I/334255/2022

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

No. Labr/. 943 ./(LC-IR)/EIL/6P-30/17 Date: 28/10/2022

ORDER

WHEREAS an industrial dispute existed between (1) M/s. Karan Global Security & Services Pvt. Ltd., P.O. – Durgachak, District-Purba Medinipur, PIN – 721635, (2) M/s. Materials Chemicals and Performance Intermediaries Pvt. Ltd., P.O. – Durgachak, P.S. Durgachak, Dist. Purba Medinipur, PIN - 721635 and Sri Tuhin Sarkar, S/o. Late Krishna Chandra Sarkar, Vill. Jharkhali No. 2 P.O. Basanti, District-South 24 Parganas, PIN - 743312 regarding the issue, being a matter specified in the Second schedule to the Industrial Dispute Act, 1947 (14 of 1947);

AND WHEREAS the workman has filed an application under section 10(1B) (d) of the Industrial Dispute Act, 1947 (14of 1947) to the Second Labour Court specified for this purpose under this Deptt.'s Notification No. 1085-IR/12L-9/95 dated 25.07.1997.

AND WHEREAS, the Second Labour Court heard the parties under section 10(1b) (d) of the I.D. Act, 1947 (14of 1947) and framed the following issue dismissal of the workman as the "issue" of the dispute.

AND WHEREAS the Second Labour Court has submitted to the State Government its Award dated 30/08/2022 under section 10(1B) (d) of the I.D. Act, 1947 (14of 1947) on the said Industrial Dispute vide memo no. 1494 – L. T. dated 26/09/2022.

Now, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14of 1947), the Governor is pleased hereby to publish the said Award as shown in the Annexure hereto.

ANNEXURE
(Attached herewith)

By order of the Governor,

Joint Secretary
to the Government of West Bengal

No. Labr/. .943. .1/(5)/(LC-IR) Date :28/10/2022

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

1. M/s. Karan Global Security & Services Pvt. Ltd., P.O. – Durgachak, District-Purba Medinipur, PIN – 721635.
2. M/s. Materials Chemicals and Performance Intermediaries Pvt. Ltd., P.O. – Durgachak, P.S. Durgachak, Dist. Purba Medinipur, PIN – 721635.
3. Sri Tuhin Sarkar, S/o. Late Krishna Chandra Sarkar, Vill. Jharkhali No. 2 P.O. Basanti, District-South 24 Parganas, PIN - 743312.
4. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
5. The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Building, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata – 700001.
6. The Sr. Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

Joint Secretary

No. Labr/. .943. .2/(2)/(LC-IR) Date 28/10/2022

Copy forwarded for information to:-

1. The Judge, Second Labour Court West Bengal, with respect to his Memo No. 1494 – L. T. dated 26/09/2022.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata – 700001.

Joint Secretary

In the matter of an application under section 10(1B)(d) of The Industrial Disputes Act, 1947 filed by Shri Tuhin Sarkar, S/o. Late Krishna Chandra Sarkar of Vill. Jharkhali No. 2 P.O. Basanti, District-South 24 Parganas, PIN – 743 312 against (1) M/s. Karan Global Security & Services Pvt. Ltd. of P.O.- Durgachak, District–Purba Medinipur, PIN–721 635. (2) M/s. Materials Chemicals and Performance Intermediaries Pvt. Ltd. (In short MCC PTA INDIA CORP. PVT. LTD.) of P.O. Durgachak, P.S. Durgachak, Dist. Purba Medinipur, PIN-721 635.

Case No. 7/2014 u/s 10(1B)(d)

Before the Second Labour Court, West Bengal, Kolkata

Present: Shri Argha Banerjee, Judge
Second Labour Court
Kolkata

Dated: 30.08.2022.

AWARD

This is a case under section 10(1B)(d) of The Industrial Disputes Act, 1947 filed by the applicant for his reinstatement in service along with full back wages / salaries for the period of unemployment. The case of the applicant as elucidated in the application under section 10(1B)(d) of the Industrial Disputes Act, 1947 in a nutshell is that: –

1) The opposite party no. 1 was the immediate employer and the opposite party no. 2 was the principal employer of the workman hereinafter referred as the 'applicant'. The applicant was appointed by the opposite party no. 1 on the 1st day of July, 2003 and thereafter the applicant's name was enrolled with the ESI Corporation by the O.P.

2) That this applicant was confirmed in the service by the opposite party no. 1 on the 1st day of January, 2009 as a Senior Cook and the same used to perform his duties accordingly under the supervision of a Supervisor and did not had the authority and control of any other cook of the O.P concern.

3) The applicant had contended the fact that since his joining the same was posted in the principal employer's location and had never gave any opportunity to either of the O.P's to raise any objection in regard to his performance and behaviour. That owing to some family disturbance, the applicant was arrested by the police personnel on 7th of October, 2013 from the work place and

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Second Labour Court W.B.

subsequently the same was released on bail on the 9th of November, 2013 from the Learned Additional Chief Judicial Magistrate, Haldia.

4) That soon after his release, on 11th of November, 2013, the applicant had been to his work place to rejoin his duty but the site supervisor had refused to allow him to join his duty and had asked the applicant to contact the trade union leaders of the company's union. Accordingly, the applicant had met with the leaders and was assured by the same that the management will allow him to join the company but neither the union leader not the management had taken the initiative for allowing the applicant to resume his duties.

5) That finding no other alternative, the applicant had submitted a letter dated 12th December, 2013 to the O.P concern asking the same to permit the applicant to join his work but no reply was received from their end. Subsequently, the applicant had again written a letter dated 20th of December, 2013 to the opposite party No. 2 with a similar prayer (a copy of the same was also forwarded to the opposite party No. 1.) but no relief as prayed for by the applicant was granted.

6) That finding no other alternative the applicant had written a letter (dated 15th January, 2014) to the Deputy Labour Commissioner, Haldia praying inter alia for intervention with regard to the termination of his employment w.e.f. 11th of November, 2013 by way of refusal of employment. That, even after series of conciliation meeting and owing to the adamant attitude of the O.P the dispute could not be resolved. Subsequently, the applicant had prayed for certificate to the conciliation officer under section 10(1b) of the Industrial Disputes Act, 1947 and Rule 12A(2) of The Industrial Disputes Rules, 1958 in Form P4 on 12th September, 2014. Accordingly, a certificate was issued by the conciliation officer under rule 12A(3) of The Industrial Disputes Rules, 1958 in Form S on the 15th of September, 2014.

