. It was also stated that the applicant was a budli workman and excepting one workman all the other workmen including the applicant were budli workers having no guaranteed right of employment as per law as well as the extent rules of engagement of budli workers. The company pleads that there was no further sitting of the conciliation proceedings and no further move for more than a month due to which company wrote a letter to the Principal Secretary, Labour Department on 16.06.2005 informing the fact to him and further requesting him that if any failure report was submitted in the matter he might not take any action on the basis of the same without affording reasonable opportunity of being heard to the company. The company further pleads that sometime in the late November, 2005 it received order of reference. According to the company the order of reference made by the appropriate government is bad in law, perverse, illegal and a product of total non-application of mind and the purported dispute is not an industrial dispute and it does not come within the purview of Section 2A of the I.D. Act. The company further pleads that the issue of date of joining of the workman in the company was not a matter of dispute and cannot be deemed to be an industrial dispute under Section 2A of the I. D. Act. The Conciliation Officer submitted the purported failure report ignoring the direction of the Division Bench of the Hon'ble Court. It further pleads that the appropriate government also ignored the direction of the Division Bench of the Hon'ble High Court relating to formation of opinion as to the existence of industrial dispute and expediency to refer the matter to the Tribunal for adjudication. The company further pleads that in the issue framed in the order of reference the expressions "termination

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of service" and "refusal of employment" have been used in the same breadth which is not permissible in law and cannot co-exist together as there is severance of jural relationship in termination of service while there is no such severance in refusal of employment. The company further pleads that on receipt of the order of reference the company filed a writ petition before the Hon'ble Court and the Hon'ble Court was pleased to remand back the matter to this Tribunal under Order dated 07.02.2018 adding another issue - "Whether the workmen have abandoned employment or refused to take up engagement / employment". The company denies and disputes the claims and allegations made by the applicant in his written statement and pleads that the applicant was not in permanent employment having guaranteed right of employment as such there was no requirement of issuance of show-cause/charge-sheet against him and also that the applicant not being in continuous service within the meaning of section 25B of the I. D. Act is not entitled to the protection of the provisions of the Act. The company prays for passing an award in its favour holding that the applicant was not entitled to any relief.

The workman examined himself as PW-1 and brought the following documents on record in support of his case:

1. Copy of the letter of ESI addressed to the company as Exhibit-1;
2. Copies of affidavits of applicant and his father affirmed before Notary Public as Exhibit-2;
3. Copies of two pay slips of the applicant as Exhibit-3;
4. Copy of letter 11.07.2003 of the applicant addressed to the Labour Commissioner as Exhibit-4;

The company on the other hand examined its Senior Manager (Personnel) Sri Prakash Manna as OPW-1, Sri Binod Kumar Singh, security personnel of the company as OPW-2 and Sri Bhola Prasad, ex-security personnel of the company as OPW-3.

The company brought the following documents on record :

1. Xerox copy of certified standing orders of the company as Exhibit-A;
2. Xerox copy of application of Hasibul Hasan Mallick for registration of budli/casual/temporary employment as Exhibit -B;

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3. Xerox copies of letters dated 12.08.2002, 18.08.2002 and 14.09.2002 of the company addressed to the Officer-in-Charge of Uluberia P.S. as Exhibit-C, C/1 and C/2 respectively;
4. Xerox copy of letter dated 10.01.2005 of the company addressed to the Assistant Labour Commissioner, Uluberia as Exhibit-D;
5. Xerox copy of judgment and order passed by Division Bench of the Hon'ble High Court, Calcutta in MAT No.132 of 2005 and CAN No.443 of 2005 as Exhibit-E;
6. Xerox copy of letter dated 14.02.2005 of the company addressed to the Assistant Labour Commissioner, Uluberia as Exhibit-F;
7. Xerox copy of letter dated 03.05.2005 of the Assistant Labour Commissioner, Uluberia addressed to the company as Exhibit-G;
8. Xerox copy of letter dated 11.05.2005 of the company addressed to Deputy Labour Commissioner, Howrah as Exhibit-H;
9. Xerox copy of Writ Petition No.13633(W) of 2003 as Exhibit-I;
10. Copy of letter dated 06.11.2019 addressed to O/C Uluberia PS recorded as Uluberia PS GDE No 786 dated 06.11.2019 as Exhibit-J and
11. Conciliation file as Exhibit-K.

