

I/362256/2023

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

No. Labr/.85 . ./(LC-IR)/

Date: 02-02-2023.

ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. Labr/1348/(LC-IR)/22015(16)/8/2021 dated 05/08/2021 the Industrial Dispute between M/s. India Power Corporation Ltd., Central Office, P.O. – Disergarh, Dist – Paschim Bardhaman, Pin - 713333 and its workman namely, Smt. Chitra Mukherjee, Jhalbagan, ECL Colony, Qtr. No. – A/008, P.O. – Dishergarh, P.S. – Kulti, Dist. – Paschim Bardhaman, Pin - 713333 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 Ninth Industrial Tribunal, West Bengal, has submitted to the State Government its award dated 29/12/2022 on the said Industrial Dispute vide memo no. 02 - I.T. dated – 02/01/2023.

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,



Additional Secretary
to the Government of West Bengal

I/362256/2023

No. Labr/85/1(5)/(LC-IR)

Date: 02-02- /2023.

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

1. M/s. India Power Corporation Ltd., Central Office, P.O. – Disergarh, Dist – Paschim Bardhaman, Pin - 713333.
2. Smt. Chitra Mukherjee, Jhalbagan, ECL Colony, Qtr. No. – A/008, P.O. – Dishergarh, P.S. – Kultu, Dist. – Paschim Bardhaman, Pin - 713333.
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 Sr. Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

Additional Secretary

No. Labr/85/2(2)/(LC-IR)

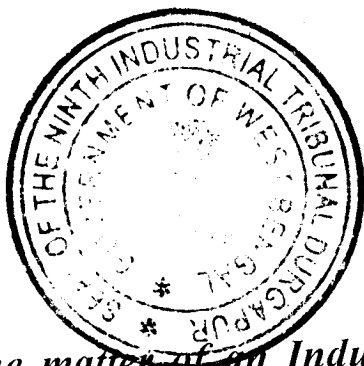
Date: 02-02- /2023.

Copy forwarded for information to:

1. The Judge, Ninth Industrial Tribunal, West Bengal, Durgapur, Administrative Building, City Centre, Pin - 713216 with reference to his Memo No. 02- I.T. dated – 02/01/2023.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.

Additional Secretary

03/02/2023



In the matter of an Industrial Dispute between Messrs. India Power Corporation Ltd, Central office, P.O-Dishergarh, Dist- Paschim Bardhaman, Pin- 713333 and its workman namely, Smt. Chitra Mukherjee referred to this Tribunal vide G.O.No. Labr/1348/(LC-IR)/22015(16)/8/2021 dated 05.08.2021.

CASE NO.X-12/2016.

Before The Judge, Ninth Industrial Tribunal, Durgapur.

Present

Shri Sujit Kumar Mehrotra, Judge

Ninth Industrial Tribunal,

Durgapur.

A W A R D

Dated : 29-12-2022

Ld. Advocate for the applicant/workman :- Mr. Ramesh Banerjee.

Ld. Advocate for the O.P/Employer :- Mr. Piyush Das.

The instant case has foundation on the reference made by the Deputy Secretary to the Govt. of West Bengal. Labour Deptt. vide reference no. Labr/1348(LC-IR) 22015(16)/8/2021 dated 05.08.2021 whereby the appropriate Govt. referred the industrial disputes between the parties for adjudication on the framed following issues:-

1) Whether the refusal of employment of the workman namely, Smt. Chitra Mukherjee by the management of MS India Power Corporation Ltd. w.e.f 21.10.2018 is justified or not?

2) To what relief is she entitled?

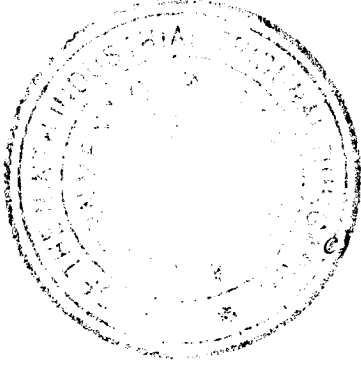
After receiving the reference order this Tribunal registered the instant case under Industrial Disputes Act, 1947 (herein after referred to as the Act, 1947) and thereafter issue notice upon both the parties. In consequence of the notice both the parties appeared filed their statements by way of WS in the instant case.