7) The applicant further submitted that the last drawn salary of the applicant was Rs. 18,342/- per month and the instant case could not be filed by the workman within time due to false assurances of the management to rejoin him and also due to financial stringencies and the applicant is totally unemployed.

*That both the **O.P. No. 1 and the O.P. No. 2** had appeared in the instant matter and had filed their respective written objections in regard to the application*

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filed by the applicant. The O.P. No. 1 being the party contractor had stated the facts that: -

a) The O.P no. 2 after taking over had discontinued the Japanese canteen where the applicant was working as Senior Cook II and there are at present no Japanese staffs. The O.P further contended the fact that the applicant used to attend his duty in a drunken state and used to use filthy languages upon other co-workers working there. The applicant on
being suspended by the O.P had admitted his fault on 25th of September, 2008 and prayed for lifting the suspension with a further prayer allowing the same to join his duties.

b) The applicant by his letter dated 21st of June, 2008 prayed for forgiveness for the unauthorised leave and had repeated the same incident in the year 2007 and 2008. Thereafter on 22.11.2011 the O.P.-1 (M/s. Karan Construction Company) (M/s. Karan Global Security & Services Pvt. Ltd. as the applicant mentioned) had issued suspension letter on the charges of irregular attendance, for taking leave without proper information/permission and attending duties in an intoxicated state thereby abusing other workers and using filthy languages; thus creating an unhealthy atmosphere at the work place.

c) The applicant by a letter dated 23.03.11 had admitted the charges and prayed for joining his duties. That, on the applicant's approach two Unions namely (i) Haldia MCCPTA India Corporation Pvt. Ltd. Contractor's Union by a letter dated 22.3.11 and (ii) Mitushbisi Chemicals Corporation Pvt. Ltd. by a letter dated 23.3.11 communicated M/s. KCC (O.P.-1) they have settled the dispute and approached the contractor (M/s. KCC) to allow the applicant to join his duties giving assurance of his good behaviour and no further occurrence of misbehaviour on the part of the applicant. The applicant had also appealed to the contractor for permitting the same to join his duties with an assurance of not repeating his misbehaviour, intoxication, disturbance at the work place.

d) The O.P.-1 further contended the fact that the applicant remained absent from his respective duty w.e.f. 07.10.13 without any prior information or sanctioned leave and had never came before the O.P no. 1 to join his duty: therefore, the question of not allowing the same to join his duty does not arise at all and the same was never terminated from the service. The O.P. No. 1 contended the fact that this applicant had never submitted any letter to the

Sd/-
Judge
Central Labour Court, HLD.

management for reinstatement. The instant application as contended by the O.P. No. 1 is being filed by the applicant to harass the same and extort money and ought to be dismissed.

*The **opposite party No. 2** in reply to the written statement filed by the applicant has contended the following facts: -*

a) That the applicant had no employer and employee relationship by and between the applicant and the opposite party No. 2. The applicant had not made any demand or had raised any dispute against the opposite party No. 2 in the instant application and in the conciliation level. It is contended by the opposite party no. 2 that the same has been unnecessarily implicated as a party in this matter.

b) The O.P. No. 2 had specifically denied all the contentions made by the applicant in the instant application and further more supports the fact that this applicant used to come to work in an intoxicated condition thereby causing an unhealthy atmosphere in the work place. The instant application as contended by the O.P. No. 2 is being filed by the applicant to harass the same and is ought to be dismissed.

ISSUES

The following issues were being framed to arrive at a just decision of the instant application filed by the applicant.

1) Whether this case is maintainable within the ambit of The Industrial Disputes Act, 1947?

2) Whether employee-employer relationship exists in between the applicant and the opposite parties?

3) Whether the applicant is a workman as per Section 2(S) of the Act?

4) Whether the termination of the service of the applicant by way of refusal is justified?

5) Whether the case is maintainable while the principle employers business is not in existence?

6) Whether the applicant is entitled to get any relief as per his prayer?

Sd/-
Judge
Second Labour Court W.B.

EVIDENCE ON THE RECORD

In order to substantiate the case ***the applicant had adduced himself*** as the sole witness to the case. On the other hand the ***O.P. no 1 had adduced one Bimal Mondal as OPW- 1*** who happened to be the authorised representative of the O.P no. 1 concern and ***one Deb Prasad Bisai***. The ***O.P. No. 2 had adduced one Upansu Sur*** who happened to be the Senior Manager (HR & Adm) of the said concern as witnesses in the instant matter. The documents produced before this Court were marked in the following manner:

EXHIBITS ON BEHALF OF THE APPLICANT

Exhibit 1 – Confirmation letter of Shri Tuhin Sarkar dated 10.09.2010.

Exhibit 2 – Identity Card of Shri Tuhin Sarkar issued by the O.P. Company.

Exhibit 3 – Identity card issued in favour of Shri Tuhin Sarkar by the O.P. No.-2.

Exhibit 4 – Identity card issued by the ESI Authority.

Exhibit 5 – A letter dated 12.12.2013 issued by Shri Tuhin Sarkar to The Proprietor / Partner of M/s. Karan Global.

Exhibit 5/1 – Postal receipt of letter dated 12/12/2013;

Exhibit 6 – A letter dated 20.12.2013 issued by Shri Tuhin Sarkar to The General Manager (HRD) of MCC PTA India Corpn. Pvt. Ltd.

Exhibit 6/1 – Postal receipt of letter dated 20/12/2013

Exhibit 7 – A letter dated 15.01.2014 issued by Shri Tuhin Sarkar to the Dy. Labour Commissioner, Haldia.

Exhibit 8 – Application in Form P4 dated 12.09.2014.

Exhibit 9 – Bonus-Pay Slip from January to August-2013 of Shri Tuhin Sarkar.

Exhibit 10 – Salary Slips of Shri Tuhin Sarkar from August, 2013 to June, 2013.

Exhibit 11 – P.F. Slips.

Exhibit 12 – Attendance Register sheet for the month of October, 2013.

EXHIBITS ON BEHALF OF THE O.P

Exhibit A – A letter dated 14.08.2017 authorising Shri Deba Prasad Bishoi to give evidence.

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Judge
Second Labour Court W.B.

EVIDENCE OF THE WITNESSES

From the substantive evidence of the ***P.W. 1 Sri Tuhin Sarkar*** it is clear that: -

1) The applicant was working under the O.P no. 1 and was being posted under O.P. No. 2 in the post of Senior Cook – II having no supervisory capacity. The applicant had not raised any dispute against the O.P. No. 2. The same was being confirmed in the service on 10/09/2010 which is clear from the **exhibit – 1** which happened to be the confirmation letter. The O.P. No. 1 had issued the **exhibit – 2** which happened to be an identity card. The O.P. No. 2 had also issued the **exhibit – 3** which also happened to be the identity card of the O.P. No. 2 concern. The same was covered under the ESI facility which is evident from the **exhibit – 4** that happens to be the identity card issued by the ESI authority.

