

I/213100/2022

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

No. Labr/ ⁷⁷³...../(LC-IR)/11L-41/2016Date: ¹²⁻⁰⁸⁻.....2022.ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. Labr/629/(LC-IR)/11L-41/2016 dated 12/06/2017 the Industrial Dispute between M/s. South Calcutta Clinic, 19A, Hindustan Road, Kolkata - 700029 and its workman Smt. Rekha Sarkar, 143A, Rashbehari Avenue, Kolkata - 700029 regarding the issue mentioned in the said order, being a matter specified in the Second / Third Schedule to the Industrial Dispute Act, 1947 (14 of 1947), was referred for adjudication to the Judge, Fifth Industrial Tribunal, West Bengal.

AND WHEREAS the Fifth Industrial Tribunal, West Bengal, has submitted to the State Government its award dated 28/07/2022 on the said Industrial Dispute vide memo no. 1175 - L.T. dated - 28/07/2022.

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,



Joint Secretary
to the Government of West Bengal

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D. Panda
16/8

No. Labr/773/1(5)/(LC-IR)

Date: 12-08- /2022.

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

1. M/s. South Calcutta Clinic, 19A, Hindustan Road, Kolkata - 700029.
2. Smt. Rekha Sarkar, 143A, Rashbehari Avenue, Kolkata - 700029.
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B. New Secretariate Building, 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/773/2(2)/(LC-IR)

Date: 12-08- /2022.

Copy forwarded for information to:

1. The Judge, Fifth Industrial Tribunal, West Bengal with reference to his Memo No. 1175- L.T. dated – 28/07/2022.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.



Joint Secretary

In the Fifth Industrial Tribunal, West Bengal
New Secretariat Buildings, Kolkata.

Present:- Shri Kamal Sarkar, Judge
Fifth Industrial Tribunal, Kolkata.

Case No. VIII-09/2017

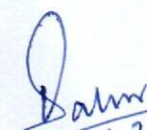
In the matter of an Industrial Disputes between M/s. South Calcutta Clinic of 19A, Hindustan Road, Kolkata – 700029 and Smt. Rekha Sarkar of 143A, Rashbehari Avenue, Kolkata – 700029.

A W A R D

This case arose by way of order of reference Vide No. Labr./629/(LC-IR)/IR/111-41/2016, dated 12/06/2017 by order of the Governor signed by the Assistant Secretary, to the Govt. of West Bengal, Labour Department, I.C.(I.R) Branch, New Secretariat Buildings, Block-A, 12th Floor, 1 No. Kiran Sankar Roy Road, Kolkata – 700 001, mentioning that an Industrial Dispute exists between M/s. South Calcutta Clinic of 19A, Hindustan Road, Kolkata – 700029 and Smt. Rekha Sarkar of 143A, Rashbehari Avenue, Kolkata – 700029 relating to the issues as mentioned in the order of reference stated to be being matters / matter specified in the Second / Third Schedule of the Industrial Disputes Act, 1947, further mentioning that it is expedient that the said dispute should be referred to an Industrial Tribunal constituted under section 7A of the Industrial Disputes Act, 1947 and therefore, in exercise of power conferred by Section 10 read with Section 2A of the Industrial Disputes Act, 1947, the Governor is pleased by this order of reference to refer this dispute to the Seventh Industrial Tribunal stated to be constituted under Notification No. 3115-IR/IR/3A-6/59, dated 21.06.1960 for adjudication requiring this Tribunal to submit Award to the State Govt. with a period of Three months from the receipt of this order of reference by the Tribunal in terms of Sub-Section 2(A) of Section 10 of the Industrial Disputes Act, 1947 subject to other provisions of the Act, the issues as have been framed in the above mentioned order of reference being.

I S S U E (S)

1. Whether the termination of service Smt. Rekha Sarkar in the garb of retirement / superannuation by the Management of M/s. South Calcutta Clinic, 19A, Hindusthan Road, Kolkata – 700029, with effect from 22/02/2016, is justified.
2. What relief she is entitled to?


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The case record shows that after receipt of the above noted order of reference, the Fifth Industrial Tribunal issued summons to both the parties as per order of reference and after receiving two summons; the workman and the management appeared before the Fifth Industrial Tribunal and thereafter date was fixed for filing their respective written statement. Thereafter both the parties have filed their respective written statement and also the list of documents before the Ld. Seventh Industrial Tribunal and finally Ld. Seventh Industrial Tribunal vide his order dated 01/08/2019 in reference with G. O. No. Labr./699/(LC-IR)/23099/15/2019, dated 26/07/2019 had transferred the present case before this Fifth Industrial Tribunal.

