

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

No. Labr./617/(LC-IR) /22015(16)/477/2018

Date : 21/08/2018

ORDER

WHEREAS an industrial dispute existed between (1) M/S. Jagatjit Industries Ltd., Shantiniketan Building, 8, Camac Street, 9th Floor, Kolkata – 700017, (2) Glaxo Smithkline Consumer Healthcare Ltd., 22, Camac Street, Block- B, 4th Floor, Kolkata – 700016 and their workman Sri Suvendu Chaudhuri, Flat No. 208, May Fair Plaza, 120, Netaji Subhas Avenue, Serampore, Dist. – Hooghly 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 (14 of 1947) to the Judge, Second Labour Court, Kolkata specified for this purpose under this Deptt.'s Notification No. 1085-IR/12L-9/95 dated 25.07.1997.

AND WHEREAS, the Judge of the said Second Labour Court heard the parties under section 10(1B)(d) of the I.D. Act, 1947 (14 of 1947);

AND WHEREAS the Judge, Second Labour Court has submitted to the State Government its Award under section 10(1B)(d) of the I.D. Act, 1947 (14 of 1947) on the said Industrial Dispute.

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

ANNEXURE

(Attached herewith)

By order of the Governor,



Deputy Secretary
to the Government of West Bengal

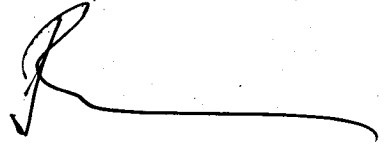
: 2 :

No. Labr./617/1(6)/(LC-IR)

Date: 21/08/2018

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

1. M/s Jagatjit Industries Ltd., Shantiniketan Building, 8, Camac Street, 9th Floor, Kolkata – 700017.
2. M/s Glaxo Smithkline Consumer Healthcare Ltd., 22, Camac Street, Block- B, 4th Floor, Kolkata – 700016.
3. Sri Suvendu Chaudhuri, Flat No. 208, May Fair Plaza, 120, Netaji Subhas Avenue, Serampore, Dist. – Hooghly.
4. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
5. The Labour Commissioner, W.B., New Secretariat Buildings, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata – 700001.
6. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Department's website.


Deputy Secretary

No. Labr./617/2(2)/(LC-IR)

Date: 21/08/2018

Copy forwarded for information to :-

1. The Judge, Second Labour Court, West Bengal, with respect to his Memo No. 1357 - LT dated 03.07.2018.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata – 700001.

Deputy Secretary

An application u/s. 10(1B)(d) of the Industrial Disputes Act, 1947 filed by **Sri Suvendu Chaudhuri**, Flat No. 208, May Fair Plaza, 120, Netaji Subhas Avenue, Serampore, Dist-Hooghly against (1) M/s. Jagatjit Industries Ltd., Shanitiketan Building, 8, Camac Street, 9th floor, Kolkata- 700 017 (2) **Glaxo Smithkline Consumer Healthcare Ltd.**, 22, Camac Street, Block-B, 4th floor, Kolkata- 700 016

(Case No. 128/ 2004 u/s. 10(1B)(d) of Industrial Disputes Act, 1947)



BEFORE THE SECOND LABOUR COURT, WEST BENGAL, KOLKATA

PRESENT : **SRI ARABINDA PANTI**, JUDGE
SECOND LABOUR COURT
KOLKATA.

Date : 29-06-2018

A W A R D

Facts of the case of the applicant, namely Suvendu Chaudhuri, in a nut shell are stated below :

It is stated that M/s. Jagatjit Industries Ltd., the Opposite Party is a public limited company registered under the Company's Act. This company is a reputed Indian Company manufacturing of beverage and Food Products like Viva and Maltova and dealing with the merchandising activities and other related works.

The main contention of the petition is that the applicant was appointed by the aforesaid company w.e.f. 22nd day of March, 1994 as Sales Promotion Representative in lieu of a salary of Rs. 1000/- per month together with 20% House Rent subsidy per month. The company also mentioned in the appointment letter for some benefits like contributory provident fund, entitlement of bonus, leave facilities, gratuity benefits. There were also some conditions that the applicant being the employee shall not secure or try to secure any other posts or pursue any course of study or work etc. There was also provision of lay off in the appointment letter whenever the company would consider it necessary and his retirement was also fixed at 58 years of age, unless the service is terminated earlier. The headquarter for the present was at BEHRAMPUR, but the company reserves the right of transfer.

29/6/18
Judge
Second Labour Court

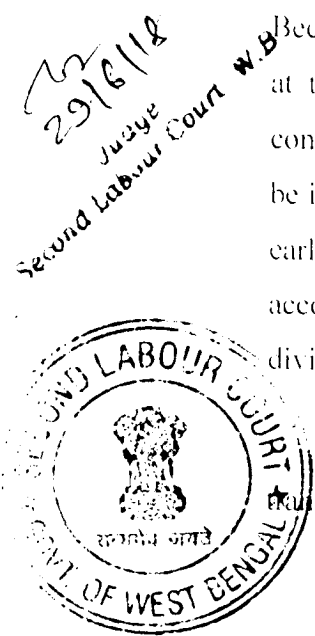
The applicant further stated that during the period of service rendered by him with the company he earned rewards, reputation and admiration by his superiors for his devotion to his duties. His service record was unblemished without any stigma. The management of the company had no opportunity to level any blame upon him regarding his performance as a Sales Promotion Representative. Being satisfied, the management confirmed his service in his post w.e.f. 21st day of March, 1995 on the terms and conditions and contained in the appointment letter, dated, 04.04.1994.