Decision with reasons

In the course of arguments, learned advocate for the company submits, that the workman on the one hand claims that his name was wrongly recorded as Hasibul Hasan Mallick and on the other he claims that he and Hasibul Hasan Mallick are the same person which are self-contradictory and hardly believable. The learned advocate refers to the cross-examination of the workman (PW1) and points that the applicant stated that he changed his and his father's name in 1995 while the affidavits filed by him are of the year 1997 and the applicant also stated that Hasibul Hasan Mallick was of village Raghudebpur and he was residing at village Chengail. Pointing at Exhibit-B, the learned advocate submits that the father of Hasibul Hasan Mallick was working in the company but in his cross-examination dated 19.11.2018 the applicant stated that his father Robjel Ali Mallick was never working in the company. He submits that the evidence of the applicant itself shows that he and

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Hasibul Hasan Mallick are different persons and he is an impostor. He contends that the allegations that the company intentionally recorded his name wrongly in order to eat up his past service benefits is incorrect and fanciful as there is nothing on record to show that there was any protest against alleged wrong recording of name at any point of time. He exclaims that the applicant did not raise the issue of wrong recording of his name and continued to work silently for years. He submits that the applicant himself abandoned his budli employment as such there arose no question of any show-cause notice, charge-sheet or domestic enquiry. He adds that a budli worker is not entitled to the protection of I. D. Act. On this point he cites the decisions of the Hon'ble Supreme Court in ***Karnataka State Road Transport Corporation Vs S. G. Kotturappa*** reported in ***AIR 2005 SC 1933***, ***Bangalore Metropolitan Transport Corpn. Vs T. V. Anandappa*** reported in ***2009 LLR 659,*** and ***Prakash Cotton Mills Vs Rashtriya Mill Mazdoor Sangh*** reported in ***SCLC (1980-90) Vol. 1 page 542***. He further submits that the applicant being a budli worker cannot claim regularization. On this score, he cites the decision of the Hon'ble Supreme Court in ***Secretary, State of Karnataka Vs. Uma Devi*** reported in ***2006 (109) FLR 826.*** Referring to the decision of the Hon'ble Supreme Court in ***Ranbir Singh Vs. Executive Engineer, PWD*** reported in ***2021 CLR 474*** the learned advocate submits that even where a workman worked for 240 days and his service is terminated in contravention of section 25F of the I D. Act, reinstatement cannot the automatic. He contends that the applicant has failed to prove that he worked continuously for 240 days preceding one year of the alleged termination. In order to get protection of section 25F of the I. D. Act it is incumbent upon the applicant to show that he worked for 240 days in terms of section 25B of the Act. The applicant did not produce pay slips or other document to substantiate his plea that he worked for 240 days as required by law. He submits that the burden to prove the fact lies on him. On this score he cites the decisions of the Hon'ble Supreme Court in ***Range Forest officer Vs S .T. Hadimani*** reported in ***2002 Lab. I. C. 987***, ***Municipal Corporation Faridabad Vs Durga Prasad*** reported in ***2008 (1) C. L. R. 1081***, R. ***M. Yalatti Vs Asst. Executive Engineer*** reported in ***2006 (108) F. L. R. 213, Essen Denki Vs Rajiv Kumar reported in (2002) 8 SCC 400, M.P. Electricity Board Vs. Hariram*** reported in ***(2004) 8 SCC 246, Manager RBI Bangalore Vs S. Mani*** reported in ***AIR 2005 SC 2179*** and of the Hon'ble Calcutta High Court in ***Gloster***