In the written statement filed by the workman, it has been contended inter alia that the workman, Smt. Rekha Sarkar was a workman under the above named OP i.e. M/s. South Calcutta Clinic as a Nursing Staff and rendered about 30 years service and in the terms of the settlement dated 12/04/1990 arose between the management of the clinic and the Union of South Calcutta Clinic one formal appointment letter was issued on 24/02/1993 with effect from 01/04/1990 though Smt. Sarkar had been rendering her service long before since 22/02/1988 without any appointment letter and it was clarified that the age of her retirement will be at the age of 58 years. Vide Letter dated 19/10/1994 the management asked Smt. Sarkar to perform her duty in the ward from 01/11/1994 as Junior Sister. It is also the case of the workman that she is also a member of ESI Scheme as in her identity card her date of birth is mentioned as 16/11/1965 and not only that being a member of EPF Scheme her P. F. Account No. is WB/Cal-026140/000043 and from the P. F. Acknowledgement Slip dated 16/07/2004 it also appears that her date of Birth has been recorded as 16/11/1965. Not only that from the Identity Card of the Workman Smt. Rekha Sarkar issued by the Management of the Clinic it also reveals that her date of birth has been recorded as 16/11/1965. Apart from the in her Aadhar Card, Voter Identity Card and PAN Card her date of birth also mentioned as 16/11/1965. In view of the date of birth as stated above the date of retirement of the workman Smt. Rekha Sarkar ought to be on 15/11/2023, on reaching the age of superannuation i.e. 58 years. Now on 30/11/2015 one letter was issued by the OP/ Management where it has been falsely alleged that inspite of repeated verbal request for a long period for submission of her Voter Card, Aadhar Card, PAN Card (Mandatory) and ration card for maintaining official record and also directed her to submit the self attested photocopies of those documents. By a letter dated 07/12/2015 Smt. Sarkar stated that she submitted various documents in support of her age proof earlier and lastly when those documents were asked by the P. F. Authority, however, the Photocopy of Aadhar Card and PAN Card was submitted by her. It is also the case of the workman that the management had lost all earlier records maintained by them otherwise the Identity Card could not be issued by them and not only that ESI Card and P. F. record could not be

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recorded in respect of her date of birth without the knowledge and consent of the management because all requisite form relating to such documents were submitted through the management only. It is the case of the workman that the management to cover up their faults raised finger to the workman questioning the integrative of the workman. The workman again submitted the photocopies of her PAN Card and Aadhar Card to the management on 07/12/2015 and by a letter dated 27/01/2016 she had intimated the management that she took steps for obtaining Voter Identity Card. In spite of that the management by their letter dated 19/02/2016 forcibly retired her with effect from 22/02/2016 though the workman by her letter dated 13/02/2016 categorically stated that her service record was maintained by the management. It was alleged by the management in their letter dated 19/02/2016 that as per Electoral Role of 01/01/2016 the age of the workman is 64 years and due to that reason instead of taking legal action she was retired with effect from 22/02/2016.

The workman had given the protest letter on 10/03/2016 denying all allegation against her and as per official record her dated of birth is 16/11/1965 which means she had further 7 years 3 months 10 days service due and she suppose to be retired on 15/11/2023 after attaining the superannuation age i.e. 58 years and she also forwarded the copy of such letter to the South Calcutta Clinic Worker's Union as she is a member of that Union. Thereafter the concerned Union by a letter dated 11/03/2016 raised protest against such forceful retirement of the present workman and the Union also demanded the resumption of duty of Smt. Sarkar with full back wages. The management was reluctant to consider the same therefore, the Union on behalf of the present workman by a letter dated 16/03/2016 sought for intervention of the Labour Commissioner. On the basis of such request conciliation proceeding took place by the Assistant Labour Commissioner on the issue of illegal termination but ultimately said proceeding failed due to adamant attitude of the management. The workman subsequently placed her rectified Voter Card with one representation dated 30/03/2016 for reconsideration of her case which was declined by the management. The aforesaid union on behalf of the management wrote a letter dated 20/09/2016 before the ALC, West Bengal mentioning the entire facts. As the conciliation proceeding failed the matter has been referred before the Tribunal for adjudication. The workman also submitted that after such termination she is totally unemployed and has no source of income at present and passing her days in acute financial hardship. Therefore by filling her written statement she prays for passing an Award holding the termination of her service in the garb of retirement by the management is unjustified and illegal and also prays for relief of reinstatement with full back wages alongwith consequential benefits.

To substantiate her case the workman Rekha Sarkar deposed herself as PW-1 and the documents marks Exhibits on her behalf are – Photocopy of her Appointment Letter dated 24/02/1993 (Exhibit-1), Copy of Letter dated 11/10/1994 (Exhibit-2), the copy of ESI Identity Card in the name of the Petitioner (Exhibit-3), copy of Accounts Statement

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and NSSN Form issued by the Provident Fund Authority on 16/07/2004 (Exhibit-4), copy of Identity Card Issued by the O.P./Management (Exhibit-5), copy of ESIC Identity Card (Exhibit-6), Copy of Aadhar Card of the workman (Exhibit-7), copy of Voter Identity Card of the Workman (Exhibit -8), copy of PAN Card of the workman (Exhibit-9), copy of Ration Card of the Workman (Exhibit-10), copy of Letter dated 30/11/2015 written by the O.P./Management and the reply dated 07/12/2015 (Exhibit-11), copy of Letter dated 15/12/2015 and its reply dated 18/12/2015 (Exhibit-12), copy of Letters dated 13/02/2016 and 19/02/2016 (Exhibit-13), the photocopy of two documents dated 15/02/2018 is marked as (Exhibit-14 & Exhibit-15 respectively), photocopy of two documents dated 15/02/2018 is marked as (Exhibit-16 & Exhibit-17 respectively), further photocopies of three documents dated 15/02/2018 is marked as (Exhibit - 18 to Exhibit-20 respectively) and the three photocopies of three documents dated 15/02/2018 is marked as (Exhibit-21 to Exhibits-23 respectively), another photocopies of four documents dated 15/02/2018 are collectively marked as (Exhibit - 24 to Exhibits - 27), another photocopies of document dated 15/02/2018 is marked as (Exhibit-28).