It is further stated in the application that the company by its letter No. CAL/F/411/2556 dated 31.03.1994 informed the applicant that his Headquarter is shifted from Behrampur to Siliguri w.e.f. 01.04.1994 and the applicant was attached to Food Division of the company at its original office at Shantiniketan Building, 8, Camac Street, Calcutta since the date of his appointment. The management was highly satisfied at the good performance of the applicant and the company awarded extra ordinary increment every year w.e.f. 1st day of April, 1995.

It is further stated that on 09.03.2000, the General Manager (Personnel) of the company, Mr. Ashok Bharti issued a letter notifying to all its Field and Office Staff ensuring the protection of the interest of the employees as per existing terms and conditions of employment consequent upon sale of their product brand - Viva and Maltova to M/s. Smithkline Beechem Healthcare Ltd. The duty and job responsibility of the employees were clarified through their inter office correspondence, dated, 17.02.2000 by Mr. S. Mahadevan, the Marketing Manager of Jagatjit Industries Ltd. (JIL), Food Headquarters Marketing at Chennai.

It is further stated that by an office correspondence on 15.02.2000 of the Director of the company that the company sold its brands namely Viva and Maltova to M/s. Smithkline Beechem Healthcare Ltd. and the company would continue to manufacture of those products at their own factory and all the Field Staff up to the level of Sales Executive would continue to be in the employment of the company and those employees would continue to be involved in the sales related activities of Maltova and Viva as were being done by them earlier. It was also intimated that the company, JIL (Jagatjit Industries Ltd.) would try to accommodate persons who cannot be covered under the above arrangement in other divisions of the company.

It is further stated that in between the period of 2000 and 2003, the company transferred some of its Sales Personnel of the brands Viva and Maltova to their liquor

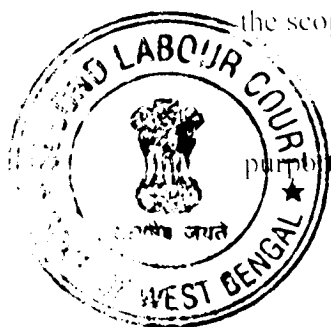


division for the same reason. M/s. Smithkline Bechem Healthcare Ltd., the purchaser company of those two products informed by letter dated 15.05.2000 to the distributors of all corner to the effect that the Field force who were attached to sales related activities of the company would be actively involved and would be fully responsible for the secondary sales management of viva and multova, but the employees were kept in dark as to the existence or non-existence of the renewal of the agreement executed by and between Jagatjit Industries Ltd. and Smithkline Bechem Healthcare Ltd.

The applicant has further stated that Mr. Ashoke Bharati, the Manager of JIL, by a notice dated 24.04.2004, intimated the applicant that with the sale of viva and multova brands to M/s. SBCH (now called Glaxo Smithkline Consumer Healthcare Ltd.), the company has entered into a distribution agreement with SBCH, under which the sales Personnel of JIL, relating to those brands were to attend the secondary selling and merchandising activities and such other sales related works and primary selling and collection were to be handled by SBCH and the distribution arrangement would be renewed time to time. JIL, further intimated by that notice, dated, 24.04.2004, that the management of SBCH sent them a notice, dated 03.12.2003 expressing their intention not to continue the secondary selling and merchandising agreement beyond 30.04.2004 and for that the activities of secondary selling and merchandising of JIL, would stand closed w.e.f. 30.04.2004. The applicant was deemed to have become retrenched U/s. 25FFF of the I.D. Act. In spite of the assurance given by management of the company, regarding continuation of service of the sales personnel of viva and multova division, such illegal notice intimating retrenchment w.e.f. 30.4.2004 was issued on 24.04.2004 and the same was received by the applicant after 30.04.2004.

The applicant further submitted that the manufacturing process of those products are still being carried on under the care, control and supervision of the company. There was no occasion to close down the undertaking of the company as all other divisions are working in animated form with support of the sales proceeds of the brands and the process of manufacturing of those brands are still continuing. The applicant actually received the termination notice on 01.05.2004, although the so called closure is fraudulent and beyond the scope and sanction of law under the Industrial Disputes Act, 1947.

The applicant has vehemently opposed the retrenchment by stating that the purported letter of retrenchment is void, illegal and in gross violation of the mandatory



provision of the Industrial Disputes Act, 1947. The termination as effected by the opposite party has been in violation of section 25N(1)(b), 25'O' and 25FFA of the Industrial Disputes Act, 1947 and moreover there was no compliance of section 25F of the I.D. Act, 1947. That apart, according to the applicant, the terms of appointment forbid the company to terminate the service of the applicant/ workman on fraudulent and unlawful reason.

The applicant has further stated that though the notice of termination was illegal, void and void-ab-initio, yet the company sent a draft for an amount o Rs. 73732.00 including the salary for the month of April, 2004. The applicant was compelled by the opposite party to encash the said draft and now he is ready to return the balance amount by adjustment of his back wages.

It is further stated that finding no other alternative, the applicant referred the matter to the Labour Commissioner, Govt. of West Bengal seeking their intervention in the matter. The Conciliation Officer arranged for several joint conferences for an amicable settlement, but due to adamant and non- compromising attitude of the management, no settlement could be arrived at. Thereafter, the applicant prayed for a certificate in the prescribed form and the Labour Commissioner issued the same and on the basis of that certificate, the applicant has filed this application before this forum-U/S 10(1B) (d) of the Industrial Act, 1947.

It is the further submission of the applicant that the so called retrenchment/termination is illegal unjustified, malafide and in gross violation of the principles of natural justice and the provision of the I.D. Act, 1947. He has further mentioned that the ownership or management of an undertaking is transferrable under section 25FF of the I.D. Act, but there is no provision in law for transfer of brands of a division of a company and maintaining of the production unit of the company of the sold brands and continuing the activities of the other divisions of the company and declaration of closure of the division after four years of the sale of the brands of that division.