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JUDGE
NINTH INDUSTRIAL TRIBUNAL
GOVT. OF WEST BENGAL

Workman/applicant employee's case as set forth in her WS may be capsulated in the following manner:-

- a) That she was appointed by the O.P/employer on 02.08.2004 in the post of Commercial Assistant in Grade B,
- b) That after her such appointment she discharged her duties without any interruption and in unblemished manner and being satisfied with her performance she was promoted on 01.07.2007 in Group A of the Assistant Cadre,
- c) That in the year 2007 she was placed in Grade A of the company and her basic pay was fixed at Rs.9720/- per month w.e.f 01.08.2007 and it was also mentioned in the appointment letter that they appointed her to the officers' cadre of the company as Officer (HRN) and her service will be governed by the "Conduct, Discipline and Appeal Rules for Officers and Assistants" of the company.
- d) That although she has been placed in the Grade A by the O.P/employer but she was not entrusted with any supervisory or officers' work and she had no independent decision-making authority.
- e) That on 18.07.2018 she met with insect bite and accordingly was treated by various doctors for that reason she could not join her duties and that applied for leave w.e.f 22.07.2018 to 31.07.2018 but surprisingly her leave application had neither been approved nor been rejected by the management,
- f) That when after recovery from illness when she went to join her duty on 01.08.2018 but she was not allowed by the security to enter into the office and her e-mail access was also blocked by the management. Finding no other way she applied through e-mail to the Chairman but the same also yielded no result.
- g) That all on a sudden on 08.04.2019 the O.P/employer terminated her service w.e.f 10.04.2019 on the ground of her continuous absence from duty since 21.07.2018.
- h) That on 31.05.2018 an unfortunate traumatic incidence took place in the office premises when she was subjected to sexual harassment by the president of the O.P. establishment and since



then she was treated indifferently and her protest ultimately lead to her arbitrary unilateral termination of service by the O.P. establishment.

- i) That her such termination was issued without following the principles of natural justice,
- j) That subsequent to her such illegal termination she approached the Assistant Labour Commissioner, Asansol on 09.306.2020 for her reinstatement but the same failed due to non-participation of the O.P establishment in the conciliation proceedings and accordingly the failure report was sent by the Deputy Labour Commissioner, Asansol to the Govt. of West Bengal.

The O.P/employer in its WS although admitted initial appointment of the applicant employee in the post of Commercial Assistant on 14.07.2004 and her subsequent promotion to the post of Officer (HRM) w.e.f 01.08.2007 but denies all other averments of the applicant's WS case.

O.P/employer in its WS took specific plea that the applicant employee is not a 'workman' as provided in sec.2(s) of the I.D. Act, 1947 and accordingly this tribunal has no jurisdiction to adjudicate on the referred issue under the I.D.Act,1947.

As per O.P/employer's WS case after the promotion of the applicant employee to the category supervisor/officer (HRM) vide letter no. 01.08.2007 her service was /is governed by the "Conduct, Discipline and Appeal Rules for Officers and Assistants" and not according to the provisions of the Act of 1947.

It in its WS specifically denies the applicant employee's claim that she was although posted as HR executive but she had no supervisory administrative and managerial functions and that the applicant employee exhibited her total lack of intention to serve the company. She literally abandoned her employment by not joining the duties continuously since 21.07.2018 without any prior leave/authorisation and her such conduct compelled the management to terminate her service w.e.f 10.08.2019.

The O.P/employer specifically pleaded that the applicant employee was appointed in the officers cadre of the company as Officer (HRM) and her condition was governed by the "Conduct, Discipline and Appeal Rules

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GOVT. OF WEST BENGAL

for Officers and Assistants" of the company but the conciliation officer did not consider the same and illegally referred the matter to the appropriate Govt.

On the above discussed averments of the WS and rejoinder O.P/employer prays for dismissal of the instant case against it.

To prove her WS case under the provisions of the I.D. Act, 1947 the applicant employee examined herself as P.W-1 and the following documents have been admitted from her side :

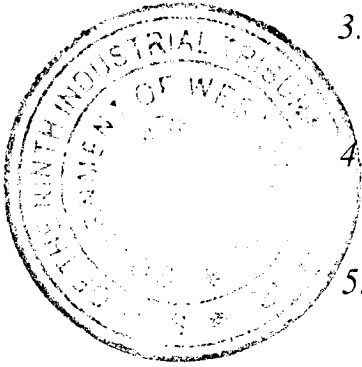


1. Company's letter dated 14.07.2004 received by the workman—
Exbt. 1,
2. Company's letter dated 29.01.2002 received by the workman—
Exbt.--1/1,
3. Company's letter dated 27.07.2006 received by the workman—
Exbt.-- 1/2,
4. Company's letter dated 01.08.2007 received by the workman—
Exbt.-- 1/3,
5. Company's letter dated 01.08.2012 received by the workman—
Exbt.—1/4,
6. Company's letter dated 23.09.2013 received by the workman—
Exbt.—1/5,
7. Company's letter dated 08.10.2014 received by the workman—
Exbt. -1/6,
8. Received copy of workman's letter given to the
Corporation/Employer dated 21.07.2018—Exbt—2,
9. Downloaded copy of workman's e-mail dated 03.10.2019 (with
objection)--Exbt.—3,
10. Termination letter dated 08.04.2019 received by the workman—
Exbt.—4,
11. Received copy of the workman's complaint lodged with the
Deputy Labour Commissioner, Asansol dated 09.06.2020 (with
objection)--Exbt.—5,
12. Copy of the intimation dated 24.07.2020 sent by the Asstt.
Labour Commissioner, Asansol to the workman—Exbt.—6.