The management of the organization M/s. South Calcutta Clinic has contested this case by filling their written statement denying all the material allegation of the Petitioner's case, by submitting that the instant case is not maintainable as the applicant was declared retired and as she is not an employee, the present dispute can not come within the purview of Industrial Dispute and as per Provision of Section 2A of the Industrial Dispute Act, the Instant case is not maintainable.

It is the positive case of the management that the age of the applicant has been mentioned in the electoral roll 2016 as 64 in Sl. No. 705 Voter I.D. Card No. SCG1607167 in the state of West Bengal Code No. S25/W.B. The management further contended that the Declaration Form No. 1 of Employees State Insurance Corporation signed by the applicant and in Form No. 2 of the Employees Provident Fund and Employees Pensions' Scheme signed by the applicant reflected her date of birth as 16.11.1965. As in the Electoral Roll of 2016 the age of the applicant has been mentioned as 64 which compelled the management to update the service record of the applicant and in pursuance to that the management advised the applicant to submit her voter I.D. Card, Aadhaar Card, Pan Card and ration card with object to close scrutiny of the age and for maintaining service file of the applicant. In spite of repeated calls, the applicant deliberately ignored the direction of the management. As the applicant failed to comply the direction, the management issued a letter dt. 30.11.2015 directing her to submit her voter I.D. Card (mandatory), aadhaar card, Pan Card (mandatory) and ration card by the self attesting within 7 days before the Administrative Officer and the applicant in response to the letter submitted one letter dt. 07.12.2015 and categorically mentioned that she regret that she did not hold the all the documents mentioned above which is far from the truth and surprisingly the applicant submitted photocopy of aadhaar card and pan card without original.

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It also submitted by the management that it was not possible to scrutiny the age and other statements declared verbally by the applicant due to non submission of original documents. In reference with the letter dt. 07.12.2015 written by the applicant, the management issued another letter on 15.12.2015 asking reply from the applicant that what documents were submitted by her at the time of her joining on which the applicant sent a letter dt. 18.12.2015 straightway confessed that she was regret on the contents of her letter dt. 15.12.2015 and submitted that she had submitted her educational certificate in the year 1988 when she joined in the Clinic. The management was not satisfied after receiving the photocopy of aadhaar card and pan card without original and further directed to the applicant by letter dt. 20.01.2016 to produce voter i.d. card (mandatory) and ration card to verify her age. The applicant by her letter dt. 27.01.2016 stated that she would take steps for obtaining voter i.d. card and ration card since on the date of the letter dt. 27.01.2016 those cards were not in her possession. The management again gave her opportunity by writing another letter dt. 10.02.2016 to produce those two documents as stated earlier against which the applicant replied by a letter dt. 13.02.2016 and submitted that she took steps for obtaining her voter i.d. card, but she did not submit her original aadhaar card and pan card and educational certificates along with her ration card though all the above documents are within her possession. The management had given ample opportunities to the applicant to produce documents by issuing several letters, but she failed to produce the same save and except the photocopies of aadhaar card and pan card. The management took decision to retire the applicant on the basis of the Electoral Roll 2016, State (S25) West Bengal as the applicant failed to substantiate her date of birth as 16.11.1965 by producing valid documents and the management denied the contention of the union that the applicant was forcefully terminated in the grab of superannuation before her date of retirement. Subsequently, after receiving the Memo No. 441/26/16/LC/Kol dt. 12.04.2016 from the Office of the Assistant Labour Commissioner, West Bengal the management made its comments by its letter dt. 02.05.2016. The management duly attended the conciliation proceedings with written replies and as the applicant failed to satisfy the Conciliation Officer that her date of birth is 16.11.1965 by producing her birth/school certificate which she had produced earlier before the management as admitted by her in her letter dt. 18.12.2015. It further submitted by the management that regarding prayer of rectification in Form 8 which was made on 03.02.2016 which denotes that the applicant had knowledge that her age was incorporated in her voter i.d. card which was under her possession. Having no other alternative, the management compelled to retire her on the basis of Electoral Roll 2016, State (S25), West Bengal and the workman was never terminated from her job. The applicant had intimated to the management by her letter dt. 21.02.2016 that as soon as she received the corrected voter identity card then she would submit the same. In reply of that letter the management instructed her to submit one voter i.d. card whether that is correct or not and before correction the same could be submitted before the management. The applicant was retired with effect from 22.02.2016 and she was never terminated or retrenched.

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So, the question of compliance of mandatory provision of Industrial Disputes Act does not arise at all. Accordingly, the O.P./management prays for rejection of the instant application as the applicant was retired with effect from 22.02.2016. In support of the management's case, one Anup Kumar Nandy, the employee of M/s, South Calcutta Clinic deposed as O.P.W.1 and the documents marked exhibits on behalf of the management are photocopy of electoral roll of Bidhan Sabha Election for the year 2016 (Exbt. A) and the list of electoral roll (Exbt. A/1), photocopy of letter of retirement dt. 19.02.2016 (Exbt. B), Form Nos. 1 & 2 (Exbts. C and C/1), photocopy of nomination and declaration Form and signature thereon (Exbts. D & D/1), photocopy of workman's letter dt. 27.01.2016 (Exbt. E), photocopy of employers' letter dt. 10.02.2016 (Exbt. F), photocopy of conciliation memo dt. 12.04.2016 issued by the Assistant Labour Commissioner (Exbt. G), photocopy of employers' letter dt. 02.05.2016 (Exbt. H), photocopy of workman's letter dt. 30.03.2016 (Exbt. I), photocopy of employers' letter dt. 11.04.2016 (Exbt. J) and photocopy of workman's letter dt.13.04.2016 (Exbt. J/1), original authorization letter (Exbt. K).