It is further averred in the petition that there was no occasion for SBCIL, the purchaser company to discontinue the agreement of the year 2000 by sending any notice in December, 2003 to Jagatjit Industries Ltd. and it is fraudulent for M/s. Jagatjit Industries Ltd. to issue retrenchment notice on 24.04.2004, making its effect on and from 30.04.2004.



Accordingly, the applicant has prayed before this court to set aside the illegal notice of retrenchment/termination of service dated 24.04.2004 issued against the applicant and to pass order for reinstatement with full back wages for the period from forced unemployment, together with consequential relief.

Initially, the applicant filed this case against M/s. Jagatjit Industries Ltd. Accordingly, the said M/s. Jagatjit Industries Ltd. entered appearance in this case and submitted written objection. Thereafter, as per the prayer of the applicant, M/s. Smithkline Becham Consumer Healthcare Ltd. (now known as Glaxo Smithkline Consumer Healthcare Ltd.) was made added party No.2 by this court vide order No. 16 dated 08.05.2006. Thereafter the name of M/s. Jagatjit Industries Ltd. was struck out from this case vide this court's order No. 78 dated 26.11.2014 as per prayer of the applicant and M/s. Glaxo Smithkline Becham Consumer Healthcare Ltd. is now the sole opposite party.

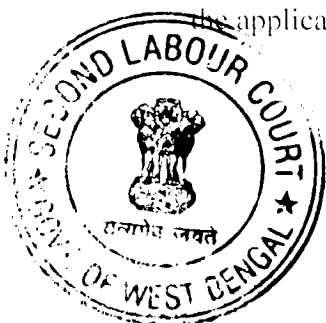
Accordingly, M/s. Jagatjit Industries Ltd. has no role to play in this case and the written objection filed by it does not require to be depicted.

Now, there is the sole opposite party namely, Glaxo Smithkline Becham Consumer Healthcare Ltd. and this opposite party filed written statement on 15.09.2014, challenging the case of the applicant.

The facts of the case of the opposite party, in nut shell, is that this opposite party is not a necessary party but a proper party. Starting from the order of Hon'ble Single Judge in Calcutta High Court, the decision of Division Bench of Hon'ble High Court Calcutta and even from the order of Hon'ble Apex Court it is transparent that this opposite party is a proper party, but not a necessary party. This view will be evident from the judgments passed in W.P. No. 13303(w) of 2006, from the result of the Appeal (MAT) 166 of 2011 and from the verdict of Hon'ble Apex Court passed in SLP(Civil) No. 783/2012.

It is further submitted by the O.P. that on a totality of the facts and circumstances, two things have come into light, viz, the contractual relationship between M/s. Jagatjit Industries Ltd. and M/s. Glaxo Smithkline Becham Consumer Healthcare Ltd. has come to an end w.e.f. 24th April, 2004 and M/s. Glaxo Smithkline Becham Consumer Healthcare Ltd. has been regarded as proper party but not as a necessary party, meaning thereby that the applicant cannot have any relief against M/s. Glaxo Smithkline Becham Consumer

29/6/18
Judge
Second Labour Court W.B.



Healthcare Ltd. The consequence of this will be that whatever award is rendered will be binding to that extent on the Respondent No.1. (Glaxo Smithkline Consumer Healthcare Ltd.). This is as per the law laid down by the court in Hochief Gammon -Vs- Industrial Tribunal, Bhubneshwar, Orissa and others reported in AIR 1964 SC 1746. It is trite law that a necessary party is one in whose absence an effective order cannot be passed whereas, on the other hand the proper party is one in whose absence an effective order can be passed. In view of the above matter, the presence of M/s.Glaxo Smithkline Becham Consumer Healthcare Ltd. is only required for the complete and final adjudication of the matter, but no order of the proceedings can ever bind it.

It is further stated in the written objection filed by M/s.Glaxo Smithkline Becham Consumer Healthcare Ltd. that Sri Suvendu Chaudhuri, the applicant was an employee under the Jagatjit Industries Ltd. and his service came to an end consequent upon the closure of the Food Division of Jagatjit Industries Ltd. by letter dated 24.04.2004. Closure compensation in terms of section 25FFF of the Industrial Dispute Act, 1947 was sent to him by Jagatjit Industries Ltd. with a clear indication that the applicant stood relieved from the service of the M/s.Jagatjit Industries Ltd. w.e.f. 30th April, 2004.

One union, in the name and style as Federation of Medical and Sales Representative Association of India raised an Industrial Dispute challenging the closure of food division of M/s. Jagatjit Industries Ltd. and ultimately by an order of reference dated 02nd August, 2005 following issues were referred for adjudication by the Ld. First Industrial Tribunal, Govt. of West Bengal.

- (1) Whether the closure of the food division of the company declared by the management w.e.f. 24.04.2004 by their notice dated 24.04.2004 is real and justified?
- (2) Whether the retrenchment of 19 workmen (mentioned in the list) by the management by their notice dated 24.04.2004 is justified?
- (3) What relief, if any, are the workmen entitled?

It is further mentioned in the written objection that the name of this applicant contains against Sl. No.9 of the chart displayed the names of the employees of the food division, yet this applicant by his letter dated 17.05.2004 raised industrial dispute with the Labour Department confirming him to be the employee of M/s. Jagatjit Industries Ltd. Moreover, no case has been made out in the application filed by the applicant testifying the

29/6/18
Judge
Industrial Tribunal



existence of employer-employee relationship between M/s.Glaxo Smithkline Becham Consumer Healthcare Ltd. and the applicant. It is further mentioned that at pre-adjudication stage the employer-employee relationship was never in existence and that can never be established by adding a M/s.Glaxo Smithkline Becham Consumer Healthcare Ltd. as additional party.