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ASANSOL

Similarly, the O.P/employer/management examined its General Manager (HR) Mr. Partha Pratim Chattoraj as O.P.W-1 and the following documents have also been admitted from its side :

1. Copy of Appointment Letter of workman dated 01.08.2007(03 sheets)—Exbt.A,
2. Workman's service confirmation letter dt. 31.07.2008—Exbt.B,
3. Copy of Annual Performance Assessment Report for the year 2016-17 (02 sheets) —Exbt.C,
4. Copy of letter of management addressed to the ALC dt.23.09.2020—Exbt.—D,
5. Downloaded copy of reply of management dt.20.07.2020 addressed to the ALC, Asansol with respect to the workman's e-mail dated 21.07.2020 (06 sheets)—Exbt.—E,
6. Pay slip of workman for the month of June, 2018—Exbt.F,
7. Copy of reply of Management dt.27.05.2020 sent to the workman by registered post (03 sheets) —Exbt.—G,
8. Termination letter dated 08.04.2019—Exbt.—H,
9. Attested copy of the Conduct, Discipline and Appeal Rules, 1994—Exbt.—I.



Argument from the side of the applicant employee/Workman

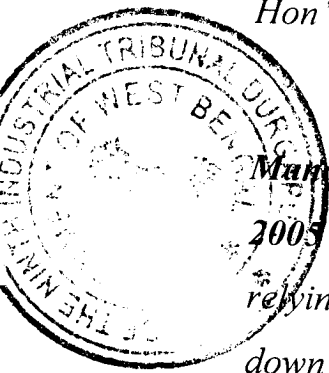
The ld. lawyer submitted that while considering whether he applicant employee is a workman within the provisions of the Act, 1947, the tribunal has to consider the nature of duties and works performed by her and not nomenclature of the post attached to her by the management of the O.P/employer.

He further contended that although undisputedly the applicant employee was promoted to the cadre of Officer/Supervisor w.e.f 01.08.2007 but she was not entrusted with any work of supervisor / officer by the management of the O.P/employer and accordingly she was performing her duties as per her previous post held by her prior to her promotion and accordingly it cannot be said that by virtue of such promotion order she has been excluded from the definition of 'workman' as provided in sec.(2S) of the I.D.Act, 1947.

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MINISTER
GOVERNMENT OF WEST BENGAL

To substantiate his such argument he relied upon the case of **Arkal Govind Raj Rao Vs. Ciba Geigy of India Ltd., Bombay** reported in and **AIR 1985 SC 985**, and the case of **Natvarlal U Modi Vs. Ahmedabad Dst. Co-op. Milk Producers Union Ltd.** reported in **2005 LAB I.C.321** as decided by the Hon'ble Gujarat High Court.



The ld. lawyer also relied upon the case of **Vishakantaiah, T.N Vs. Management of Mysore Petrochemical Ltd. , Raichur and another** reported in **2005 LAB.I.C 581** and contended that the Hon'ble Karnataka High Court by relying upon the cases as decided by the Hon'ble Supreme Court clearly laid down the test for determination of workman within the Sec.2(s) of the I.D.Act,1947.

Ld. lawyer also submitted that considering the fact as emerges from the promotion letter dated 01.08.2007 and the cross-examination of the O.P.W .I it is crystal clear that the applicant employee was although promoted to the Grade A officer/supervisor cadre but her nature of work was not changed and accordingly the applicant employee is a 'workman' within the ambit of the I.D. Act, 1947.

The ld. Sr. lawyer further argued that admittedly before terminating service of the applicant employee w.e.f 10.04.2019 the management did not follow the principles of natural justice as provided for terminating service of a workman under the I.D.Act,1947, so O.P/employer management illegally terminated the service of the applicant employee.

It was also submitted that the applicant employee never abandoned her service of the O.P./employer but she could not attend her office on and from 18.07.2018 on account of her illness and accordingly she applied for the leave but her leave application was neither approved or rejected by the management of the O.P./employer and accordingly, the grounds assigned by the O.P/employer for termination of her service are also concocted and baseless.

To substantiate his such contention the ld. lawyer relied upon the case of **Vijay Krishna Neema Vs. Central Bank of India and Ors.** reported in **2005 LAB I.C 766** as decided by the Hon'ble M.P High Court of Indore Bench.

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Applicant employee also relied upon the as **Noble Paints Pvt. Ltd. Vs. Ashoke Tukaram Shinde, 2003 LAB, I.C 3423** as decided by the Hon'ble Bombay High Court.

It was also contended by the ld. lawyer that the O.P/employer did not comply with the terms and conditions of the termination of service of the applicant employee in terms of the appointment letter and accordingly the impugned termination order is void and illegal.