It has already been discussed earlier that the order of reference contents only two issues such as

Issues

1. Whether the termination of service Smt. Rekha Sarkar in the garb of retirement /superannuation by the Management of M/s. South Calcutta Clinic, 19/A, Hindusthan Road, Kolkata – 700 029, with effect from 22/02/2016, is justified.
2. What relief she is entitled to ?

DECISION WITH REASONS

Issues No. 1 & 2

Ld. Advocates of both the parties have advanced their argument in support of their respective cases.

During hearing of argument, Ld. Advocate for the management i.e. M/s. M/s. South Calcutta Clinic submitted that the instant case is not maintainable as it is not a case U/s 2A of the Industrial Disputes Act, 1947. He further submitted that the appointment of Rekha Sarkar was made entirely on the basis of the verbal submission of Rekha Sarkar i.e. the workman and the workman did not submit any document before the management at the time of her appointment. It also argued by the Ld. Advocate for the management that the workman Rekha Sarkar had suppressed her original age and tried to mislead the management, but from the electoral roll, it reveals that her age was recorded as 64 years in the year 2016, so, the management had no other alternative but to retire her forcefully as she had crossed the age of her superannuation.

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Prior to that, on several occasions the management asked her to produce her voter identity card, aadhaar card, pan card and ration card, but the workman failed to submit those documents as per instruction of the management. It also stated by the Ld. Advocate for the management that this case is referred U/s 2A of the Industrial Disputes Act and originally the dispute was raised by the Union, but surprisingly the reference was made in the individual name of Rekha Sarkar which is bad in law and accordingly, the instant case is not maintainable. He further advanced his argument by stating that the workman Rekha Sarkar in her cross-examination dt. 17.04.2019 where she has admitted that she had casted her vote in the lok sabha election in the year 2014, but surprisingly in the year 2015 she did not submit her voter card before the management and in her cross-examination dt. 18.06.2019 she also admitted that before joining she did not submit any of her educational certificate or certificate of birth before the management. According to the management M/s South Calcutta Clinic the workman Rekha Sarkar suppressed the material facts before the management regarding her actual date of birth and her date of birth recorded in the register of the management is purely on the basis of her verbal submission and on that basis the photo i.d. card issued by the ESI Department in the name of the Petitioner (Exhibit-3), copy of Accounts Statement and NSSN Form issued by the Provident Fund Authority on 16/07/2004 (Exhibit-4), copy of Identity Card Issued by the O.P./Management (Exhibit-5), copy of ESIC Identity Card (Exbt. 6) were issued without supporting any documents submitted by the workman before the management. Now, when the management obtained the photocopy of electoral roll of Bidhan Sabha Election for the year 2016 (Exbt. A) and the list of electoral roll (Exbt. A/1), they came to know that in the year 2016 the age of the workman was 64 years and accordingly, the management was compelled to retire her from her service and she was never terminated from her service. He concluded his argument by submitting that the superannuation of Smt. Rekha Sarkar made by the management is totally justified and the workman is not entitled to get any relief as prayed for and the management prays for dismissal of the case.

On the contrary, Ld. Advocate for the workman during advancing his argument reiterated the facts of the petitioner's case and also disputed the contention of the Ld. Advocate for the management. It has been argued by him that Section 2A (1) of the Industrial Disputes Act stated as follows :

[Dismissal, etc., of an individual workman to be deemed to be an industrial dispute - Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the; dispute].

Accordingly, on the basis of Section 2A(1), if in any case the union raised the dispute before the appropriate authority regarding some dispute in which the particular

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workman is involved, said workman himself can raise the dispute even the union does not come forward and there is no bar in law to refer the matter before the appropriate Tribunal in the name of an individual workman. In support of his contention, Ld. Advocate for the workman referred a decision reported in **Laws (Cal) 2021 (9) 78**.

This Tribunal has gone through the decisions as referred by the Ld. Advocate for the workman. It appears from paragraph 12 of the judgment that Hon'ble Court has been observed which is as follows:-

In other words, a dispute between a workman terminated from service and his employer shall be deemed to be an Industrial Dispute even without participation of the Union in the dispute. The ratio of the judgment relied upon by the Union is squarely applicable to the present case. The judgment reiterates the proposition of law in the statute itself to the effect that the concerned employees are the real parties to the dispute and their cause may be represented by the Union. It is immaterial as to whether the Union has any locus stand to represent the workmen or espouse their cause and also whether it represents a minority of workmen. Even if the Respondent Union is unable to produce documents as called for by the petitioner, the affected workmen can continue to contest the case and the proceedings may be continued as if it is a reference under sec. 2A of the Industrial Disputes Act.

In view of the observations of the Hon'ble High Court, this Tribunal is also of the opinion that the present case is well maintainable as per provision of Section 2A of the Industrial Disputes.