It is further stated that, in fact The Hon'ble High Court Calcutta in WP No. 13303(w) of 2006 was pleased to hold that M/s.Glaxo Smithkline Becham Consumer Healthcare Ltd. is not a necessary party to the instant proceeding, but be a proper party. The same decision has been upheld by the Hon'ble Division Bench Calcutta. The applicant preferred petition for Special Leave to Appeal before the Hon'ble Apex Court and the same was dismissed.

Accordingly, M/s. Glaxo Smithkline Becham Consumer Healthcare Ltd. prays for rejection of the application filed by the applicant U/s. 10(1B)(d) of the Industrial Disputes Act, 1947.

It is pertinent to mention here that after filing written objection by M/s. Jagatjit Industries Ltd. and adding GSCHL as O.P. No.2 the following issues were framed vide order No. 58 dated 24.12.2013:

ISSUES

- (1) Is the application U/s. 10(1B)(d) of the Industrial Disputes Act, 1947 consequent upon certificate issued by the Conciliation Officer maintainable in law?
- (2) Is the determination of contract of employment consequent upon closure would come within the scope and ambit of Section 10(1B)(d) of the Industrial Disputes Act, 1947?
- (3) Whether the selfsame dispute regarding the closure and termination of employment is pending before the Ld. First Industrial Tribunal?
- (4) Whether the applicant discharged duties in the scope and ambit of Section 2(s) of the Industrial Disputes Act, 1947?
- (5) Whether the O.P. No.2 was not the employer of the applicant since after is purchase of the Brands, Viva & Multova from the O.P. No.1?
- (6) Whether the O.P. No.2 is not bound to reinstate the applicant for doing the same works relating to those purchase brands by it and to pay the back wages to the applicant?
- (7) Whether the applicant is entitled to get the relief, if any, as prayed for?

29/6/18
Judge
Second Labour Court W.B.



M/s. Glaxo Smithkline Becham Consumer Healthcare Ltd. was added as O.P. No.2. Thereafter, this additional party submitted written objection and on the basis of the pleadings, the following additional issues were framed vide order No. 95 dated 16.02.2016.

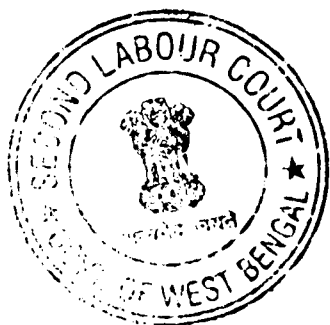
ADDITIONAL ISSUES

1. Whether the O.P. No.2 can be regarded as a necessary party to the present dispute?
 2. Whether the O.P. No.2 has become the owner of the brand Viva and Moltova w.e.f. 08.02.2000 on purchasing those brands?
 3. Whether the provision of Section 25FF (proviso) of Industrial Disputes Act, 1947 will be applicable in this case?
 4. Whether the retrenchment of the applicant/workman was in compliance with the condition precedent enumerated in Section 25F of the Industrial Disputes Act, 1947?
 5. Whether the applicant is entitled to get any relief in respect of O.P. 2 in view of the judgment and order dated 24.12.2010 passed by the Hon'ble High Court, Calcutta in W.P. No. 13303(w) of 2006?
 6. Whether the applicant is entitled to get any relief U/s. 11A of the Industrial Disputes Act, 1947?
- The applicant preferred only one decision i.e. the judgment passed by the Hon'ble Supreme Court in the petition for Special Leave to Appeal filed by him in 783/2012 filed by the applicant.

On the other hand the opposite party referred decisions held in:

1. 2004 SC 243(workmen of Nilgiri Coop.Mkt.Society Ltd. Vs. State of Tamil Nadu and Ors.)
2. 2005 SC 338(Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari).
3. 2013 ALL Hon'ble High Court 064(U.P. State warehousing corporation & Another Vs. Presiding Officer Industrial Tribunal & Another).
4. 2010 SC 1161(General Manager(OSD), Bengal Nagpur Cotton Mills Rajnandgaon Vs. Bharatlal & Another.)
5. 2014 SC 694 Balwantraai Saluja & Another Vs. Air India Ltd. & Others.
6. 2013 Cal HC 377(Calcutta Port Trust Union Vs. Haldia shore ship & Transport Handling Workers Co-operative Construction Society Ltd. & Another.)

2
25/8/18
Judge
Second Labour Court W.B



DECISION WITH REASONS

Issue No. 1

This issue is taken up alone for brevity of discussion and taking decision. Section 10 of the Industrial Disputes Act, 1947 deals with reference of disputes to boards, courts or tribunals.

Section 10. Reference of Disputes to Boards, Courts or Tribunals – Section 10(1) of the Act is in the nature of operative provision providing for reference of any matter relating to an industrial dispute or the dispute itself to various authorities created by the Act. A precondition for making any reference by the Appropriate Government under this section is in existence or apprehension of an industrial dispute. The reference should be by an order in writing. This sub-section provides that where the Appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time:

- (a) refer the dispute to a Board for promoting a settlement thereof; or
- (b) Refer any matter appearing to be connected with or relevant to, the dispute to a court for inquiry; or
- (c) Refer the dispute or any matter appearing to be connected with, or relevant to the dispute, to a Labour Court for adjudication provided the dispute relates to any matter specified in the second schedule; or
- (d) Refer the dispute or any matter appearing to be connected with, or relevant to, the dispute (where it relates to any matter specified in the Second Schedule or Third Schedule), to a tribunal for adjudication;

There are some provisos in this section but those are not relevant to the instant proceedings.