To conclude his argument the ld. lawyer submitted that the impugned letter of termination of service is liable to be set aside and the applicant employee be reinstated in her service with full back wages.

Argument from the side of the O.P/employer

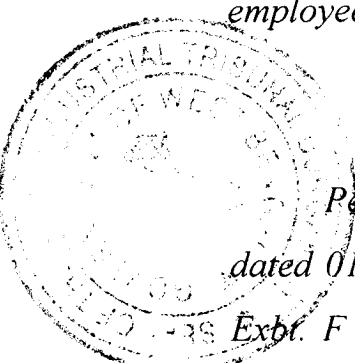
Per contra the ld. Sr. lawyer by taking recourse to the promotion letter dated 01.08.2007 i.e Exbt.1/3 and the pay slip for the month of June, 2018 i.e. Exbt. F submitted that the applicant employee accepted her promotion to the post of Supervisor/Officer and accordingly her service was governed by the "Conduct, Discipline and Appeal Rules for Officers and Assistants" of the O.P Company and not otherwise. Consequently, as per sec.2(s)(iv) of the I.D.Act,1947 she does not come within the definition of 'workman'.

He further argued that the applicant employee is estopped from raising such point that she was although promoted to the Supervisor /Officer rank but she was not discharging the duty of any Supervisor or Officer of the O.P Company.

The ld. lawyer also submitted that the applicant employee never disputed about her assigned work to the management and accordingly she cannot raise any dispute about the same before this tribunal.

To substantiate his such argument he took the tribunal through the cross-examination of the P.W-I, and the Exbt. A,B & C.

Furthermore, it was also submitted that as the applicant employee stopped attending her office without any reason for a considerable long time i.e. since 21.07.2018 without any prior sanctioned leave or authorisation, so the management of the O.P rightly terminated her service on and from 10.08.2019



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in terms of the "Conduct, Discipline and Appeal Rules for Officers and Assistants" of the company.

To substantiate his above mentioned argument the ld. lawyer relied upon the case of **Dewa Singh Vs. state of Jharkhand, [2022 (174) FLR 872]** as decided by the Hon'ble Jharkhand High Court.

Issue No.1:-

To decide the instant issue we are to first consider the merit of the contention of the parties regarding the applicant employee being a workman or not being a workman under the I.D. Act, 1947.

Sec.2(s) of the I.D.Act., 1947 provides as under :-

"workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment by express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person –

- (i) who is subject to the Air Force-Act, 1950 (45 of 1950) or the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding [ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.]

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 MEMBER
 JUDICIAL
 JHARKHAND HIGH COURT
 JHARKHAND

From the plain reading of the above provisions it is crystal clear that a person is not included in the definition of workman if he comes under any of the categories as mentioned in clause (i) to clause (iv).

During the course of argument it was argued from the side of the O.P/employer that as it is established from the evidence in cross-examination of P.W-1 and the Pay slip i.e. Exbt.F that the applicant employee used to draw monthly wages exceeding the statutory wages of Rs.10,000/- so, she is not a workman within the definition of the I.D.Act, 1947.

In view of the above discussed pleading case of the O.P/workman by which it took the defence that after promotion to Grade A category the petitioner is not a workman under the I.D. Act, 1947, clause (iv) is the relevant provision. In other words, the O.P/employer, took recourse to clause (iv) by disputing the jurisdiction of this tribunal in adjudicating the industrial disputes as referred to it by the Govt.

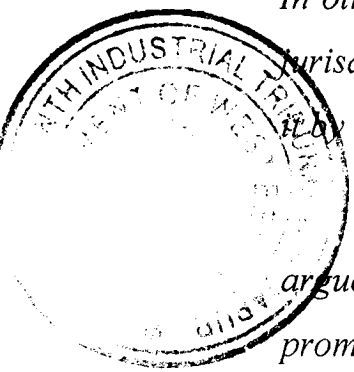
During the course of argument the ld. lawyer for the O.P/employer argued that the applicant employee is not a workman by virtue of accepted promotion to the post of supervisor/officer (HRN) as well as because of her monthly wages exceeding ceiling limit of ten thousand rupees.

On the other hand, the ld. lawyer for the applicant employee contended that it is only the nature of the work assigned and performed by the applicant employee which should be the only criteria for determination whether she comes within the definition of 'workman' under the Act, 1947 or not.

From clause (iv) if sec.2(s) of the I.D Act it is apparent that the famous of the legislature has put a ,(comma) in between the word 'supervisory capacity and draws wages exceeding ten thousand rupees'.

To consider the merit of the argument of the ld. Sr. lawyer from the side of the O.P establishment we are to read the entire clause as a whole to give effective meaning of the same with the object of the Act.

It is the golden rule of interpretation of a statute that words of statute must prime facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and



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GOVT. OF WEST BENGAL

unambiguous, the courts are bound to give effect to that meaning irrespective of the consequences.