Ld. Advocate for the workman further advanced his argument by submitting that in Para 12 of Page 15 of the written statement of the workman, it has been categorically stated that the workman is still unemployed and this contention also corroborated in Paragraph 12 of her affidavit in chief. It is also the positive case of the workman that she had submitted all necessary documents before the management regarding her educational qualification and her age on the basis of which the management had issued ESIC Card (Exbt. 3), PF document (Exbt.4) and Identity Card issued by the management (Exbt.5) from which it will be reflected that the date of birth of the workman is recorded as 16.11.1965. Ld. Advocate further submitted that apart from the above documents the smart card issued by ESIC (Exbt.6), her aadhaar card (Exbt.7), voter i.d. card (Exbt.8) from which it also reflects that the date of birth of the workman is recorded as 16.11.1965 and Exhibit 9 i.e. the Pan Card of the workman also reflects the same date of birth. He further argued that the from employees' particulars for Group Gratuity Scheme issued by the management (Exbt. 28) it will reflect at second page of the document and Sl. No. 34 that the name and date of birth of the workman Rekha Sarkar was mentioned there and not only that all documents issued by the management in favour of the workman Rekha Sarkar, it will reflect that the date of birth of the workman Rekha Sarkar has been

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recorded as 16.11.1965 and the management has ignored the documents i.e. the service documents issued by them and only relying upon the sole documents that is the photocopy of electoral roll and its list (Exbts. A & A/1) has forcibly terminated the workman from her service and even till date the management did not produce the service record of the workman which is admittedly in their possession.

He further submitted that the management issued the letter of retirement dt. 19.02.2016 (Exbt. 13) and prior to that, the management never gave the workman any opportunity to give any explanation regarding her defense. It also argued by him that the workman had made several correspondents with the management and she had submitted the photocopy of her aadhaar card and pan card before the management and also prayed for adequate time for obtaining the rectified voter i.d. card from the concerned department, but ignoring her submission the management forcefully terminated her from her service in the garb of retirement. It also contended by the Ld. Advocate for the workman that no positive evidence has come forward on the part of the management that in the year 2016 her date of birth was 64 save and except the photocopy of electoral roll which has got no basis and can not be a valid document for age proof and none of the witness of the management has able to prove by adducing any cogent evidence that the workman Rekha Sarkar was 64 years old in the year 2016. Ld. Advocate for the workman also relied upon the decisions reported in (1981) 3 SCC 544, (2006) LLR 525, 2013 LLR 1094, (2016) 16 SCC 663 and (2013) 10 SCC 324. He submitted that as per the observation of the Hon'ble Court the photocopy copy of the electoral roll can not be treated as an age proof document and the age as recorded in the service record of the workman can not be changed on the basis of the photocopy of the electoral roll which has got no basis. The management has ignored the various documents issued by them regarding the age of the workman which is also not permissible in law and it further reveals that as per those documents the date of birth of the workman is 16.11.1965 and she was forcefully terminated by the management with effect from 22.02.2016 and as per the norms of the management the age of superannuation is 58 years, but unfortunately at the time of her forceful retirement with effect from 22.02.2016 it will be clear that 7 years 3 months and 10 days service were left for her retirement which could be on 15.11.2023. Accordingly, Ld. Advocate for the workman concluded his argument by submitting that the management has illegally terminated her from her service on 22.02.2016 which is totally unjustified and illegal and the workman is entitled to for her reinstatement in service along with full back wages, consequential relief and continuity in service and prays for award in her favour.

This Tribunal has gone through the referral order of the government as well as the written statements filed by both the parties in support of their respective cases, the evidences on record, both oral and documentary, as well as the decisions referred by the Ld. Advocates for the parties.

The gist of the applicant's case is that she has been wrongly superannuated as she had 7 years 3 months and 10 days service more left. She claims her date of birth is 16-11-1965 contrary to the management's case that she was 64 years of age in the year 2016.


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Judge
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The applicant relies on the date of birth recorded in her aadhaar card, pan card, voter i.d. card, ESI Identity Card issued by the management, copy of accounts statement and NSSN Form issued by the Provident Fund Authority, the identity card issued by the management and ESIC Identity Card. She also filed her epic card and from all the above documents it appears that her date of birth has been recorded as 16.11.1965. She claimed that the actual date of her retirement is on 15.11.2023 i.e. 58 years. Accordingly, this Tribunal is of the view that there is no dispute that the age of superannuation was 58 years and if the date of birth of the applicant is taken into consideration as 16.11.1965, then her date of retirement can not be in the year of 2016. The letter dt. 19.02.2016 i.e. the letter of retirement addressing to the applicant by the management and the applicant has admitted regarding the receipt of that letter from said letter it reveals that the management had considered the electoral roll of 2016 where the age of the applicant has been mentioned as 64 years a proof of her date of birth. It further reveals from Exbt. 11 i.e. a letter dt. 30.11.2015 which had been written by the management addressing to the applicant for submitting the self attested photocopies of her voter card (mandatory), aadhaar card, pan card (mandatory) and ration card for maintaining their official record in the service file of the applicant. Nowhere in that letter the applicant was asked to submit the original voter card, aadhaar card, pan card or ration card. In continuation of Exbt. 11, it reveals that the applicant had given reply of the letter dt. 30.11.2015 vide her reply letter dt. 07.12.2015 where she had submitted that at that time she did not hold all the documents as stated above, but for the purpose of identity she had submitted various documents in support of proof of her age in the past few times and lastly in the last year when there was demand of those documents from the PF Authority and she had apprehended that the management had misplaced those documents and she had submitted the photocopies of her aadhaar card and pan card before the appropriate authority. In that letter dt. 07.12.2015 she also mentioned that her earlier residential address has been changed and in the year 2015 she had been residing in the new residential address. In reply of that letter dt. 07.12.2015, the management again issued a letter on 15.12.2015 (Exbt.12) where it was asked from the applicant to submit the nature of documents submitted by her at the time of her joining. In continuation of Exbt. 12, the applicant had given reply on 18.12.2015 to the management against their letter dt. 15.12.2015 where she had categorically mentioned that the certificate of her education was produced at the time of joining duty in the year 1988 and accordingly identity card was issued by the management and accordingly, the age was recorded with the P.F. Commissioner since then. It also mentioned in the letter dt. 18.12.2015 that address was recorded earlier which was changed and on request of the management pan card and aadhaar card was submitted three years back for submission to the PF Authority and inspite of that the management wanted documents further which presumed that those documents were not readily traceable.