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Ltd. Vs State of WB reported in ***2013 (4) CHN 488.*** Learned advocate also raises the issue of maintainability stating that no dispute was raised with the company as the applicant straightaway made application before the Conciliation Officer which is contrary to the settled position of law laid down in the case of ***Sindhu Resettlement Corporation Vs. Industrial Tribunal, Gujarat,*** reported in ***1968 (16) FLR 307.*** He contends that after the alleged refusal of employment the workman never approached the company management to ask the reasons of such refusal and to demand reinstatement and after maintaining a long silence he directly approached the labour commissioner. He further contends that the issue No.2 framed in the reference is not within the domain of the Industrial Tribunal as only termination or cessation of employment amounts to industrial dispute under Section 2A of the Industrial Disputes Act, 1947. He further contends that the alleged refusal of employment does not amount to retrenchment under Section 2(oo) of the I. D. Act as refusal of employment may be lockout u/s 2(l) of the I. D. Act. On this score he cites the decision of the Hon'ble Supreme Court in ***Punjab Land Development & Reclamation Corporation Ltd. Vs. Presiding Officer, Labour Court, Chandigarh*** reported in ***1990 (II) CLR 1.*** He also takes me to the conciliation file (Exhibit-J) and submits that the Conciliation Officer submitted the failure report without application of mind in a mechanical way ignoring the directions in the order of the Division Bench of the Hon'ble High Court and the Govt. also made the reference without application of mind. He further submits that the applicant in any case cannot claim full back wages as the employer company is not at all responsible for delay in this case because the writ petition filed by the company in 2006 was pending before the Hon'ble Court. He submits that full back wages in case of reinstatement is not the rule and on this score he cites the decisions of the Hon'ble Supreme Court in ***UP State Brassware Corporation Ltd. Vs. Udaynarayan Pandey*** reported in ***2006 I CLR 39, Gujarat State Road Transport Corporation Vs Dawoodbhal. I Ghanchi*** reported in ***(2012) 1 CLR 28*** and ***Metropolitan Transport Corporation Vs. V. Venkatesan*** reported in ***2009 III CLR 1***. Concluding his argument learned advocate for the company submits that applicant worked as a budli worker impersonating ex-budli worker namely Hasibul Hasan Mallick fraudulently and he has failed to establish that he worked for 240 days preceding the date of the alleged refusal as such he is not entitled to any relief in this reference.

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Learned advocate for the applicant, on the contrary, contends that the Tribunal being a creature of the statute cannot go beyond reference and also cannot enter into the question of validity of the reference. In support of his contention he cites the decision of the Hon'ble Calcutta High Court in ***Mecon Limited Vs State of West Bengal*** reported in ***2001 (1) CHN 333.*** He further submits that the refusal of employment is certainly an industrial dispute in the light of the amendment of Section 2A in West Bengal. On this point, he cites the decision of the Hon'ble Calcutta High Court in ***Jagdamba Motors Vs. State of West Bengal*** reported in ***2009 (4) CHN 67.*** He further submits that the company had filed writ petition before the Hon'ble Court where it wanted the framing of additional issue to the effect that whether the workman voluntarily abandoned his employment / engagement and therefore the employer-employee relationship between the company and the applicant stood admitted. He further submits that raising of dispute with the employer first is not a ***sine qua non*** for raising industrial dispute and existence of the industrial dispute as a matter of fact is only relevant and on this score he cites the decision of the Hon'ble Calcutta High Court in ***WWA, Cossipore English School Vs. State of West Bengal*** reported in ***2019 (1) CalLJ 547.*** He further contends that the applicant is running from pillar to post for getting his service back and he could not give up his livelihood in any manner by allegedly abandoning his service. He submits that there cannot be any presumption of abandonment of service by the workman. On this point he cites the decision of the Hon'ble Supreme Court in ***G.T. Lad Vs. Chemicals & Fibers India Ltd.*** reported in ***1979 (1) LLJ 257.*** He contends that the company has not produced any material to show that on which date the applicant abandoned his service. No notice was served upon the applicant in connection with the alleged abandonment and the theory of abandonment of service by the applicant is not believable. He further submits that if the applicant was an impostor he could not be allowed to work in the company for such a long time. He further submits that the company never lodged FIR against the applicant alleging that he was an impostor and he entered into the employment fraudulently. He further submits that if the applicant was a budli worker there was no question of his joining or abandoning employment. He further submits that no attendance register or salary register has been filed by the company. He further submits that the applicant was refused employment without service of any notice or show-cause against the principles of natural justice taking