The applicant made a prayer before the appropriate Govt. under reference against JIL and no conciliation could arrive at. Admittedly, after obtaining certificate from the appropriate Govt. the instant proceeding was initiated against only JIL, the erstwhile only O.P. At present the GSCIL has become the only sole O.P. and this O.P. was not a party to the conciliation proceedings before the appropriate Govt.

29/6/18
Judge
Second Labour Court W.B



Accordingly, this issue has become infructuous in the present scenario and thus this issue is disposed of.

Issue No. 3:

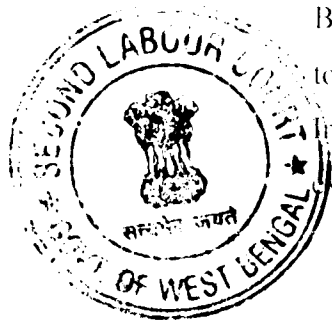
This issue is taken up alone for convenience of discussion and taking decision. Ld. Advocate of the opposite parties during course of his argument submitted that one union in the name and style as Federation of Medical and Sales Representatives Association of India raised and Industrial disputes challenging the closure of Food Division of M/s Jagatjit Industries Ltd (herein after to be called and known as JIL) before the Labour Department, Govt. of West Bengal. The Assistant Secretary, to the Govt. of West Bengal Labour Department vide its letter No. 908-LR/IR/111-67/05, dated 2nd August 2005 referred the matter to the Ld. First Industrial Tribunal for passing award after determining three issues which were framed by the Labour Department as follows:

1. Whether the closure of the "Food Division" of the company declared by the management with effect from 24-04-04 by their notice dated 24-04-04 is real & justified?
2. Whether the retrenchment of 19 workmen (mentioned in the list) by the management by their notice dated 24-04-04 is justified?
3. What relief, if any are the workmen entitled to?

Therefore, according to him, two proceedings cannot run simultaneously while the applicant through his union has joined in that proceedings. then he should have to wait for the result of Ld. Tribunal. Ld. Advocate for the applicant/workman submitted that his client did not authorize any person there to add him in that proceeding.

After hearing argument from both sides, this court goes through the documents marked as exhibit (4). In this exhibited documents, in Page 60 to 62 this court finds that the submission of Ld. Advocate of the opposite party is justified. By letter No. 908-LR/IR/111-67/05, dated 2nd August 2005, the Assistant Secretary to the Govt. of West Bengal, Labour Department sends the dispute to the Ld. First Industrial Tribunal for passing its awards. It further appears from page 62 of exhibit (4) that the name of Mr. Suvendu Chaudhuri appears in Sl. No. 9 out of

29/6/18
JUDGE
SECOND LABOUR COURT W.B.



19 employees. I.d. Advocate for the O.P failed to produce any documentary evidence to show that the applicant authorized any person to that said reference.

But this dispute is pending in between JIL and Federation of Medical and Sales Representatives Association of India, wherein the beneficiaries are the employees of JIL. The present opposite party namely, M/s Glaxo Smithkline Beecham Consumer Healthcare Ltd. (herein after to be called and known as GSCHL) is not a party to that reference. In the instant case of M/s JIL is also not a party. Therefore, it cannot be held that the selfsame proceeding is pending before the First Industrial Tribunal.

Thus, this issue is disposed of in favour of the applicant.

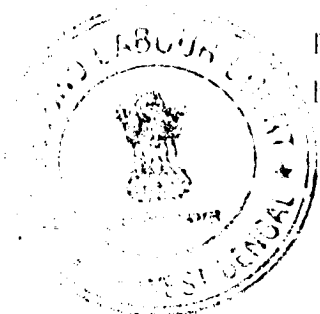
Issue No. 4:

This issue is also taken up also for brevity of discussion and taking decision. It relates to the definition of "workman". Section 2(s) of the Industrial disputes Act, 1947 defines – "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.....".

The determination as to whether Mr Suvendu Chaudhuri/applicant is a workman or not is not so vital in the instant case. The O.P. did not take the defence that the applicant is not a workman within the meaning of section 2(s) of the Industrial Disputes Act, 1947. No argument has advanced to that effect from the side of O.P.

The applicant in his statement of facts claimed himself to be the sales promotion representative with a salary of Rs. 1000 per month together with 20% house rent subsidy per month with effect from 22.03.1994. The applicant did not

29/6/18
Judge
Second Labour Court



produce his letter of appointment as was issued by JIL on 4th April, 1994. He has placed a letter of confirmation in JIL with effect from 21st March, 1995 as per terms and conditions contained in the appointment letter dated 04.04.1994. This court does not find what were the terms and conditions contained in the appointment letter dated 04.04.1994. Exhibit (4) is a bundle of documents wherein at Page No.56, the confirmation letter appears. This letter contains the fact that **"The management is pleased to confirm your appointment in our organization with effect from 21st March 1995 on the terms and conditions contained in your Letter of Appointment dated 4th April, 1994....."**

The applicant claimed himself to be a sales promotion representative in JIL on and from 22nd day of March, 1994, but the service confirmation letters speaks that his appointment letter was issued on 4th April, 1994 and his service was confirmed wef. 21st March, 1995. This court fails to understand as to why appointment letter was issued later than that of his joining in service

Therefore, this court does not find any document from where the terms and conditions of employment of the applicant in JIL would be visible.