2) The applicant was being arrested and was subsequently released on bail on 09/11/2013. The O.P No. 1 after his release on bail had not permitted the applicant to resume his duty and had asked the same to contact the respective union. That Debu Bishoyee and few other persons were present when the same was refrained from joining his duty on 11/11/2013 by the Supervisor Mondal Babu. However, no documents were being produced by the applicant to show that the same was denied by the O.P.no. 1 to resume his duties.

3) The applicant had sent the **exhibit – 5** and **exhibit – 6** (duly alongwith **exhibit – 5/1 and 6/1**) which happens to be a letter dated 12/12/2013 and 20/12/2031 and the postal receipts on the same letter respectively praying addressed to the O.P no. 1 for resuming his respective duty. However, no reply was received from the O.P. concern in such regard and the fact that the exhibit – 5 and exhibit – 6 were being received by the O.P concern.

4) That finding no other alternative the applicant had sent a letter dated 15/01/2014 to the Deputy Labour Commissioner which was marked as **exhibit – 7** for arriving at a proper conciliation, however no settlement could be arrived in that regard and this applicant had obtained a pendency certificate from the Deputy Labour Commissioner which was marked as **exhibit – 8**.

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5) The applicant had also filed the respective bonus slip, salary slips, the P.F. slips and the attendance register which were marked as **exhibit – 9, exhibit – 10 series, exhibit – 11 series and exhibit – 12** respectively. That neither any charge sheet nor any domestic enquiry was held in regard to the termination of the applicant.

From the substantive evidence of the ***O.P.W. 1 Sri Biman Mondal*** it is clear that: -

1) The same has been working under the O.P. No. 1 concern having his designation as 'Site Supervisor' and was posted at the premises of the O.P. No. 2 and had been authorised to depose on behalf of the O.P. No. 1 who had appointed the applicant and used to pay the salary of the same.

2) The O.P. No. 1 being a contractor was being engaged in running the Japanese Canteen of the O.P. No. 2 and to provide contract labours for rendering services of Mechanical, Canteen work, Gardening, Sweeping, Security, Driving etc. in the cite of the O.P. No. 2. That the applicant used to work as a Senior Cook – II in the said canteen under the supervision of the O.P. No. 2. That the applicant was charge sheeted and suspended on various occasions due to major misconduct but in spite of black spot in his service record the management of the O.P no. 1 had not terminated the service of the applicant.

3) Though it has been contended by the O.P that the applicant was charge sheeted and suspended on various occasions due to major misconduct yet no documents were being produced in order to substantiate such aspect. The applicant was absent from his duties from 08.10.2013 without any proper authorization and apart from an arrest memo dated 23.11.2013 no other information was being given from the applicant to the principal employer substantiating his unsanctioned leave however no proper document was produced in such regard to substantiate that fact.

4) Though, the O.P had not issued any letter of termination in regard to the applicant for his unauthorised absence from the O.P concern yet the same was willing to let the applicant resume his duties after obtaining permission from the O.P. No. 2 and on condition that the same shall withdraw this instant application; and furthermore, the period from 11.11.2013 onwards shall be

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treated as 'No work, no pay'. However, owing to the fact that the Japanese Canteen where this applicant used to work has seized to exist the service of the applicant cannot be resumed and his employment as per exhibit – 1 was only for the O.P. No.2.

From the substantive evidence of the ***O.P.W. 2 Sri Deb Prasad Bisai*** it is clear that: -

1) The same was the Security Guard and a member of MCCPTA India Corporation Contractors Union and had been authorised to depose on behalf of the O.P. No. 1 which is clear from the **Exhibit – A** and was working at the site where the applicant had been working. The name of the company had changed from MCCPTA India Corporation Pvt. Ltd. to MPI but the name of the respective union remained the same.

2) The witness knew the applicant who used to work in the Japanese Canteen in the O.P. No. 2 concern which is presently not in existence. However, no documents were being produced in this regard. The applicant was being arrested by the police authorities in the year 2013. That though the applicant was not dismissed by the O.P. No. 1 yet the same never came at the gate. The witness being the General Secretary of the Union had not raised any objection in regard to rejoining of the applicant concern,

From the substantive evidence of the ***O.P.W. 3 Sri Upansu Sur*** who is the ***witness for the O.P. No. 2*** it is clear that: -

1) The same is the Sr. Manager, (HR & Adm.) of M/s. MCPI Pvt. Ltd. The applicant was an employee of the O.P. No. 1 concern who was a service provider of the O.P. No. 2. for the purpose of cooking.

2) No claim had been made against the O.P. No. 2 by this applicant. However, the same used to attend his duties in an intoxicated manner and used to consume alcohol at the work premises.

3) Since the applicant was not working in the O.P. No. 2 concern there was no question of suspension or termination of services by the same. However, the canteen where the applicant used to work is not in existence since the year 2017.

Sd/-
Judge
Second Labour Court W.B.

ARGUMENTS MADE BY THE PARTIES

Ld. Counsel of the applicant and The Ld. Counsels for both the O.P's had filed their written notes of argument.

ARGUMENTS ON BEHALF OF THE APPLICANT

The Learned Counsel on behalf of the applicant had stated in his argument that the workman herein get appointed in the opposite party No. 1 on 1st July, 2003 and after the same the applicant's name has been enrolled with the ESI corporation by the said employer. The applicant's service was confirmed by the Opposite Party No. 1 w.e.f. 1st January, 2009 as Sr. Cook-2. Being the Sr.-Cook-2, the applicant used to perform the job of a cook under the supervision of a supervisor and the applicant has no role to play to control and supervise any work to any other cook of the company. The applicant since joining was posted in the Opposite Party No. 2's location. Out of some family disturbance, the applicant get arrested by the Police Personnel on 7th October, 2013 from the work place and subsequently the applicant got bail on 9th November, 2013 from the Learned Court of Additional Chief Judicial Magistrate, Haldia. Immediately after release, on 11th November, 2013, the applicant went to his work place to join his duty but the site supervisor did not allowed him to join in his duty and asked the applicant to contact the trade union leaders of the company's union. The applicant met with the leaders and they assured the applicant that the management will allow him to join the company but on some pretext and another the management and the union leaders dragging the matter. Having no other alternative, the applicant submitted a letter dated 12th December, 2013 to the management and asking them to allow the applicant to join in his work but the same was not heeded to. The applicant again wrote a letter dated 20th December, 2013 to the opposite party No. 2 with a similar prayer and a copy of the same has been also forwarded to the opposite party No. 1. The applicant having no other alternative wrote a letter dated 15th January, 2014 to the Deputy Labour Commissioner, Haldia praying inter alia for intervention with regard to the termination of his employment w.e.f. 11th November, 2013 by way of refusal of employment. Ultimately the concerned workman prayed for certificate to the conciliation officer under section 10(1b) of the Industrial Disputes Act, 1947 and Rule 12A(2) of the Industrial Disputes rules, 1958 in Form S on 15th September, 2014. Accordingly, the applicant filed the instant case.