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away the livelihood of the applicant by simply refusing employment to him. He further submits that the workman has been wrongfully refused employment and he was not gainfully employed anywhere as such he is entitled to get full back wages. On this score, he cites the decision of the Hon'ble Supreme Court in ***Deepali Gundu Surwase vs. Kranti Junior Aadhyapaka Mahavidyalaya*** reported in ***2013 (12) JT 322, Jasmer Singh Vs State of Haryana*** reported in ***(2015) 4 SCC 458*** and in ***Jayantibhai Raojibhai Patel Vs. Municipal Council, Narkhed*** reported in ***2019 (17) SCC 184 SCC.*** He concludes his argument submitting that the company wrongfully took away the employment of the applicant and therefore he is entitled to the relief of reinstatement with full back wages.

In reply the learned advocate for the company submits that the case of ***Mecon Limited*** supports the company's case as it lays down that the tribunal has every authority to adjudicate the employer-employee relationship between the parties and when there is no such relationship there cannot be said to exist any industrial dispute. Regarding ***WWA, Cossipore English School*** case he submits that in that case the dispute was known to the employer as several civil and criminal proceedings were pending between the parties. He further submits that the case of ***Jagdamba Motors*** is not applicable as there is no termination order in this case. Regarding the case of ***Deepali Gundu Surwase*** the learned advocate submits that there was victimization of the lady in different ways in that case and the decision in that case did not take away the discretion of the tribunal in the matter of granting back wages. He contends that the cases of ***Jasmer Singh*** and ***Jayantibhai Raojibhai Patel*** were on different facts. He further submits that ***G.T. Lad*** case is not applicable in this case as the applicant did not approach the company to demand employment and straightaway went to the conciliation officer after remaining silent for about seven months.

Taking up the point of maintainability first we find that in ***WWA, Cossipore English School*** the Hon'ble Calcutta High Court opined that raising a demand with the employer was not a ***sine qua non*** for an industrial dispute to come into existence. We therefore find that factual existence of dispute is the foundation of coming into existence of an industrial dispute irrespective of the fact whether formal demand has been raised with the employer or not. In this case we find from the evidence of the company that there existed a dispute in the mill of the company. Exhibits-C, C/1 and C/2 speak of an unrest prevailing at the mill of the company little before the alleged

date of refusal of employment. Alleging inaction on the part of the Asst. Labour Commissioner, Uluberia, the applicant and others filed writ petition before the Hon'ble Court being Writ petition No. W. P. 13633 (W) 2003 impleading management of the mill as a party. The applicant and other writ petitioners sought issuance of writ against the Labour authorities to expedite the proceeding regarding the industrial dispute raised by them before the Asst. Labour Commissioner, Uluberia. They had also stated that their services were wrongfully terminated and their remedy was reinstatement. Now, the company did not contest the writ petition for their own reasons i.e. labour unrest as stated. Subsequently the company preferred appeal before the Division bench of the Hon'ble Court challenging the order passed in W. P. No. 13633 (W) 2003. We therefore find that the matter of alleged termination of employment and the demand of reinstatement of the applicant and others was very much known to the company. Had the company reinstated them the dispute would have come to an end but the company did not reinstate the applicant. Therefore, it cannot be said that there existed no industrial dispute and the company had no knowledge of such dispute. Thus, in spirit there appears no deviance from the legal position laid down in ***Sindhu Resettlement*** case. Considering the facts and circumstances and the position of law, the contention of the company that the reference is not maintainable as the dispute was not first raised with it is not acceptable. Learned advocate for the company also challenged the validity of the reference on the grounds of non-application of mind, power to frame issue No. 2 and that refusal of employment did not amount to retrenchment under Section 2(oo) of the I. D. Act. The company had filed writ petition before the Hon'ble Court challenging the validity of the reference being W. P. No. 3132 (W) of 2006 during the pendency of reference. The Hon'ble Court was pleased to dispose of the writ petition along with W. P. No. 20314 (W) of 2006 and other writ petitions with direction to include the issue "Whether the workmen have abandoned employment or refused to take up engagement / employment ?" in the reference. When the issue of validity of reference was challenged before the Hon'ble Court, I find no justification of agitating the same issue before this tribunal. In ***Mecon Limited*** case the Hon'ble Supreme Court held, " It is now settled position of law that in making a reference under section 10 of the Act, the appropriate Government does an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a