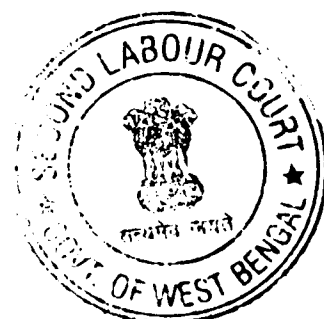
However, the present opposite party did not press this issue regarding the status of the employee and now this court does not want to discuss more. In that event, this issue is decided in favour of the applicant.

Issue No. 2 & 5

These two issues are aliking and are taken up together for convenience of taking decision.

The applicant filed this case only against JIL. The case made out in its application is that he was employed by JIL on 22nd day of March, 1994 and his service was confirmed by JIL by issuing letter dated 13th April, 1995 and that document has been marked in the series of document in exhibit 4. The applicant was examined as PW1. In cross examination he has candidly admitted that he was an employee of JIL. By tendering exhibit 2 (notice of closure of secondary selling and merchandising activities of Viva and Maltova Brands by Jagatjit Industries Ltd.) to PW1, question was put from the side of O.P. that who send this notice to this witness, the applicant answered that M/s. JIL send that notice. Then it is cleared that notice of closure of secondary selling and merchandising activities of

29/6/12
Judge
Second Labour Court, Kolkata



Viva & Maltova brands by JIL. This notice also displays the closure compensation amount and it further reveals that the applicant was to relieve from service w.e.f 30.04.2004. At the time of initiating of this dispute u/s 10 (1B), LD Act, 1947 on 03.12.2004 and by filing written statement on 16.05.2005, the applicant claimed himself to be the employee under JIL and categorically stated that the manufacturing of food products Viva and Maltova were carried on by JIL. Even after adding the present O.P(GSCHL), the applicant did not amend his main application or his written statement to the effect that M/s GSCHL is his employer. During the course of making adding party, the applicant claimed himself to be the employee of GSCHL.

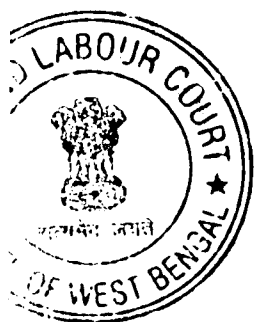
Both sides argued on this point. Ld. Advocate for the applicant argued that since the product of Viva and Maltova have been purchased by the O.P (GSCHL), and as the applicant was the sales promotion executive of those brands, it is to be presumed that the applicant has become employee under GSCHL.

Ld. Advocate for the O.P argued that onus is upon him who exerts the fact. Here, according to him, the applicant claims himself to be the employee GSCHL, but he failed to establish this fact by adducing fortified, cogent and believable evidence either by oral or documentary. In arguing so, he relied upon decision held in:-

- (1) 2004 SC 243 (Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamilnadu and Ors.)
- (2) 2005 SC 338 (Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari)
- (3) 2013 All Hon'ble High Court 064 (U.P Statewarehousing Corporation & Another Vs. Presiding Officer Industrial Tribunal & Another)

On careful perusal of the above mentioned decisions it appears to this court that the Hon'ble High Courts and the Hon'ble Apex Court were pleased to hold that the burden of proof would be upon him who sets up a plea of existence of relationship of employer and employee. In the above referred decisions, the Hon'ble Apex Court has made it clear upon whom the burden of proof lies as mentioned below:

29/6/18
Judge
Second Labour Court W.B.



"BURDEN OF PROOF"

"It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employee and employer, the burden would be upon him. In N.C. John Vs. Secretary Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Others [1973 Lab. L.C.398], the Kerala High Court held:

The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship"

In Swapan das Gupta and Other Vs. the first Labour Court of West Bengal and Others [1975 Lab.L.C.202] it has been held:

Where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

The question whether the relationship between the parties is one of the employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."

Therefore, it is transparent that the burden of proof lies upon him who asserts the fact. Here in this case, the applicant claimed himself to be the employee under GSCIL, but no documentary proof has come on record. Even PW1, the applicant failed to establish by oral fortified evidence that the opposite party is his employer after purchasing the brands Viva and Maltova.

The parameter of establishing employer employee relationship depends upon certain factors and that has been made clear by the Hon'ble Apex Court in 2014 SC 694 (Bawantrai Saluja & Another Vs. Air India Ltd. & Ors.). In deciding the employer employee relationship in the above mentioned decision, the Hon'ble Apex Court made the following guidelines:

29/6/18
Judge
Second Labour Court West Bengal



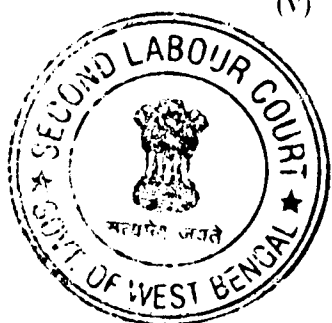
"Thus it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia, (i) who appoints the workers; (ii) who pays the salary/remuneration;

(iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v) whether there is continuity of service; and (vi) extent of control and supervision, i.e. whether there exists complete control and supervision. As regards, extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case (supra), the International Airport Authority of India case (supra) and the NALCO case (supra).