The conventional way of interpreting a statute is to seek the intention of its maker and apply that to the facts of the case at hand. An interpretation of the statutory provision which defeats the intent and purpose for which the statute was enacted should be avoided. The Hon'ble Calcutta High Court in the case of *Badsha Mia Vs. Rajjab Ali*, AIR 1946 Cal 348 observe that the primary object in interpreting a statute is always to discover intention of the legislatures.

This apart, the Hon'ble Supreme Court in catena of decisions observed that it is the settled proposition progressive and beneficial legislation must be interpreted in favour of the beneficiaries when it is possible to take two views of a local provision. In this regard, we may refer the case of *Kerala Fisherman Welfare Fund Board Vs. Fenci food*, Appeal (Civil) Number 3058 of 1995 decided on 25.04.1995.

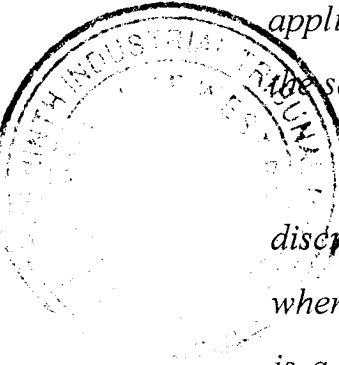
The Hon'ble Apex Court in the case of *S. Gopal Reddy Vs. the state of A.P* reported in (1996) SCC(4) 596 also reiterated its same view.

Adverting to the interpretation of clause (iv) of sec.2(s) of the Act, 1947 it can be seen that the framers of the legislatures used the word "or" in between the words "mensem" and "exercises" to express their intention to lay down another criteria for not considering a person within the ambit of 'workman'. But the legislatures have used , (comma) in between the words "supervisory capacity and draws wages" which means that a person who is employed in a supervisory capacity and draws wages exceeding 10,000/- (ten thousand) rupees per mensem does not come within the definition of 'workman' under the Act, 1947.

If for the sake of argument I do accept the proposition of the ld. Sr. lawyer that , (comma) is to be interpreted in a disjunctive manner, then the same does not give any effective meaning in consonance with the object of the Act of 1947 to the sentence "being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem" as well as the word "or" used in between the word "mensem" or exercises. Accordingly, clause (iv) of sec.2(s) of A.D. Act, 1947 excludes any person to be a workman if he is employed in a supervisory capacity and draws wages exceeding Rs.10,000/- per mensem

in one category and in second category if he exercises either by nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

Considering above discussed pleading case as well as argument of the parties I am of the considered view that before going into the merit of the same it is necessary to have a look at the law on the bone of contention regarding applicant employee's claim of a workman and denied by the O.P/employer of the same under the Act, 1947.



The Hon'ble Supreme Court in the case of **Arkal Govind Raj Rao (Supra)** discussed the term "workman" under the Act, 1947 and in Para 6 observed that where an employee has multifarious duties and a question is raised whether he is a workman or someone other than a workman the court must find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not necessarily be in tune with the basic duties these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be first taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of the person....."

The Hon'ble Court in para 16 further held as under:-

The test that one must employ in such a case is what was the primary, basic or dominant nature of duties for which the person whose status is under enquiry was employed. A few extra duties would hardly be relevant to determine his status. The words like managerial or supervisory have to be understood in their proper connotation and their mere use should not be detract from the truth.

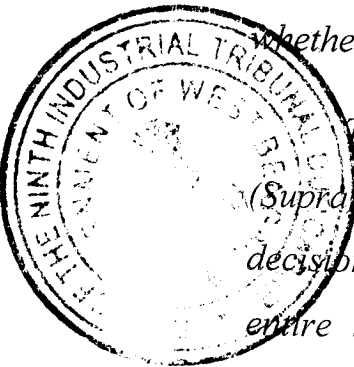
The Hon'ble Supreme Court further observed that difference in salary is hardly decisive, nor the designation of a clerk by itself is decisive. Focus has to be on the nature of duties performed.

The Hon'ble Supreme Court in the case of **S.K. Verma Vs. Mahesh Chandra**, AIR 1984 SC 1462 at Para 4 held that "so we are adopted pragmatic and pedantic approach and we proceed, in providing the question whether development officers in the Life Insurance Company are workmen to first consider the broad question on which side of the line they fall, labour or

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JUDGE
INDUSTRIAL TRIBUNAL
BANGALORE

management, and then to consider whether there are in good reasons for moving them over from one side to other.

The Hon'ble Gujarat High Court in the case of *Natvarlal U Modi (Supra)* had the occasion to discuss the actual meaning of "workman" as provided in the Sec.2(s) of the I.D. Act, 1947 and held that mere designation is not decisive but it is the nature of the duty which is important and relevant for determination whether a person is a workman under the Act, 1947 or not.