preliminary step to the discharge of its function does not make it less administrative act. The Court cannot therefore canvass the order of reference closely to see if there was any material before the Government to support its conclusion as if it was a judicial or quasi judicial determination." The company's plea of abandonment of employment by the applicant itself suggests the existence of employer-employee relationship. In view of the facts and circumstances of this case and in the light of the legal position appearing in the case of ***Mecon Limited,*** I am not inclined to buy the arguments over the legality and validity of the reference. Thus, the reference is found to be valid.

According to section 2(oo) of the I. D. Act, retrenchment means termination by the employer of the service of a workman for any reason whatsoever otherwise than the exceptions enumerated in it. The case of the workman certainly does not fall under any of the exceptions in the section. After insertion of the term 'refuses employment' and 'refusal of employment' in section 2A of the Act by West Bengal Act 33 of 1989 w.e.f 08.12.1989, the refusal of employment by any employer is deemed to be an industrial dispute. The contention of the company that the alleged refusal of employment is not retrenchment and it is a lockout is not acceptable in the light of the decision in the case of ***Jagdamba Motors*** when factually the alleged refusal of employment resulted in actual cessation of the employment of the applicant and it is no case of the company that the refusal of employment was made for a temporary period. The decision in ***Punjab Land Development & Reclamation Corporation Ltd. Vs. Presiding Officer, Labour Court, Chandigarh*** where the Hon'ble Supreme Court held that retrenchment means termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section 2 (oo) of the I. D. Act is of no help to the company.

According to the company the applicant is an impostor who started working in the place of ex-budli worker Hasibul Hasan Mallick from sometime in 1996. Company's plea that upon raising of the matter of working of impostors in the company's mill by a section of workers union the then Addl. Labour Commissioner, Govt. of WB had held meeting with the company and the concerned unions and the matter went up to the Hon'ble Labour minister and at that time the applicant and other impostors sensing trouble and to avoid possible police action is not substantiated by any cogent evidence. No document regarding the raising of such

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matter by a section of workers or holding of such meeting is filed. We find from the evidence of OPW1 that no action was taken against the alleged impostors by the company on getting knowledge of impersonation of ex-budli worker Hasibul Hasan Mallick by the applicant. The company did not lodge any FIR against the applicant. Exhibits-C, C/1 and C/2 do not whisper of any impostor. On the other hand, the applicant has filed copy of letter dated 17.11.1997 of R. R. Branch Regional office of the Employees State Insurance Corporation which has been marked as exhibit-1. It is found from Exhibit-1 that the name was changed from Hasibul Hassan Mallick son of Barkat Ali Mallick to Md. Rafique Ali Mallick son of Md. Robjel Ali Mallick retaining the same ESIC No. The letter is addressed to the company with subject-Correction in the record of insured persons Sk. Moymur and Md. Rafique Ali Mallick. It is found that the change in the name was effected in ESIC record on the basis of the company's letter dated 27.10.1997 and other documents. There is nothing on record to show that the company ever raised any issue with the ESIC authority regarding the change of the name and particulars of the worker in the ESIC record despite getting knowledge of such change on receiving the letter from ESIC. No complaint in this regard was made to any labour authority rather it is found that the applicant continued to work in the company till October 2002. Applicant has filed copies pay slips (Exhibit-3) in his name issued by the company. Company did not challenge the pay slips. Thus, the materials on record show clearly that the change/correction of name of the applicant was duly given effect to by the company. OPW1 in his examination-in-chief stated that the documents exhibited by the applicant were a manufactured but the company did not produce its record to substantiate their version. Company's plea that the change was effected in the ESIC record of the applicant in collusion with some unscrupulous staff does not stand to any reason as there is nothing on record to indicate that any such unscrupulous staff was identified and proceeded against by the company. Manipulating the workers record with the company is certainly a grave matter but no action whatsoever was taken by the company. In the circumstances it is unthinkable that the change was effected in the ESIC record by some staff of the company without company's authorization. Company did not produce any document like attendance register, salary register etc. relating to Hasibul Hasan Mallick or Md. Rafique Ali Mallick. Statement of the applicant in his cross-examination dated 19.11.2018 that Barkat Ali