All the above points for determination of relationship in the instant case is here by discussed as below:

- (i) **who appoints the workers:-** Here in this case, the present opposite party (GSCHL) did not issue any appointment letter and or did not employ the applicant under it even at the time of entering into secondary selling and merchandising agreement, nor even after purchasing of the brands Viva & Maltova.
- (ii) **who pays the salary/remuneration:-** The opposite party here in never paid salary/remuneration to the applicant and it is not the case of the applicant that the present opposite party paid him salary/remuneration.
- (iii) **who has the authority to dismiss:-** Obviously, the present O.P. did not dismiss the applicant. Rather it is the case of the applicant that JIL by letter dated 24th April, 2004 (exbt 2) terminated his service wef. 30th April, 2004. The present O.P. had no occasion to dismiss the applicant from his service.
- (iv) **who can take disciplinary action:-** In the instant case M/s GSCHL had no occasion to take any disciplinary action against the petitioner. The applicant never placed his service under the present O.P. Therefore, the question of taking disciplinary action by GSCHL does not arise.
- (v) **whether there is continuity of service:-** This point is vital in the instant case. Ld. Advocate for the applicant tried to convince this court that the applicant was absorbed in service by JIL and he was the Sales Promotion Executive for Viva and Maltova and he continued the service even after purchasing the

29/6/18
Judge
Second Labour Court W.B



above mentioned products by GSCHL. Now, this moot question can be solved by going through the covenant held in between JIL and SBCH (presently known as GSCHL). That agreement has been marked from the side of applicant as exbt (4).

Sub Clause (ii) of Clause 11 of the said agreement reads as follows:

"All employees of JIL shall be and continue to remain employees of JIL. Nothing herein or anywhere else shall be deemed to constitute an assignment of any personnel of JIL to SBCH. All liabilities, obligations, whether statutory or under contract or otherwise howsoever in relation to JIL's employees, shall be and remain those of JIL. JIL hereby indemnifies SBCH against all and any claims, demands and/or assertions by and/or on behalf of any JIL's employees against SBCH. JIL undertakes to promptly and fully comply with all statutory and other obligations in relation to its employees."

As per agreement of secondary selling and merchandising held in between JIL and SBCH, M/s SBCH had to perform certain obligation as mentioned in Clause 5 of that agreement which reads as follows:

"(i) In consideration of JIL performing the Services SBCH shall pay JIL the following monthly fee exclusive of service tax or any other indirect tax, if any:

Rs. 10,00,000/- (Rupees Ten Lakhs only) per month

(ii) In addition to the above, JIL may charge Out of Pocket expenses e.g. travelling and other incidental expenses (such as printing and stationery) actually and properly incurred and all such expenses shall have the prior approval of SBCH.

(iii) All payment made by SBCH to JIL shall be subject to all applicable tax laws.

(iv) JIL shall raise an invoice on SBCH on a monthly basis and SBCH shall make requisite payment within 21 days of receipt of such invoice.

(vi) The fee as set out in Clause 5(i) above is valid up to 31st December 2000 whether this shall be mutually reviewed and agreed by and between the parties."

29/6/18
Judge
Labour Court W.B.



Therefore, it is crystal clear that the applicant did not continue his service under the present O.P. at any point of time, even the continuation of service under the present O.P does not arise at all as the present O.P did not take the responsibility and liability of the employees of JIL, neither at the time of entering into secondary selling and merchandising agreement nor even after termination of the said agreement.

(vii) **extent of control and supervision:-** Admittedly, the present O.P. had no occasion to control and supervise the service of the applicant. JIL Controlled and

supervised the services of the workmen who were put by JIL for looking after the brands Viva and Maltova after entering into secondary selling and merchandising agreement and for that the present O.P. had to pay some allowance to JIL.

Therefore, the present O.P (GSCHL) had no power to control and supervise the service of the applicant even a least.

Considering the discussions held in the foregoing paragraphs, this court is construed to hold that the present O.P. was not of the employer of the applicant since after purchase of brands Viva and Maltova.

Thus, these two issues are decided against the applicant.

Additional issue No. 1

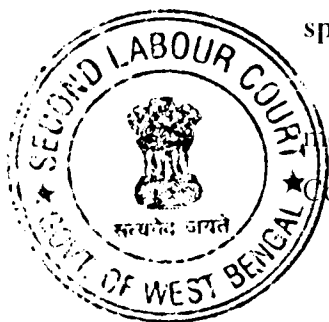
This issue relates to the bone of contention of the parties as to whether GSCHL be regarded as necessary party to the present dispute.

A marathon argument and series of appeals were made by both sides.

Ld. Advocate of the O.P during course of his arguments time and again submitted that GSCHL is not a necessary party but a proper party. In arguing so, Ld. Advocate attracted the notice of this court towards the order passed by the Hon'ble Judge of Single Bench in W.P. No. 13303(W) of 2006 and the order passed by Hon'ble Division Bench in MAT No. 166 of 2011(FMA No. 729 of 2011) and the solemn verdict of The Hon'ble Apex Court passed in special leave to appeal (Civil) No. 783/2012.

Now, this court carefully goes through the solemn verdicts of the above mentioned decisions of Hon'ble High Court, Calcutta and the Hon'ble Apex Court, India. It is crystal cleared that all the Hon'ble Courts relied upon the

25/6/18
Judge
Second Labour Court W.B



The applicant was appointed by M/s JIL. After termination of his service, M/s JIL complied with Section 25F of the Act. It appears from exbt(2) that notice of closure of secondary selling and merchandising activities of Viva & Maltova was sent to the applicant by M/s JIL. By that notice an amount of Rs. 74,240.00 towards retrenchment compensation was given to the applicant by M/s JIL after deducting P.F of Rs. 468.00 and Professional Tax of Rs. 40.00. The applicant

received the said amount and he has admitted the fact. Section 25FF of the Industrial Disputes Act, 1947 deals with compensation to workmen in case of transfer of undertakings.