The Hon'ble Karnataka High Court in the case of *Vishakantaiah T. N (Supra)* discussed all the above discussed Supreme Court's decision and other decisions and held that "the broad intention of the legislature is to take the entire labour force and exclude managerial forces. The designation of an employee is not of which importance and what important is the nature of duties being performed by him. The determinative factor is the main duties of the concerned employees and not some other work incidentally done. In other words, what is in substance the work which employee does or what is in substance he is employed to do".

It has further been held that the principal or main work in the employment of a person will have to be determined from the letter of appointment, the nature of duty the employee is to perform in the course of his employment and other attending circumstances. The question whether an employee is a workman or not is not a pure a question of fact. It is a mixed question of fact and law. In arriving at the conclusion the tribunal first has to address itself to the various duties assigned to the employee and then draw a conclusion of law as to whether in the light of duties assigned to him, the employee would be a workman or not.

The Hon'ble Karnataka High Court laid down the following guiding principles to be followed when the status of a workman is disputed under the I.D. Act, 1947 touching jurisdictional issue of the tribunal. The same as are follows:

- 1) The court shall adopt a pragmatic and not pedantic approach.
- 2) What the court has to see is, what is the primary or substantial duty which the person is performing. Is the said work managerial, administrative or supervisory in nature?

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IN CHARGE
CENTRAL INDUSTRIAL TRIBUNAL
GOVT. OF WEST BENGAL

- 3) *What is the remuneration paid for?*
- 4) *Then to consider which side of the line they fall, labour or management , and then to consider whether there are any good reason for moving them over one side to other.*
- 5) *In arriving at conclusion the nomenclature attached to the designation should not blurr the mind of the court.*
- 6) *Similarly, some additional or incidental duties attached to the main work should not be given undue weightage.*
- 7) *Substantial duty performed by the person should be covered by the terms of the order of appointment, terms of contract if entered into, oral evidence and such other material the court deems fit to rely on.*



From above discussed case laws of the Hon'ble Supreme Court as well as various High Courts it is crystal clear that in determining whether a person is a 'workman' within Sec.2(s) of the I.D. Act, 1947 it is the primary nature of the duties performed by him which is to be taken into consideration and not the designation attached to his post and monthly wages. Moreover, the argument of the Id. Sr. Lawyer that as the applicant employee had accepted her promotion post to the category of supervisor by drawing wages for the said post, so she is estopped from taking the plea that she is a workman within the Act of 1947 has got no merit as it is the settled proposition of law that the doctrine of estoppels does not apply against any statute.

Thus, I find no merit in the argument of the Ld. Sr. Lawyer from the side of the O.P/employer that besides the post of supervisory the drawing wages exceeding ten thousand rupees per mensem is one of the criteria has got no merit.

Now, let us come back to our discussion regarding the evidence adduced from the side of the parties with respect to their pleading case on that scope.

However, since the O.P/employer challenged the jurisdiction of this tribunal by disputing status of the applicant employee not being a workman under the Act, 1947, so the onus lies upon it to prove the same.

I have meticulously gone through the pleading as well as evidence adduced from the side of the parties regarding this issue and the undisputed fact as evident therefrom are that the applicant employee was appointed as Commercial Assistant in Grade B w.e.f 02.08.2004 vide Exbt.1 by the

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NINTH INDUSTRIAL TRIBUNAL
GOVERNMENT OF WEST BENGAL
KOLKATA

O.P/employer in its company. That by virtue of Exbt.1/3 i.e. letter dated 01.08.2007 corresponding to Exbt.A the applicant employee was appointed to the officers' cadre as officer (HRM) w.e.f 01.08.2007. Furthermore, as per Exbt. 1/3 corresponding to Exbt. A service condition of the officer's cadre are to be governed by the clause of Conduct, Discipline and Appeal rules, 1994 of the O.P establishment i.e. Exbt. I and that the service of the applicant employee was terminated vide termination letter dated 08.04.2019 on and from 10.04.2019 i.e. Exbt. 4 corresponding to Exbt. H.

Applicant employee in Para 4 of her evidence -in -chief stated that being placed in Grade A she has been entrusted with the following official duties :

- a) Compilation of data and preparation of monthly IR related reports.*
- b) Preparation and processing of medical reimbursement, fuel reimbursement of staff.*
- c) Preparation of report of domestic consumption of electricity of employees.*
- d) Preparation of salary savings of employees.*
- e) Processing, distributing and delivering stationery items to different departments and*
- f) Preparation and processing of telephone bills.*
- g) Preparation of E.S.I and P.P. related A/cs.*

She further stated that in addition to the same she was also responsible for such other jobs which are allotted to her from time to time by her superior officer or manager.

From the cross-examination of the P.W-1 it is evident that no question was put to her suggesting by virtue of the promotion vide Exbt.1/3 the nature of her work of the petitioner/employee has been changed from the nature of work which she was entrusted to and was performing while she was working in the post of Commercial Assistant Grade B vide Exbt.1.