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Mallick was working in the company and Md. Robjel Ali Mallick was never working in the company, highlighted by the learned advocate for the company, does not appear to be of any consequence as the applicant clarified that Md. Robjel Ali Mallick was the changed name of his father Barkat Ali Mallick. No doubt the affidavits of the applicant and his father (Exhibit-2) cannot conclusively establish that Hasibul Hasan Mallick and Md. Rafique Ali Mallick is one and same person but when the company accepted it, effected the change of name in the ESIC record and continued to employ him till the year 2002, it does not lie at least in the company's mouth, that the applicant is an impostor. The argument that the applicant never raised the issue of wrong recording of his name also does not appear plausible because so long he was getting work and wages there was no occasion of raising any dispute. The company needed labour and the applicant needed work. OPW2 and OPW3 are also employees of the company but there is nothing in their evidence to indicate that the applicant had wrongfully procured job in the company. OPW3 who joined service of the company in 1983 stated that the applicant joined the company after him. Had the applicant committed fraud with the company the other regular staff of the company must have known it. Moreover, the refusal of employment to the applicant was not on the ground of the alleged impersonation. It is found that the plea of alleged impersonation by the applicant has been raised only after the date of refusal of employment to the applicant. In view of the facts and circumstances and materials appearing on record the company's assertion that the applicant is an impostor and he had been working by impersonating Hasibul Hasan Mallick an Ex-budli employee of the company holds no water.

Now, the applicant claims to be a permanent worker of the company but according to the company he worked as budli worker only and abandoned his employment sometimes in 2002.

Evidence of the applicant shows that he joined the service of the company on 07.09.1988 as a casual employee and in 1995 he became a registered budli employee. Exhibit-B supports that claim of the applicant that he joined the service of the company on 07.09.1988.

In ***Karnataka State Road Transport Corporation,*** referred to by the company, where the workman had not completed 240 days of service during the period of 12 months preceding termination as contemplated in section 25F read with section 25B

of the I. D. Act, the Hon'ble Supreme Court held that the budli workers did not acquire any legal right to continue in service and they were not even entitled to the protection under the I. D. Act. The proposition laid down was followed in the case of ***Bangalore Metropolitan Transport Corpn.*** In ***Prakash Cotton Mills*** case also the Hon'ble Supreme Court held that budli workmen had no right to claim compensation on account of closure. The decisions in ***Karnataka State Road Transport Corporation, Bangalore Metropolitan Transport Corpn.*** and ***Prakash Cotton Mills*** have been followed in ***Gloster Limited*** case. The cases of ***Uma Devi*** and ***Ranbir Singh*** relate to public employment by Government and its instrumentalities as such they are not relevant to the present case.

Now, the question is whether the applicant completed 240 days' work in the 12 months preceding his alleged termination or not.