The Opposite Parties filed their written statements and contested the case. The Opposite Party No. 1 tried to establish a fact that, they did not refuse the applicant from his employment rather the applicant withdraw himself from his employment. The Opposite Party No. 2 tried to shift the burden on the shoulder of the Opposite Party No. 1.

To prove his case, the applicant examined himself as PW1 and exhibited the confirmation letter dated 10th September, 2010 as Exhibit 1, the Identify Card issued by the O.P. No. 1 as Exhibit 2, the Identify Card issued by O.P. No. 2 as

Sd/-
Judge

Exhibit 3, ESI Identify Card as Exhibit 4. Letter dated 12th December. 2013 as Exhibit 5 and the postal receipt thereto as Exhibit 5/1. letter dated 20th December, 2013 as Exhibit 6 and the postal receipt thereto as Exhibit 6/1. letter to the Deputy Labour Commissioner as Exhibit 7 and the Form P4 as Exhibit 8.

At the time of cross examination on 18th July, 2016. the applicant categorically named the supervisor and the persons present at the spot when the applicant was refused to allow/join in his duty.

The Opposite Party No. 1 examined two witnesses. The Opposite Party No. 1 had tried to build up a case which is not in its pleading and as such the same can not be looked into. The Opposite Party No. 1 tried to impress upon the Learned Court that, the character of the applicant is not at all good and he was not refused from his employment rather he voluntarily left the organisation. The OPW 2 claimed himself as a security guard and at the time of cross examination, he categorically stated that, the management and the union has no objection, if the applicant resume his duty.

Admittedly, in this case, the Opposite Parties failed to issue any charge sheet. show cause and to hold any domestic enquiry against the applicant before throw him out of his employment. The Opposite Parties also did not complied with the provision of Section 25F of the Industrial Disputes Act. 1947.

WRITTEN NOTES OF ARGUMENT ON BEHALF OF THE OPPOSITE PARTY NO. 1.

The O.P no. 2 had argued upon the points that the applicant used to work as Sr. Cook-2 at Japanese canteen which was controlled and supervised by the ex Principal employer. That the said canteen of Opp. Party no.2 has no any existence by way of closure as admitted by the parties. In spite of black spot in his service record the service of the applicant was not terminated by the opp. Party No. 1. During working the applicant was in habit of drinking liquor and used to abuse filthy languages and there is record about several misconducts in the hand of the opp. Party no. 2.

The Opposite Party No. 1 has relied upon the principals of the following case laws and/or judgments of various Hon'ble High Courts in India and Hon'ble Supreme Court.

2008 LLR-1080 in the case of Kerala electrical and A.E. Company Ltd. Vs.- Leemens'D. Cruze (Kerala High Court) Para-17 & 18 wherein the Hon'ble Apex Court was of the opinion that: -

a) When the workers alleged to be engaged by the contract or in the statutory canteen of a factory were being controlled by the company and the evidence as a whole work prove that the contracting was only a glorified supervisor of the company without any in dependent functions regarding the running of the contractor, such contract workers have been rightly held to be employees of the company. This principle decision is very much applicable in this case.

1988 LABIC-730 (Punjab & Haryana High Court, in the case of Food Corporation of India Vs. The Presiding Officer, Central Govt. Industrial

Sd/-

Tribunal, Chandigarh & Another. Relevant paragraphs 14 & 15. Held-" Every worker works for a Principal Employer to whom the provisions of contract labour Act are attracted, is to be treated as the worker of the Principal Employer unless two conditions are satisfied:–

That the establishment had secured a certified of registration for the relevant period; (if it has employed contract labour employed through the a licensed contractor. If either of the conditions is missing then the contract shall be treated to be the works of the employer.

In the instant case above two mandatory conditions are missing. The principal Employer which is an industry in terms of section 2(j) of I.D. Act, 1947 failed to produce the above mentioned vital documents before your Honour's Court. Hence, employee/workman of the contractor will be treated as direct employee/workman of the principal employee.

Accordingly, as per issue No. 2, the employee employer relation exists in between the applicant and the opp. Party No. 2 (i.e. the principal employer) and not the contractor, the opp. Party No. 1.

Although the applicant was the direct employee of the principal employer in terms of above case law but it is admitted position that the canteen Department of the said opp. Party No. 2 has/had no existence form the year 2017 as stated by Mr. Upansu Sur, the OPW2 (of opp. Party no. 2) on 07.09.2018 during cross examination and the said statement was not cross examined by the Ld. Advocate of the applicant. Moreover the statements of both witnesses of opp. Party No. 1 (i.e. OPW1 Sri Bimal Mondal and OPW2 Sri Deb Prasad Bisai, i.e. OPW2) regarding non existence of the said canteen of department of opp. Party No. 2 (which had not been crossed and/or suggested by the Ld. Advocate of the applicant) are stood established.

In view of said facts of the case the opposite party No. 1 is relying the remarkable judgments of *Hon'ble Supreme Court in the case of Pimpri Sugar Mill Supreme Court) in the year 1962 and in the case of JK Synehetic Vs-Rajasthan Trade Union Kendra as reported in 2001 CLR 1058(SC)* wherein it was held that there was Textile Section and there was no serious dispute that the Textile Section had been closed. The Division Bench erred in coming to the conclusion that there was no closure of Textile Section and the said findings of the Division Bench cannot be sustainable.

The Issue No. (iii) whether the applicant is a workman as per Section 2(s) of the I.D. Act; and the issue No. (iv) whether the termination of service of the applicant by way of refusal is justified.