In my considered view, if it is fact that after promotion of the applicant employee to the post of Officer(HRM) of the O.P company any nature of her work of the applicant employee has actually been changed from which it could be inferred that she has been actually shifted from the category of labour force to the management site, then the O.P/employer should have confronted the

On perusal of the Exbt.1/3 I find that the same although mentioned about the general conditions of the service of Officers(HRM) but it does not specify any job suggesting the same is actually is of supervisory or managerial in nature.

O.P.W-1 who is the General Manager (HR) of the O.P company in his entire evidence-in-chief nowhere stated that after appointment or promotion of the applicant employee in the cadre of Officer (HRM) Managers her nature of work has been changed and she used to performed any managerial or supervisory nature of work. He simply stated that the applicant employee used to perform supervisory -administrative-managerial work. Curiously enough, he in his entire evidence-in-chief nowhere stated about in what nature of work the applicant employee was actually entrusted with or performing before her termination.

On the contrary, it is evident from his cross-examination that he joined the O.P. company on 21.05.2016. Accordingly, his evidence regarding the acts of his company prior to that day which includes the appointment and promotion of the applicant employee to the cadre of Officers (HRM) cannot be said to be of the evidence of the O.P/employer on those relating matters.

He in his cross-examination although claimed that there was a separate cell for the applicant employee in the HR department and the she was empowered to depute workmen in different departments as per the requirement of the company and she was also empowered to allow or reject leave of the workmen but no documentary evidence is produced to substantiate the same .

However, from his cross examination it is evident that the Exbt. 1 does not remain with any clause, empowering the applicant employee to take independent decision regarding any official matter. In my considered view, if the applicant employee was performing any managerial nature of work, then she

should have been empowered by virtue of the clause of the appointment letter i.e. Exbt.1 or the promotion letter dated 01.08.2007 i.e. Exbt, 1/3. Barring the above discussed evidence no other piece of evidence has been adduced from the side of the O.P/employer to establish its pleading case.

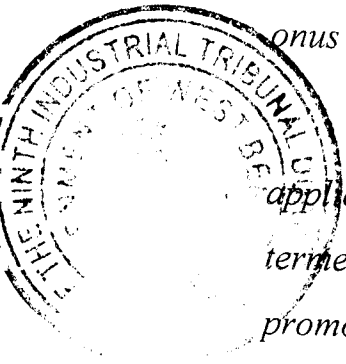
In my considered view, since the O.P/employer challenged the status of the applicant employee as not being a workman under the ambit of Act, 1947 so, onus lies upon it to prove the same.

O.P.No.1 in his evidence-in-chief nowhere stated that after promotion the applicant employee was entrusted with any new nature of work which could be termed as work of a supervisor or of a manager or that after promotion/appointment to the officers' cadre the applicant employee was entrusted with any work which is different from the work as specified in her initial appointment letter i.e. Exbt. 1/3. It is also evident that the same does not speak about any change in nature of work than what the applicant employee was performing since the date of her appointment in the O.P establishment.

Besides that, no evidence has been adduced from the side of the O.P establishment to show that the applicant employee was actually performing the work of HRM in its establishment on and from 01.08.2007. The nature of work of a manager of HRM consists of not only managing the workforce of an establishment or factory but it segregates it from the category of workforce and brings it to the category of managerial staff / management staff.

On the other hand, applicant employee i.e. P.W-1 in her examination-in-chief clearly speaks about the nature of work which she had to perform even after her promotion to the officers' cadre and the O.P/employer in her cross-examination did not challenge the same either by denying or by putting specific question regarding the nature of work used to be performed by the applicant employee after her promotion.

Curiously enough, O.P/employer neither in its pleading nor while cross - examining the P.W-1 specifying any specific nature of work which the applicant employee had to perform after her promotion. To put it otherwise. O.P employer failed not only to plead but also to prove that after appointment of the applicant employee to the officers' cadre there was is any change of nature of her work



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from which it could be inferred that she was actually entrusted with and was performing work either of supervisors in nature or managerial nature.

In my considered view, if it is fact that after promotion of the applicant employee to the supervisory cadre there was actually any change in nature of her work, then O.P. being her employer would be the best person to prove the same. But it fails to adduce or produce any evidence to establish the same. Accordingly, it cannot be said that O.P/employer has been able to discharge its legal obligation successfully in proving that by virtue of promotion or appointment to the officers' cadre manager (HRM) the applicant employee was actually performing the work of a supervisor or manager.

In view of the above discussed settled proposition of law as well as the evidence of the parties, I do not have any sort of hesitation to come to the findings that the O.P/employer miserably failed to prove that the applicant employee is not 'workman' within the Act of 1947. Accordingly, question of governing her service in terms of Exbt. I do not arise at all.