In the light of the proposition of law appearing in the cases of ***Range Forest officer, Municipal Corporation Faridabad, R. M. Yalatti, Essen Denki, M.P. Electricity Board, Manager RBI Bangalore*** and ***Gloster Limited*** the burden to prove the fact that he worked for 240 days during the period of 12 months preceding the alleged refusal of employment squarely lies upon the applicant.

The applicant deposing as PW1 denied the company's version that he did not complete one year continuous service as defined in section 25B of the I. D. Act but he nowhere asserted that he worked for 240 days or more during the period of 12 months preceding the refusal of employment. Except two pay slips (Exhibit-3) he did not file any document to support his claim that he worked for 240 days during the period of 12 months preceding the refusal of employment.

It is found that the company was employing about 3000 employees on an average. An employer is legally liable to pay contribution to ESI fund for all the workmen whether contract labour or casual/temporary or permanent employee, therefore, mere recording of the name of the applicant in the ESIC records does not make him a permanent employee. The two pay slips dated 07.01.1996 and 06.10.2002 showing wages earned as Rs. 90/- and Rs 1490/- (Exhibit-3) in filed by the applicant can hardly be relied upon to conclude that the applicant worked for 240 days during the period of 12 months preceding 08.10.2002. No other document has been produced by the applicant to establish his plea. In view of the facts and

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circumstances and the materials on record I am constrained to find that the applicant has failed to prove that he was a permanent employee of the company.

Now, we find from the written statement of the company and the evidence of OPW1 that one Sk. Moymur, against whom similar allegations of impersonation have been made, was given the status of special budli with guaranteed employment in the mill for 220 days in a year and he was recognized as such by the company. Applying the principles of natural justice and rule of parity the applicant, who is similarly circumstanced and has served the company for a long period of time, must be held to be a special budli having guaranteed right of employment for 220 days in a year. Thus, the applicant is held to be a special budli worker of the company since 21.10.1997 when the company wrote letter to ESIC for changing the name of the applicant in ESIC record.

Evidently, no notice was issued upon the applicant before refusal of employment to him in accordance with the certified standing orders of the company and no opportunity was given to him by the company. Therefore, the refusal of work to the applicant by the company is found unjustified.

Coming to the issue of abandonment of employment or refusal to take up engagement / employment by the applicant, we find that the company took the plea on the ground that the applicant and others disappeared sensing trouble and possible police action and after seven months silence the applicant raised dispute with the Dy. Labour Commissioner. We have already found that no action was taken against the alleged impostors by the company on getting knowledge of impersonation and the company never lodged any FIR against the applicant. In fact, the plea of impersonation by the applicant was raised much after the date of refusal of employment. On the other hand the applicant who admittedly worked in the company had all along been desperately trying to get his employment back resorting to the forums available in law. It is no case of the company that the name of the applicant was removed from its roll due to his long unauthorized absence. There is nothing on record to show that the company offered employment to the applicant which he refused. It is found from the evidence of the applicant that he and others had initially taken shelter of political leaders of the union for relief but when he did not get relief he raised individual dispute. Thus, the company's argument of long silence by the applicant does not fortify their plea of abandonment of service by the applicant. In ***G.***

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T. Lad Vs Chemical and Fibres Ltd., referred to by the applicant, the Hon'ble Supreme Court observed that abandonment and relinquishment of service is always a question of intention and normally such an intention cannot be attributed to an employee without adequate evidence in that behalf. As there was no action against the applicant by the company there could not be any reason for the applicant to sense trouble or police action as alleged. There also appears no reason to believe that the applicant voluntarily gave up his livelihood and then he began to fight legal battle to get it back. In the circumstances I find no reason to hold that the applicant abandoned his employment or he refused to take up engagement / employment.

In ***UP State Brassware Corporation Ltd.,*** referred to by company, the Hon'ble Supreme Court held that no precise formula could be laid down as to under what circumstances payment of entire back wages should be allowed and also that payment of back wages is not automatic and it depends upon the facts and circumstances of each case.