Section 25FFF of the Industrial Disputes Act, 1947 deals with compensation to workmen in case of closing down of undertakings. These two sections clearly speaks of retrenchment compensation to be paid to the workmen as per Sections 25F of the Act. As M/s JIL was the appointing authority of the applicant, it has complied with the provision of section 25FF and 25F of the Act. The question of compliance of the proviso of section 25FF does not hit M/s GSCHL. Section 25FF proviso speaks as follows:

"Provided" that nothing in this section shall apply to workman in any case where there has been a change of employers by reason of the transfer, if -

- (a) The service of the workman has not been interrupted by such transfer;
- (b) The terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
- (c) The new employer is under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

As per Clause (a) of Section 25FF, of the Act, the service of the workman was interrupted as soon as closing down of the undertaking and payment of closure compensation. By the same way Clause (b) (c) of Section 25FF (proviso) of the Act, the workman never be termed as the employee under the purchaser company. This court has also discussed the point of employer-employee relationship in between M/s GSCHL and the applicant in disposing of issue nos. 2 & 5 and those issues have been decided against the applicant.

29/6/18
Judge
Second Labour Court W.B.



Thus, these two additional issues are decided against the applicant.

Issue nos. 6, 7 and additional issue no. 5 and 6

All these four issues are co-related with each other and for that reason these issues are taken conjointly for taking decision.

This court has taken decision that the applicant is not the employee under M/s GSCHL. He has accepted the closure compensation within the meaning of Section 25F of the Act from M/s JIL. M/s GSCHL did not take the responsibility and liability of the employees who were working under M/s JIL. The agreement dated 08.02.2000(exbt 4) is clear to that effect.

Now, the question arises being the added party what is the liability rests upon M/s GSCHL. As soon as it became added party, it moved a writ petition being no. 13303(w) of 2006 before the Hon'ble High Court, Calcutta. Hon'ble Mr. Justice Aniruddha Bose was pleased to hold that M/s GSCHL is not necessary party but a proper party. The applicant preferred appeal before the Hon'ble Division Bench and the decision of Hon'ble Judge of Single Bench, Calcutta was confirmed in MAT No.166 of 2011(FMA No. 729 of 2011). The applicant again preferred petition for Special Leave to Appeal, being No. 783 of 2012 before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court was pleased to dismiss the Petition for SLA and did not allow the petitioner for appeal with the observation that "we fail to see what is the grievance of the petitioner".

The last paragraph of the solemn order of the Hon'ble Apex Court is mentioned below:

"In that proceeding he has applied to join respondent No. 1 as additional respondent. The Labour Court has allowed that application by holding that respondent No.1 would be a proper party if not a necessary party. That view has been confirmed all throughout. The consequence of this will be that whatever award is rendered, will be binding to that extent on the respondent no.1. This is as per the law laid down by this court in Hochief Gammon Vs. Industrial Tribunal, Bhubneshwar, Orissa and others reported in AIR(1964)



29/6/18
Judge
2nd Labour Court W.B

SC 1746. The impugned order takes care of the interest of the petitioner. We fail to see what is the grievance of the petitioner”.

The Hon'ble Supreme Court did not pass any comment on “proper party” or “necessary party”. Ld. Advocate for Opposite Party/Company referred decision held in 2013 CAL HC 377. It appears from this decision that Hon'ble High Court was pleased to hold “..... in necessary parties one, in whose absence an effective order cannot be made, whereas the proper parties one, in whose absence an effective order can be made but, whose presence is necessary for complete and final adjudication of the dispute involved in the proceeding as held in Ramesh Hira Chand Kundanmal (Supra)”

The observation of the Hon'ble Supreme Court held in petition for Special Leave to Appeal No. 783/2012 is very vital to this case. In fact Hon'ble Apex Court wanted to mean by using the words “**Whatever award is rendered**” i.e. the award be either in positive form or negative form. Now, this court is to see what the “award” means. As per the Industrial Disputes Act, 1947 any order of final adjudication is termed as **AWARD**. To grant relief is an award, by the same way rejection is also an award.

Therefore, the argument which was advanced from the side of applicant that the Hon'ble Apex Court has been pleased to direct this court by speaking order that the award be passed in favour of the applicant, has no basis at all.

This court has decided in issue no. 2 & 5 against the applicant and that be so, the applicant is not entitled to get any relief as prayed for and those grounds are again mentioned below:

- 29/6/18
- (1) M/s. GSCHL did not take the liability and responsibility of the employees of M/s. JIL.
 - (2) There is/was no employer-employee relationship in between M/s. GSCHL and Mr. Suvendu Chaudhuri.
 - (3) The applicant never worked under M/s. GSCHL
 - (4) M/s. GSCHL had no supervision and control over the applicant and it did not retrench the applicant.




- (5) The applicant did not make M/s. GSCHL a party to the conciliation proceedings.
- (6) The applicant accepted the retrenchment compensation from his employer M/s. JIL
- (7) By accepting retrenchment compensation, the applicant accepted the retrenchment.
- (8) The applicant did not refund the compensation money.
- (9) The applicant did not file any petition before this court intending to refund the compensation money.
- (10) The applicant did not approach to M/s GSCHL praying for absorbing him in service.
- (11) After making M/s. GSCHL added party, no new case has been made out by the applicant by amending his application.
- (12) The actual employer viz M/s. JIL has been given relief from this case at the sweet will of the applicant.
- (13) The closure of Food Division of M/s. JIL is a subject matter in the sub judice dispute before the Ld. First Industrial Tribunal.
- (14) M/s GSCHL is not a necessary party to this dispute, but a proper party.

Accordingly, all these four issues are decided against the applicant. In the sum the case fails. Hence, it is

Ordered

that the instant petition u/s. 10 (1B)(d) of Industrial Dispute Act, 1947 is hereby rejected on contest but without cost. This is the award passed by this court.

Judge


(Arabinda Panty)
Judge, 2nd Labour Court
Kolkata.
29.06.2018