Before dealing the above issues it is also required to discuss about the evidences of all witnesses and written statements of both opp. Parties and their evidences in a nutshell. The applicant in his evidence in chief and/or his EIC that his last drawn salary was Rs. 18,342/- per month and stated on 15.12.2015 in examination in chief (middle portion) that he was working in the post of cook. In ext.-1, his category has been mentioned as Senior cook-II. As per definition of Section 2(s) of I.D. Act the applicant was not a workman as his

Sd/–

salary was more than Rs. 16,000/- per month. Hence, as per issue No. III, the applicant was not a workman.

The opp. Party no. 1 in their both written statement and EIC stated that the opp. Party no. 1 did never terminate his service which was not been denied in the evidence the applicant's evidence in chief. No cross examination and/or suggestion was made by the applicant's evidence in chief. No cross examination and/or suggestion was made by the applicant's Ld. Lawyer to the OPW1 (i.e. witness N. 1 of opp. Party no. 1) against his evidence in chief as filed on 23.03.2017 stating that the company did never terminate his service. As such company's said evidence in chief is stood established.

The alleged claim of the applicant was on the basis of his letter dated 12.12.2013 (Ext.5) and also a letter dated 20.12.2013 (Ext.-6) addressed to the opp. Party No. 1 stating the same facts by alleging that the supervisor did not allow to the applicant to join in his duties and asked him to contact with the Union's leaders. But in cross-examination the Ld. Lawyer of the applicant did not cross-examine to both witness having OPW1 (Mr. Bimal Mondal) and Mr. Deb Prosad Bisai, the OPW2 against the above allegations of the applicant. No suggestion was made to that effect. As such the question of alleged termination by way of refusal do not and cannot arise at all. Such allegations are nothing but after thought. Moreover, the questions of not issuing charge sheet and not holding any domestic enquiry do not come also. Without prejudice to the right and contention it is submitted that the termination will be held illegal in case of non compliance of section 25F of I.D. Act. But the applicant's written statement there is no such whisper at all. Burden of proof is upon the applicant. As per settled law it is for him to prove that he has in fact completed 240 days in the preceding 12 months period. Although the applicant in cross-examination said that he has completed 240 days but he did not produce any document in support of his said denial. He produced the copy of attendance register having marked as Exhibit 12 wherein it is seen that he worked only 5 days.

Moreover, said section of 25F has no application to a closed or dead industry in terms of settled law. The burden of proof is upon the applicant by producing documents and/or producing any corroborate witness by showing that the opp. Part no. 1 terminated his service. In this regard the opp. Party nol. 1 is relying the judgment of *Hon'ble High Court of Rajasthan as reported in 2006-1 CLR-209, in the case of Moharaja Shree Unid Mills Ltd. -vs-Judge Labour Court & Ors.* Wherein was held (specially paragraph 53, 59,62,63, 64) that it was the duty of respondent No. 2 to prove his case by adducing cogent evidence to controvert of the stand taken by the petitioner company but the respondent No. 2 has failed to prove the case by producing cogent evidence. Furthermore, the findings of the Ld. Labour Court are not based on correct application of entire material available on records and same as erroneous, perverse etc.

Said judgment is very much applicable in regard to issue no. (iv). Accordingly the question of alleged termination of service does not arise at all. Moreover, no any date of termination is mentioned in the said issue. As such said issue is not applicable. The applicant is not entitled to get any relief as claimed.

Sd/—
Judge
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WRITTEN NOTES OF ARGUMENT ON BEHALF OF THE OPPOSITE PARTY NO. 2.

The Learned Counsel on behalf of the O.P No. 2 had stated in his argument that the opposite party No. 2 had filed its written statement on 16.09.2015. In regard to the issues the Learned Counsel appearing on behalf of the O.P No. 2 has stated that: -

There was no employer and employee relationship by and between Sri Tuhin Sarkar and the opposite party No. 2. Sri Tuhin Sarkar was an employee of the opposite party No. 1 M/s. Karan Global Security & Services Pvt. Ltd., one of the contractors of the opposite party No. 2. Opposite party No. 1 is a service provider. As per contract the opposite party No. 1 deployed Sri Tuhin Sarkar to the opposite party No. 2 as a cook in the Japanese Canteen.

The applicant had raised the dispute before the Labour Directorate against the opposite party No. 1 for his alleged termination. The applicant never raised any dispute with the opposite party No. 2 and nor even made a single demand to the opposite party No. 2 for reinstatement in service for his alleged termination and nor in the conciliation level. There is no supervision and control of the opposite party No. 2 upon the applicant.

Mr. Upansu Sur adduced evidence on behalf of the opposite party No. 2 by filing EIC on affidavit on 07.09.2018 wherein he has been clearly stated that there is no employer and employee relationship by and between Sri Tuhin Sarkar and the opposite party No. 2. Opposite Party No. 1 deployed Sri Tuhin Sarkar in the company for cooking purpose. He had done several misconducts including consuming alcohol in the work place.

Therefore the opposite party No. 2 is no way responsible for any alleged termination of Sri Tuhin Sarkar. Thus, in the absence of an employer and employee relationship by and between the Opposite Party No. 2 and Sri Tuhin Sarkar the question of termination by the opposite party No. 2 does not arise at all. The applicant is not entitled to any relief as claimed from the opposite party No. 2.

DECISION WITH REASONS

Issue No. 1: - Whether this case is maintainable within the ambit of The Industrial Disputes Act, 1947?

To ascertain whether the instant case is maintainable within the ambit of Industrial Disputes Act, 1947 the fact to be considered is what the term "Industrial Dispute" means. In accordance with section 2(k) an

(k) " industrial dispute" means any dispute or difference between employers and employers or between employers and workmen, or between workmen and

workmen, which is connected with the employment or non- employment or the terms of employment or with the conditions of labour, of any person;

In the instant matter it is seen that the applicant was working under the O.P no. 1 being a contractor who was being engaged in running the Japanese Canteen of the O.P. No. 2 and to provide contract labours for rendering services of Mechanical, Canteen work, Gardening, Sweeping, Security, Driving etc. in the cite of the O.P. No. 2.and was being posted under O.P. No. 2 in the post of Senior Cook – II. The applicant was being arrested and was subsequently released on bail on 09/11/2013. The O.P No. 1 after his release on bail had not permitted the applicant to resume his duty and had asked the same to contact the respective union. Such fact was duly substantiated from the **exhibit – 5** and **exhibit – 6** (duly alongwith **exhibit – 5/1 and 6/1**) which happens to be a letter dated 12/12/2013 and 20/12/2031 and the postal receipts on the same letter respectively praying addressed to the O.P no. 1 for resuming his respective duty and no reply was received from the O.P. concern in such regard. The O.P No.1 had not issued any letter of termination in regard to the applicant for his unauthorised absence from the O.P concern and the same was willing to let the applicant resume his duties after obtaining permission from the O.P. No. 2: however, owing to the fact that the Japanese Canteen where the applicant used to work had seized to exist the service of the applicant cannot be resumed and his employment as per exhibit – 1 was only for the O.P. No.2. Thus, the determination of the fact whether the applicant was refused to join and the fate of the applicant upon termination of the Japanese Canteen falls under the purview of an Industrial Dispute and thus the instant case is maintainable in its present form.