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In reply of the letter dt. 18.12.2015 the management again issued a letter to the applicant on 20.01.2016 (Exbt. 14) where it has been mentioned that the management had instructed the applicant to submit her voter i.d. card (mandatory), aadhaar card, pan card (mandatory) and ration card among which the applicant had submitted the photocopies of aadhaar card and pan card which are not sufficient regarding the complete proof of personal identity and it also further instructed to the applicant to submit her voter i.d. card and ration card within 10 days. Another letter dt. 13.02.2016 which is part of the Exbt. 13 written by the applicant to the management wherein she stated that incompliance of the management's letter dt. 10.02.2016 she submitted that her service record was maintained with the record and information as obtained by the management like many other employees where she also mentioned that she had taken steps to obtain the voter identity card and as soon as she got the same would hand over the management. Now, from Exbt. F i.e. the letter dt. 10.02.2016 written by the management addressing to the applicant , it reveals that the management has mentioned that the applicant never submitted any valid documents in support of her address and age which appears to be not correct before this Tribunal as the management has admitted in their several letters that the applicant had submitted the photocopy of her aadhaar card and pan card and this Tribunal is surprising about the view of the management that they are not considered the aadhaar card as a proof of address and they also not considered the date of birth of the applicant which are recorded in the aadhaar card and pan card of the applicant. It is also surprising to note that after receiving the letter dt. 13.02.2016 from the applicant without giving any opportunity to the applicant forcefully terminated the applicant in the garb of retirement vide their letter dt. 19.02.2016 on the basis of the age recorded in a photocopy of the electoral roll.

Now, let this Tribunal also consider that how much the management has able to prove the validity of that photocopy of electoral roll. The only person who has been examined on behalf of the management as O.P.W.1 is Mr. Anup Kumar Nandy who is one of the Administrative Officer of the management. Said O.P.W.1 in his cross-examination has admitted that when the applicant Smt. Rekha Sarkar was appointed then O.P.W.1 was not attached with the clinic and he also failed to say that whether at the time of appointment the applicant had submitted all relevant documents and it was accepted by the management or not. From this part of the evidence of O.P.W.1, it is clear that no iota of evidence has been given by the management from which it can be revealed that the applicant Rekha Sarkar never submitted any documents at the time of her appointment. The O.P.W.1 also admitted in his cross-examination that the age of superannuation in their establishment is 58 years and he failed to remember that whether there is any service rule in their establishment or not. O.P.W.1 also admitted that the identity card was issued from their establishment in which the date of birth of Rekha Sarkar is mentioned as 16.11.1965. He also stated that on the basis of documents of Smt. Rekha Sarkar mentioned in her PF and ESI Identity Card was issued and her date of birth was recorded as 16.11.1965. O.P.W.1 failed to say that at the time of joining of Smt. Rekha Sarkar which processes was adopted by their establishment to send her name for PF and ESI. Therefore, from the above piece of evidence of O.P.W.1, it is clear before this Tribunal that on the basis of documents of Smt. Rekha Sarkar her P.F and ESI identity card was issued which denotes that Smt. Rekha Sarkar had submitted her documents before the management. It further reveals from the evidence of O.P.W.1 that in his cross-examination he categorically admitted that the documents like identity card, EPF of Smt.

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Rekha Sarkar and ESI Smart Card which were issued by their establishment in favour of Smt. Rekhar Sarkar the date of birth are mentioned in those documents as 16.11.1965. O.P.W.1 also admitted that in aadhaar card (Exbt.7), voter identity card (Exbt. 8), pan card (Exbt.9) of Smt. Rekhar Sarkar her date of birth is mentioned as 16.11.1965. When Exhibits A & A/1 i.e. the electoral roll and voter list for the year 2016 tendered to the witness is stated that these documents are not the true copies of the original documents of the election commission and personally he did not verify those documents and on the basis of those documents their establishment had superannuated Smt. Rekha Sarkar and prior to superannuation their establishment did not give any opportunity to Smt. Rekha Sarkar for a hearing for verifying those documents. It also admitted by O.P.W.1 that as per the documents of Smt. Rekhar Sarkar like her identity card issued by the management and her PF card and ESI card and gratuity papers it appears that the tenure of service of Smt. Rekhar Sarkar still exists and she has not attained her age of 58 years. To that effect this Tribunal is of the opinion that the management i.e. M/s. South Calcutta Clinic never file the service record of the workman Smt. Rekha Sarkar before this Tribunal which is the best evidence regarding the age recorded by the management. In this aspect the workman has referred the decision of the **Board of Directors, Allahabad Agricultural Institute and another Versus State of U.P. and Others, reported in (2013) 138 FLR 796**, where the Hon'ble Court observe which is as follows:- *"Even otherwise, the Court files that the best evidence which the petitioner had was not filed, namely, the Service Record of the Workman which was with the petitioner. It is well settled principal of Service Jurisprudence that when an employee is appointed in an organization, the Date of Birth of the employee is recorded in the registers of the Organization which eventually becomes part of the service records of the employee, but such date of birth was not brought forward at any stage. The age recorded in the Voter's list is not the gospel truth and can not be relied upon."*