In the case of ***Metropolitan Transport Corpn.,*** referred to by company, also the Hon'ble Supreme Court, relying upon the decision in ***UP State Brassware Corporation Ltd.,*** held that even if the Court finds it necessary to award back wages, the question would be whether back wages should be awarded fully or only partially (and if so the percentage) and that depends upon the facts and circumstances of each case. In ***Gujarat State Road Transport*** case, the Hon'ble Gujarat High Court held that unless and until a statement is made that the workman was unemployed and inspite of his best efforts to seek employment he could not get employment back wages cannot be granted to the workman.

In the cases of ***Deepali Gundu Surwase*** and ***Jasmer Singh*** full back wages were allowed as the termination of service was found in contravention of law. In ***Deepali Gundu Surwase*** the Hon'ble Supreme Court held that the cases in which the Tribunal finds that the employer has acted in gross violation of the statutory provisions and / or the principles of natural justice or is guilty of victimizing the employee then the Tribunal concerned would be fully justified in directing full back wages. It was also held that the employee had to plead or at least make a statement before the adjudicating authority that he was not gainfully employed or was employed on lesser wages. In the case of ***Jayantibhai Raojibhai*** full back wages were not granted but in the circumstances of the case the Hon'ble Supreme Court

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after considering various earlier decisions of the Supreme Court including the decisions in ***Hindustan Tin Works (P) Ltd v Employees ("Hindustan Tin Works")*** reported in ***(1979) 2 SCC 80*** and ***Deepali Gundu Surwase*** granted a lump sum compensation of Rs. 5 lakhs.

In ***Deepali Gundu Surwase*** and ***Jasmer Singh*** the employees were undisputedly permanent employees and their services were terminated violating the mandatory provisions of I. D. Act but in the present case, the applicant is found to be a special budli worker only and not a permanent worker. As a special budli the applicant had right to employment for 220 days only in a year as such he had to take some other job on the remaining days of the year. The termination of special budli employment of the applicant in this case is in contravention of the procedure prescribed in the certified standing orders of the company as the applicant not being a permanent employee and not having completed 240 days of work in 12 months preceding the date of the refusal of employment is not entitled to the protection of Section 25F of the I. D. Act.

Having considered the entire facts and circumstances and the evidence and materials appearing on record and also considering the nature of employment of the applicant I hold that reinstatement of the applicant as a special budli in the company with back wages applicable to special budli at the rate of 25 per cent from 08.10.2002 till his reinstatement would be just and proper.

Thus the issues in this case are answered as follows :-

Issue No. 1 – The management is not justified in terminating the service of the applicant Md. Rafique Ali Mallick by way of refusal of employment with effect from 08.10.2002.

Issue No. 2 - The date of joining of the applicant is 07.09.1988 as a budli worker and since 08.01.1998 he became a special budli.

Issue included in terms of Hon'ble High Court's Order dated 07.02.2018 in W.P. No.20314 (W) of 2006 – The applicant did not abandon his employment and he did not refuse to take up engagement / employment.

Issue No. 3 - The applicant is entitled to reinstatement as special budli with back wages applicable to special budli at the rate of 25 per cent from 08.10.2002 till his reinstatement.

All the issues stand disposed of accordingly.

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Hence, it is,

Ordered

that the applicant Md. Rafique Ali Mallick is entitled to reinstatement in the mill of the company as special budli with back wages applicable to special budli at the rate of 25 per cent from 08.10.2002 till his reinstatement.

Messers Ludlow Jute Mills, Proprietor Ekta Limited, Village & Post – Chengail, Howrah is directed to reinstate the applicant Md. Rafique Ali Mallick as special budli and pay 25% of back wages from 08.10.2002 till his reinstatement as special budli within 60 days from the date of publication of this award.

Let, the copies of the award be sent to the Labour Department, Government of West Bengal in accordance with the usual rules and norms.

This is my award.

Dictated and corrected by me

sd/-

Judge

sd/-

(Sanjeev Kumar Sharma)
Judge 3rd Industrial Tribunal
Kolkata
05.07.2022