Issue No. 2: - Whether employee-employer relationship exists in between the applicant and the opposite parties?

In order to determine this issue it is seen from the substantive evidence of the parties to the proceeding that :-

a) The applicant was working under the O.P no. 1 being a contractor who was being engaged in running the Japanese Canteen of the O.P. No. 2 and to provide contract labours for rendering services of Mechanical, Canteen work, Gardening, Sweeping, Security, Driving etc. in the cite of the O.P. No. 2.and was being posted under O.P. No. 2 in the post of Senior Cook – II having no supervisory capacity.

b) The same was being confirmed in the service on 10/09/2010 which is clear from the **exhibit – 1** which happened to be the confirmation letter. The O.P. No. 1 had issued the **exhibit – 2** which happened to be an identity card. The

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O.P. No. 2 had also issued the **exhibit – 3** which also happened to be the identity card of the O.P. No. 2 concern. The same was covered under the ESI facility which is evident from the **exhibit – 4** that happens to be the identity card issued by the ESI authority.

c) From the respective bonus slip, salary slips, the P.F. slips and the attendance register which were marked as **exhibit – 9, exhibit – 10 series, exhibit – 11 series and exhibit – 12** respectively it is clear that this applicant was working under the O.P. No. 1 concern being presently posted under the O.P. No. 2 to render his services.

d) The applicant was being arrested and was subsequently released on bail on 09/11/2013. The O.P No. 1 after his release on bail had not permitted the applicant to resume his duty and had asked the same to contact the respective union. Such fact is quite clear from the **exhibit – 5** and **exhibit – 6** (duly alongwith **exhibit – 5/1 and 6/1**) which happens to be a letter dated 12/12/2013 and 20/12/2031 and the postal receipts on the same letter respectively praying addressed to the O.P no. 1 for resuming his respective duty and no reply was received from the O.P. concern in such regard.

e) The O.P No.1 had not issued any letter of termination in regard to the applicant for his unauthorised absence from the O.P concern and the same was willing to let the applicant resume his duties after obtaining permission from the O.P. No. 2; however, owing to the fact that the Japanese Canteen where the applicant used to work had seized to exist the service of the applicant cannot be resumed and his employment as per exhibit – 1 was only for the O.P. No.2.

Thus, from the exhibits **exhibit – 1** which happened to be the confirmation letter; **exhibit – 2** which happened to be an identity card; the **exhibit – 3** which also happened to be the identity card of the O.P. No. 2 concern; the **exhibit – 4** that happens to be the identity card issued by the ESI authority bonus slip, salary slips, the P.F. slips and the attendance register which were marked as **exhibit – 9, exhibit – 10 series, exhibit – 11 series and exhibit – 12** respectively it is clear that there was an employer and employee relationship in between the applicant and the O.P. No. 1. No claim had been made by the applicant in respect of the O.P. No. 2 and such fact admitted by the applicant. Thus, this fact is decided in favour of the applicant.

Issue No. 3: - Whether the applicant is a workman as per Section 2(S) of the Act?

Now the point to be determined is whether this applicant comes under the purview of the term "Workman" under the Industrial Disputes Act. Section 2(s) provides the definition as to who will be deemed to be a workman under the Industrial Disputes Act.

".....2(s) 5" workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any

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such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature...."

In the present situation it is seen that there had been no denial from the side of the O.P. no. 1 that this applicant was appointed as a Cook to render his services in the O.P. No. 2 concern and as such it is admitted by the parties that this applicant had been rendering his skilled labour towards the opposite party. Thus, it can be clearly said that this applicant was a workman under the opposite party company.

In order to prove the fact that whether the applicant was a permanent employee under the O.P. company the fact that is to be considered is the tenure of the applicant in the company from the day of his employment to the day of his termination in service. Section 25B of the Industrial Disputes Act states that ***".....a workman is said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;***

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

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

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

In the present situation it is seen that the applicant had joined the service of the O.P. Company on and from 1st day of July, 2003 and had continued his service 11th of November, 2013. Thus, this applicant had rendered his services for a period of approximately 3786 days. Though there has been an

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allegation from the opposite party that this applicant used to take unauthorised leave yet such fact has not been substantiated.

Issue No. 4: - Whether the termination of the service of the applicant by way of refusal is justified?

The applicant was working under the O.P no. 1 being a contractor who was being engaged in running the Japanese Canteen of the O.P. No. 2 and to provide contract labours for rendering services of Mechanical, Canteen work, Gardening, Sweeping, Security, Driving etc. in the cite of the O.P. No. 2.and was being posted under O.P. No. 2 in the post of Senior Cook – II having no supervisory capacity.

The same was being arrested and was subsequently released on bail on 09/11/2013. The O.P No. 1 after his release on bail had not permitted the applicant to resume his duty and had asked the same to contact the respective union. Such fact is quite clear from the **exhibit – 5** and **exhibit – 6** (duly alongwith **exhibit – 5/1 and 6/1**) which happens to be a letter dated 12/12/2013 and 20/12/2031 and the postal receipts on the same letter respectively praying addressed to the O.P no. 1 for resuming his respective duty and no reply was received from the O.P. concern in such regard.

It is furthermore seen from the substantive evidence of the parties that neither the O.P No.1 had not issued any letter of termination in regard to the applicant for his unauthorised absence from the O.P concern nor the same had produced any document to this applicant to resume his services that will tend to show the willingness of the O.P to permit the applicant for resuming his services.

The fact that the applicant had wilfully abstained himself from attending the work assigned to him by the O.P. No. 1 in the canteen of the O.P. No. 2 could not be substantiated by O.P. No. 1. No endeavour was taken by the O.P which tends to show the fact that the same had taken the initiative to resume the services of the applicant and neither any action was taken by the O.P when the matter was pending before the Deputy Labour Commissioner. Thus, it can be clearly seen that: -

a) The applicant was working under the O.P no. 1 being a contractor who was being engaged in running the Japanese Canteen of the O.P. No. 2 and to provide contract labours for rendering services of Mechanical, Canteen work, Gardening, Sweeping, Security, Driving etc. in the cite of the O.P. No. 2.and

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was being posted under O.P. No. 2 in the post of Senior Cook – II having no supervisory capacity.

b) The same was being arrested and was subsequently released on bail on 09/11/2013. The O.P No. 1 after his release on bail had not permitted the applicant to resume his duty and had asked the same to contact the respective union.

c) Though no letter of termination was being issued by the O.P. No. 1 yet no documents were produced by the same to substantiate the fact that the same had taken and in accordance to section 25 of the Industrial Disputes Act the following conditions are to be fulfilled prior to termination of service.