Since it is the admitted fact of this case that the service of the applicant employee was not terminated after following the requirements under the Act of 1947 which are essential for termination of service of a workman but the same was terminated as per Exbt. I, so it cannot be said that the O.P employer was justified in terminating the service of the applicant employee by virtue of Exbt.4 corresponding to Exbt.H. Thus, I decide this issue in favour of the applicant employee.

Issue No.2 :-

In considering the instant referred issue we are to first consider the power of the tribunal to give relief in case of dismissal of a workman from his service.

Sec.11A of the Act,1947 deals with the same power of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen. It provides as follows :

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour

Court, Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any, proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

On perusal of the above provisions it is clear that the Tribunal while adjudicating the referred issue concerning discharge or dismissal of a workman from his service has the power to declare the same as unjustified if it is satisfied and the said provision also empowers the Tribunal that while passing an award of setting aside the order of discharge or dismissal it has also the power to reinstatement of the workman on such terms and conditions to give such other relief including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. However, its such power has been circumscribed with a rider clause that the same is to be considered on the basis of the material on record and shall not take any fresh evidence in relation to the matter.

In other words, the Tribunal while granting relief of setting aside of order of dismissal or discharge as the case may be, has to give relief to the workman depending upon the circumstances of each case. There cannot be any straight jacket formula for giving relief to a workman under said provisions of law.

Now, let us consider the facts and circumstances of the case in hand.

Since this tribunal has already arrived at the findings that the order of dismissal of service of the applicant employee being unjustified, mainly on the ground of technicalities not on merit of the allegation as made by the O.P employer so this tribunal has to take into account on the grounds on which the termination order was passed vide Exbt.4 corresponding to Exbt. H.

Applicant employee in her WS as well as in her evidence-in-chief stated that on 08.07.2018 she got insect bite and accordingly she was unable to join

her duty and when she went to join her duty on 01.09.2018 she was not allowed to join. She further stated that she applied for leave from 22.07.2018 to 31.08.2018. But she nowhere stated that her leave was allowed / granted by the management of the O.P establishment. Exbt.2 is the receipt copy of her leave application on medical ground.

O.P. W-1 in his cross-examination categorically stated that he did not take any action on Exbt.2 i.e. leave application but he did not assign any reason for not taking any action. Not only that, he nowhere stated that even after received of such leave application the same applicant employee was informed about rejection of the same. His such conduct clearly indicates that the management of the O.P./employer, was very indifferent towards the applicant employee for the reason best known to it.

At the same time an employee cannot claim any leave as a matter of right. Moreover, the management of an establishment is also not authorised not to consider the leave application in either way. It is desirable from the side of the employer establishment that when any leave application has been submitted by its workman then the same has to be considered in either way and it cannot simply sit over it silently. Such inaction on the part of the management of the employer establishment compels this tribunal to draw an inference in favour of the applicant employee's case that after filing complaint of sexual harassment against one of the top official of the O.P management managements attitude towards her was indifferent.

This apart, it is evident from the contents of the Exbt.2 that applicant employee submitted her leave application on the medical ground. Her such ground has been corroborated by the evidence of the Doctor Ambika Prasad Mondal i.e P.W-2 and Exbt.7 of this case.

From my above discussion it is crystal clear that the applicant employee did not perform any work in the O.P's establishment since the date of her termination of service i.e from 10.04.2019 till this date and the said factor should be taken into consideration while considering the relief in terms of money apart from the relief of reinstatement.

To conclude my discussion I am of the view, the materials on the record justified the reinstatement of the applicant employee in her service in the post

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held by her at the time of her termination within the one month from the date of publication of the award by the appropriate Govt. alongwith 25% of the back wages on and from the date of termination till the date of her actual reinstatement by the O.P./employer. Thus, both these issues are disposed of accordingly.

Hence, it is

Ordered

that the case under reference number, as mentioned herein above is hereby allowed on contest but without cost. The termination of service of the workman Smt. Chitra Mukherjee by the employer M/s. India Power Corporation Ltd. vide letter dated 08.04.2019 is hereby declared as illegal and unjustified and she is reinstated alongwith 25% back wages from the date of her such termination.

The employer M/s India Power Corporation Ltd. is hereby directed to reinstate the workman Smt. Chitra Mukherjee in the post which she was holding at the time of her termination along with 25% of the back wages within the period of one month from the date of publication of award by the appropriate Govt.

Send a copy of this award to the Principal Secretary, Labour Department, Govt. of West Bengal for information and necessary action.

D/C by me

Sd/- Sri Sujit Kumar Mohapatra
Judge, 9th I.T. Durgapur.
29.12.2022.

RECEIVED
29.12.2022

Sd/- Sri Sujit Kumar Mohapatra
Judge, 29.12.2022.

9th I.T. Durgapur

JUDGE
NINTH INDUSTRIAL TRIBUNAL
GOVT. OF WEST BENGAL