Therefore, this Tribunal is of the opinion that the management i.e. M/s. South Calcutta Clinic was not justified to forceful retirement of the workman Smt. Rekha Sarkar merely considering her age recorded in the Voter list or the Electoral Roll for the year 2016 (Exhibit-A & Exhibit – A/1). Admittedly the workman in her written statement as well as in her affidavit in chief categorically stated that she had submitted the documents of her Educational Qualification and her age proof and address proof at the time of joining of her service on the basis of which the management had issued her ESI Identity Card (Exhibit-3) copy of accounts statement and NSSN Form issued by the Provident Fund Authority (Exhibit – 4), an Identity Card issued by the O.P./Management (Exhibit-5) and ESIC Identity Card (Exhibit-6) and in all those documents her date of birth has been recorded as 16/11/1965.

From the four corners of the written statement of the management as well as from the cross-examination of OPW-1 it reveals that the management never deny the date of birth of the Rekha Sarkar has been recorded in the Official Record of the Management as 16/11/1965. The management also never disclosed either in their written statement or in the evidence of OPW-1 that where from they had got the photocopy of Electoral Roll for the year 2016.

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It has already discussed earlier that electoral roll can not be the basis of age proof and even the management has failed to prove the genuineness of Exhibit – A and Exhibit – A/1, either producing its original copy or calling the appropriate person of the appropriate department to prove the same. It also admitted position that the management never gave any opportunity to the workman of being heard regarding those electoral roll and voter list (Exhibit – A and Exhibit – A/1).

To that effect the Hon'ble Apex Court in its decision reported in **Shankar Lal Vs. Hindustan Copper Limited and others reported in (2022) 6SCC211** observed which is as follows:- *“ Service Law – age – determination of date of birth, discrepancy in date of birth recorded in service book and statutory Form – B i.e. in Service Book date of birth recorded as 21/09/1949 while in Form – B it was stated to be 21/09/1945, correction in date of birth by employer in Service Book as per Form – B unilaterally without hearing employee at fag end of his carrier – impermissibility.*

Different documents emanating from or maintained by respondent employer including L.I.C. Policy subscribed by Appellant Employee showing his date of birth to be 21/09/1949 and in compilation sheet of his estimated “VRS Benefit” also same date of birth reflected, appellant granted VRS on 03/10/2002 and he alleged that he became aware of change of his date of birth in service book only on that day. Held, unilateral exercise of correcting age entry in service book on perception that error was being corrected, without granting opportunity of hearing to the appellant, at fag end of his service tenure impermissible, very reasoning on which employee is not permitted to raise age correction plea at fag end of carrier to extend his tenure apply to employee as well”.

In view of the observation of the Hon'ble Apex Court this Tribunal is of the opinion that in the instant case the management i.e. M/s. South Calcutta Clinic did not give any opportunity to the workman Smt. Rekha Sarkar of being heard regarding the change of her date of birth prior to issuance the letter dated 19/02/2016 by which the O.P. / Management informed Mrs. Rekha Sarkar regarding her forceful retirement which is impermissible in law as per view of the Hon'ble Apex Court.

The normal Rule is that the date of birth recorded in service book should accepted as correct and in the instant case it appears that on the basis of service record the various documents was issued in favour of the workman of Smt. Rekha Sarkar and it also discussed earlier that in those documents the date of birth of Smt. Rekha Sarkar was recorded as 16/11/1965.

Evidently the O.P./Management forcefully retire the workman petitioner assuming her age as 64 in the year 2016 and in support of their contention they have submitted Exhibit – A & Exhibit – A/1 i.e. the photocopies of electoral roll and voter list for the year 2016 which this Tribunal has already discussed earlier i.e. not permissible to consider as a document of age proof.

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Moreover, the management has failed to produce any service record before this Tribunal in support of their contention rather contra evidence has come forward before this Tribunal which are the document itself issued by the O.P./Management from which it is reflected that the date of birth of the workman is recorded as 16/11/1965. They are appears no materials on record to disproved and dislodged the entries in the documents like the copy of ESI Identity card of the workman (Exhibit – 3), the Account statement and NSSN Form issued by the provident fund authority in the name of the workman (Exhibit – 4) the Identity Card issued by the O.P./Management (Exhibit – 5), and ESIC Identity Card (Exhibit – 6) in which the date of birth of the workman has been recorded as 16/11/1965 and admittedly all those documents were issued by the O.P. / Management and some of the documents bears the seal of the company. Not only that the date of birth recorded in (Exhibit – 3 to Exhibit -6) also corroborated with the date of birth recorded in the Aadhaar card (Exhibit – 7), Voter Identity Card (Exhibit – 8) and PAN Card (Exhibit – 9) of the workman and the O.P./Management has failed to establish by any means that the date of birth recorded in the aforesaid exhibited documents i.e. (Exhibit – 3 to Exhibit – 9) are not correct. In absence of any evidence in the contrary this Tribunal has no hesitation to hold that the date of birth recorded in the documents like (Exhibit – 3 to Exhibit – 9) certainly prevail upon the documents as shown in (Exhibit – A & Exhibit – A/1).