> ***25F. Conditions precedent to retrenchment of workmen:- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--***
>
> ***(a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:***
>
> ***(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service] or any part thereof in excess of six months; and***
>
> ***(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette].***

In the present scenario it is clearly seen that apart from verbal denials neither any proceeding as envisaged under Industrial Disputes Act was being initiated nor any notice for retrenchment had been served upon this applicant. Thus, it can be clearly said that the termination of the service of the applicant by way of refusal is not at all justified and accordingly this issue is decided in favour of the applicant.

<u>Issue No. 5: - Whether the case is maintainable while the principle employers business is not in existence?</u>

The first aspect which is taken into consideration is that the O.P. NO. 1 is the principle employer of the applicant and the O.P. No. 2 is not the principle employer of the same which has been admitted by all the parties to the proceeding. The exhibit – 1 clearly substantiate the fact that the applicant was

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being appointed by the O.P. No. 1 and no witness has been produced to show that the business of the O.P. No. 1 is not in existence.

Even if for arguments sake it is taken into consideration that the applicant was appointed to render his services in regard to the O.P. No. 2 concern yet this issue becomes clear from the **exhibit – 1**. The said **exhibit - 1** filed by the applicant happens to be the confirmation letter dated 10/09/2010 from where it is clear that this applicant at the 'first instance' was to be posted at the site of M/s MCC PTA India Corp Ltd at Haldia and his employment was specifically in connection with the contractors of the O.P. No. 1 and was to be terminated upon the expiry of the contract with the respective clients. Moreover the services of the applicant was subjected to transfer from any department, section, operations site or subsidiaries of the O.P. No. 1 concern. The fact that there was termination of agreement between the O.P. No. 1 and O.P. No. 2 for which the service of the applicant was to be terminated was never the fact in issue in the instant matter.

Thus, it clear from the **exhibit - 1** that this applicant was engaged by the O.P. No. 1 to render services in regard to the contractors (the O.P. No. 2 in this case) and there was no specific clause in the said **exhibit – 1** which tends to show the fact that the present applicant services were limited to that of O.P. No. 2 and of no others. Accordingly, in my opinion after taken into consideration the discussion made herein above the instant case is maintainable as the existence of business in between the O.P. No 1 and O.P. No. 2 is still in existence.

Issue No. 6: - Whether the applicant is entitled to get any relief as per his prayer?

From the substantive evidence of the parties, all the exhibits, the arguments made by the parties and other materials on the record it is clear that: -

a) The applicant was working under the O.P no. 1 being a contractor who was being engaged in running the Japanese Canteen of the O.P. No. 2 and to provide contract labours for rendering services of Mechanical, Canteen work, Gardening, Sweeping, Security, Driving etc. in the cite of the O.P. No. 2.and was being posted under O.P. No. 2 in the post of Senior Cook – II having no supervisory capacity.

b) The same was being confirmed in the service on 10/09/2010 which is clear from the **exhibit – 1** which happened to be the confirmation letter. The O.P. No. 1 had issued the **exhibit – 2** which happened to be an identity card. The O.P. No. 2 had also issued the **exhibit – 3** which also happened to be the identity card of the O.P. No. 2 concern. The same was covered under the ESI

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facility which is evident from the **exhibit – 4** that happens to be the identity card issued by the ESI authority.

c) The applicant was being arrested and was subsequently released on bail on 09/11/2013. The O.P No. 1 after his release on bail had not permitted the applicant to resume his duty and had asked the same to contact the respective union. Such fact is quite clear from the **exhibit – 5** and **exhibit – 6** (duly along with **exhibit – 5/1 and 6/1**) which happens to be a letter dated 12/12/2013 and 20/12/2013 and the postal receipts on the same letter respectively praying addressed to the O.P no. 1 for resuming his respective duty and no reply was received from the O.P. concern in such regard.

d) The O.P No.1 had not issued any letter of termination in regard to the applicant for his unauthorised absence from the O.P concern and the same was willing to let the applicant resume his duties after obtaining permission from the O.P. No. 2; however, owing to the fact that the Japanese Canteen where the applicant used to work had seized to exist the service of the applicant cannot be resumed.

e) That this applicant at the 'first instance' was to be posted at the site of M/s MCC PTA India Corp Ltd at Haldia and his employment was specifically in connection with the contractors of the O.P. No. 1 and was to be terminated upon the expiry of the contract with the respective clients. Moreover the services of the applicant was subjected to transfer from any department, section, operations site or subsidiaries of the O.P. No. 1 concern. The fact that there was termination of agreement between the O.P. No. 1 and O.P. No. 2 for which the service of the applicant was to be terminated was never the fact in issue in the instant matter.

The burden to prove the fact that the applicant has been working with the opposite party is upon the applicant. In the present case apart from verbal evidence the applicant has duly produced the **exhibit – 1** which happened to be the confirmation letter. The O.P. No. 1 had issued the **exhibit – 2** which happened to be an identity card. The O.P. No. 2 had also issued the **exhibit – 3** which also happened to be the identity card of the O.P. No. 2 concern. The same was covered under the ESI facility which is evident from the **exhibit – 4** that happens to be the identity card issued by the ESI authority to prove the fact that the same had been working with the opposite party since 2005. Thus, it is proved that this applicant has been rendering his service towards the O.P. No. 1 prior to the year 2010. On the other hand neither any documents had been produced by the O.P. No 1 to prove the fact that the same had not caused any retrenchment of the applicant nor the O.P. No 1 had taken legal methods as envisaged under the Industrial Laws to cause retrenchment of this applicant.

Furthermore, it has been stated by the applicant in his substantive evidence and admitted by the opposite party that the applicant was engaged as a 'Senior Cook' in the O.P. No. 2 concern. The applicant was drawing a gross salary of Rs.22,729/- from the O.P. No. 1 and such fact is clear from the exhibit 10.

It is clearly stated in the section 25F(b) that prior to retrenchment of a workmen the same is to be paid compensation which shall be equivalent to fifteen days

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average pay for every completed year of continuous service or any part thereof in excess of six months. In the present situation no initiative had been taken by the O.P. No. 1 about the fact that prior to retrenchment of the applicant he was to be given compensation as envisaged under the act. Under such circumstances keeping in view the spirit of section 25F(b) I am of the opinion that prior to retrenchment of the applicant the opposite party ought to have given the compensation which the same had failed and accordingly such aspect is a condition precedent to retrenchment. Thus, the termination of service of the applicant becomes unjustified and inoperative and the applicant is entitled to get the relief as claimed for. Accordingly this issue is decided in favour of applicant.

Now the question that is to be considered is what relief/reliefs if any, is the applicant entitled to as per law and equity.

From the discussions made herein above the following points are taken into consideration prior to granting relief to the applicant: -

a) That this applicant was being employed by the opposite party company from the 1st day of July, 2003 and had been rendering his service to the O.P no. 2 as a 'Senior Cook' of the said concern.

b) That the applicant had performed his duties towards the opposite till 11th of November, 2013.

c) That in November, 2013 the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.

d) That the opposite party company had failed to comply with the conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.

e) The reason for retrenchment of service of the applicant by the opposite party company could not be properly justified by the same.

f) The applicant was not working for gain for other employer in any other concern.

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

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee / workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

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iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

Thus, keeping in view the above discussions I am of the opinion that this applicant used to get a salary of Rs. 22,729/- per month from the opposite party at the time when he was dismissed. That the applicant was not working with any other concern and had to wait for a prolonged period for conclusion of this instant application. Thus, keeping in mind the present market conditions it will be highly justified to pass an award of full back wages along with other consequential benefits if any to the applicant from the day his service was terminated (11/11/2013). **Accordingly the applicant is entitled to get full back wages along with all other consequential benefits (if any) from 01/06/2009.**

In 1991(63) Riaz Ahmed v. M.I. Mohd. of Bom. (Bom. H.C.) (BOMBAY HIGH COURT) B. N. SRIKRISHNA, J. Writ Petition No. 5043 of 1985 August 23, 1991 Between RIAZ AHMED and MUNIR ISMAIL MOHAMMED OF BOMBAY and another the Hon'ble Apex Court was of the opinion that "....Even if the story of voluntary abandonment of service by workman put by employer is accepted – It was incumbent upon the employer to hold an enquiry – Before treating the service as terminated on this ground - In absence of such an enquiry by the employer the termination of service cannot be held legal and valid.

In the current scenario it is seen from the materials on the record that the applicant was removed from the service without holding a proper enquiry. The opposite party had not raised this issue that the same had conducted such enquiry.

(DELHI HIGH COURT) K.S. BHAT, J. C.W.P. No. 1684 of 1991 February 14, 1994 Between MUNICIPAL CORPORATION OF DELHI and SHRI SUKHVIR SINGH and others the Hon'ble Court was of the opinion that ".... Once it is held that the employment of workman was not for a specific period – The denial of employment to the workmen by Corporation shall have to be only according to law – If he had abandoned the employment – That could have been a ground for holding an enquiry and passing appropriate order...."

2013 LAB I.C. 4249 (SUPREME COURT) (From: Bombay) * G.S. SINGHVI AND V. GOPALA GOWDA, JJ. The Hon'ble Court was of the

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opinion that in the case where there is a Wrongful Termination of service reinstatements with back wages is the rule – However , while granting back wages Courts/Tribunals has to keep in view consideration like length in service, nature of misconduct, financial condition of employees – In the case where it is seen that termination of service is an outcome of victimization or is done in gross violation of statues the employee is entitled to full back wages.

In the current scenario it is seen from the material on the record that though this applicant was in appointment for a period of 3786 days yet his termination was done without following the Industrial Laws on the Country and hence the same is entitled to get the full back wages

In Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., reported in (2013) 10 SCC 324. the Hon'ble Court was of the opinion that "..... If after a protracted time and energy consuming litigation during which period the workman just sustains 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 sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, workman whose service has been illegally terminated would be entitled to full wages except to the extent he was gainfully employed during the enforced idleness.

The propositions which can be culled out from the aforementioned judgements are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee / workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv. The cases in which the Labour Court / Industrial Tribunal exercises power under Section 11A of the Industrial exercises power under Section 11-A of

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the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee /workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court / Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v. The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and / or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages.

This court now carefully goes through the decisions held by the Hon'ble Courts in **AIR 1992 Supreme Court 573 (C.E.S.C Ltd. Vs. Subhash Chandra Bose & Others), 1978 SCR (3) 1073 (Hussain Bhai Vs. Alath Factory Thozhilali Union, Kojhikode& Others), 2004) 1 Supreme Court cases 126 (Ram Singh & Others Vs. Union Territory, Chandigarh & Others).**

The Hon'ble Courts were pleased to give emphasis on many factors in determining the relationship of employer and employee. According to those referred decisions, it can be mentioned clearly that

"in determining the relationship of employer and employee, no doubt "control" is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts and circumstances are required to be considered including the terms and conditions of the

contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole "tests of control". An integrated approach is needed. "Integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remain apart from and independent of it. The other factors which may be relevant are – who has the power to select and dismiss, to pay remuneration, deduct insurance contribution, organize the work, supply tools and materials and what are the "mutual obligations" between them".

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

g) That this applicant was being employed by the opposite party company on and from 1st day of July, 2003 and had been rendering his service as a 'Senior Cook' of the O.P No. 2 concern.

h) That the applicant had performed his duties towards the O.P. No. 2 till November, 2011.

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i) That in November, 2011 the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.

j) That the opposite party company had failed to comply with the conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.

k) The reason for retrenchment of service of the applicant by the Opposite party company could not be properly justified by the same.

l) The applicant was not working for gain for other employer in any other concern.

Hence, it is

ORDERED

The application under Section 10(1B)(d) of The Industrial Disputes Act, 1947 be and the same is thus allowed on contest without costs. The Opposite Party was not justified in dismissing the applicant and is thus, directed to cause reinstatement of the applicant **Sri Tuhin Sarkar** at once. The applicant shall receive 50% of the back wages for the period from 01/11/2011 till the present date (@ Rs. 18,342/- per month) along with all other consequential benefits if any. The O.P is directed to comply with the award.

This is my award.

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

Dictated & Corrected by me

Sd/-
Judge
Second Labour Court

Judge
Second Labour Court

Sd/-
(Argha Banerjee)
Judge
Second Labour Court
30.08.2022.

Judge
Second Labour Court W.B.