Having regard to the entire facts and circumstances of the case and also after considering the evidences on record both oral and documentary, this Tribunal is of the view that the retirement of the termination of service of the applicant of Smt. Rekha Sarkar with effect from 22/02/2016 considering her age as 64 in the year 2016 by the O.P./Management is not justified.

The Hon'ble Supreme Court in a case i.e Joyantibhai Raojibhai Patel Vs. Municipal Council, Narkhed and others reported in (2019) 17SCC184 has been observed which is as follows:-

“This Court made the following observation; (SCC Page 85 Para -9) – it is no more open to debate that in the field of Industrial Jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectra of common law doctrine that contract of personal service can not be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying.

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If after such a protracted time and energy consuming litigation during which period the workman just sustained himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idealness. That is the normal Rule. Any other view would be a premium on the un-warranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances re-instatement being the normal rule, it should be followed with full back wages."

In the instant case this Tribunal has already hold that the termination of the present workman Smt. Rekha Sarkar in garb of superannuation is illegal and not justified and she is entitled for re-instatement with complete back wages. It further reveals from the case record that Smt. Rekha Sarkar was terminated from her service vide letter dated 19/02/2016 duly written by the management and said retirement was effected from the date 22/02/2016. It further reveals that against that letter dated 19/02/2016 she had submitted her protest letter on 10/03/2016 and thereafter on her behalf and thereafter, the South Calcutta Clinic Worker's Union by its letter dated 11/03/2016 raised their protest before the management where it also mentioned that the workman Smt. Rekha sarkar made an appeal on 21/02/2016 for not taking any action on the basis of wrongful entry of age by the Election Commission but the same was in vein. The Union thereafter, submitted one letter dated 20/09/2016 before the Assistant Labour Commissioner, West Bengal informing him the entire matter. Apart from that the workman had intimated to the management by her letter dated 30/03/2016 that she had received her rectified Voter Identity Card and also requested to resume her in her duties which was declined by the management. It further reveals that the conciliation process took place before the Conciliation Officer for a long time and finally on 15/05/2017 he referred the dispute to the Government for sending it to the Judicial Authority for adjudication along with the present issues which have already discussed earlier. From the above discussion it is well established that the workman did not make any delay to ventilate her aggrieved-ness before the appropriate authority. It is also the case of the workman that she is totally unemployed after such termination of her service and she has no source of income at present and she is passing her days with acute financial hardship. Nothing has transferred from the evidence of the management both oral as well as documentary that the workman has any source of income after her termination of service from M/s. South Calcutta Clinic. It is also discussed earlier that as per the acceptable documents issued by the O.P./Management M/s. South Calcutta Clinic, if the age of superannuation is 58 years then as per those accepted documents issued by the management in which it has been recorded as 16/11/1965 then the date of her superannuation will be 15/11/2023.

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Accordingly, both the issues are hereby disposed off fully and decided in favour of the workman Smt. Rekha Sarkar on contest.

Hence,

ORDERED

that both the issues i.e. whether the termination of service of Smt. Rekha Sarkar in garb of retirement / superannuation by the Management of M/s. South Calcutta Clinic, 19A, Hindustan Road, Kolkata – 700 029, with effect from 22/02/2016 is justified and what relief she is entitled to are decided in favour of the workman Smt. Rekha Sarkar on contest but without cost. It is held by this Tribunal that the termination of service of Smt. Rekha Sarkar in the garb of retirement / superannuation by the management of M/s. South Calcutta Clinic with effect from 22/02/2016 as mentioned in the order of reference, is illegal, arbitrary, un-justified and the same is quashed and it is also held that the workman Smt. Rekha Sarkar is entitled to be reinstated in her service with full back wages / additional wages and also with other consequential benefits arising therefrom with effect from the date of her illegal termination. Accordingly, the management of M/s. South Calcutta Clinic is hereby directed to reinstate the workman Smt. Rekha Sarkar in her post with effect from 22/02/2016 and the management of M/s. South Calcutta Clinic is also hereby directed to give her arrear salaries alongwith other consequential benefits as mentioned earlier, immediately. This order and direction of this Tribunal in view of the order of the reference having no. Labr./629/(LC-IR)/IR/111-41/2016, dated 12/06/2017 signed by the Assistant Secretary, to the Govt. of West Bengal, Labour Department, I.C. (I.R) Branch, New Secretariat Buildings, Block-A, 12th Floor, 1 No. Kiran Sankar Roy Road, Kolkata – 700 001, is to be treated as an award of this Tribunal on contest. There is no order to cost.

It is also directed that necessary number of copies of this judgment and award be sent to the Ld. Additional Chief Secretary, to the Government of West Bengal, Labour Department, New Secretariat Buildings, 1 No. Kiran Shankar Roy Road, Kolkata – 700 001.

D/C by me



Judge
5th Industrial Tribunal.
Dated: 28/07/2022

Judge,
5th Industrial Tribunal
Govt. of West Bengal



Kamal Sankar

Judge
5th Industrial Tribunal
Dated: 28/07/2022

Judge,
5th Industrial Tribunal
Govt. of West Bengal