

I/70883/2019

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

No. Labr/ 1028/(LC-IR)/22015(16)/640/2019

Date : 2/12/ 2019

**ORDER**

WHEREAS under the Government of West Bengal, Labour Department Order No. 386-IR/11L-131/2002 dated 18.04.2007 the Industrial Dispute between M/s Dalmia Industries Ltd., 12 B, Stephen House, 4, B.B.D. Bag East, Kolkata – 700 001, Head Office at 8-A, Atma Ram House, 1, Tolstoy Marg, New Delhi - 110001 and their workmen represented by Medical Sales Representatives Union, 5, Sarat Ghosh Street, Kolkata – 700 014 regarding the issues mentioned in the said order, being a matter specified in the Second Schedule to the Industrial Dispute Act, 1947 (14 of 1947), was referred for adjudication to the Judge, Third Industrial Tribunal, Kolkata.

AND WHEREAS the Judge of the said Third Industrial Tribunal, Kolkata, has submitted to the State Government its award 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

Date : 2/12/ 2019

No. Labr/ 1028/(15)/(LC-IR)

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

1. M/s Dalmia Industries Ltd., 12 B, Stephen House, 4, B.B.D. Bag East, Kolkata – 700 001.
2. The Secretary, Medical Sales Representatives Union, 5, Sarat Ghosh Street, Kolkata – 700 014.
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B. New Secretariat Buildings, 1, K. S. Roy Road, 11<sup>th</sup> Floor, Kolkata- 700001.
5. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Department's website.

No. Labr/ 1028/2(2)/(LC-IR)

Date : 2/12/ 2019

Deputy Secretary

Copy forwarded for information to :

1. The Judge, Third Industrial Tribunal, Kolkata with reference to his Memo No. 1444 – L.T. dated 07.11.2019.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.

Deputy Secretary



BEFORE THE THIRD INDUSTRIAL TRIBUNAL, WEST BENGAL

PRESENT: *SRI SUBERTHI SARKAR, JUDGE, THIRD INDUSTRIAL TRIBUNAL.*

CASE NO.. VIII-36/2007

DATE – 31<sup>ST</sup> OCTOBER, 2019

Workmen represented by West Bengal Medical Sales Representatives' Union, 5, Sharat Ghosh Street, Kolkata – 700014 (Regn. No. 17866).

.....Applicant

-VS-

M/s. Dalmia Industries Ltd., 12 B, Stephen House, 4, B.B.D. Bag East, Kolkata-700 001, Head Office at 8-A, Atma Ram House, 1, Tolstoy Marg, New Delhi-110001

..... Opposite Party

A W A R D

By Government of West Bengal, Labour Deptt., G.O. No.386-I.R./IR/11L-131/2002 dt.18.04.2007 an Industrial Dispute between M/s. Dalmia Industries Ltd., 12 B, Stephen House, 4, B.B.D. Bag East, Kolkata-700 001, Head Office at 8-A, Atma Ram House, 1, Tolstoy Marg, New Delhi-110001 and their workmen represented by Medical Sales Representatives Union, 5, Sarat Ghosh Street, Kolkata – 700014 (Regn. No. 17866) has been referred to this Tribunal for adjudication of the following issues:

I S S U E(S)

1. Whether the termination of service of Shri Saibal Chatterjee by the management with effect from 12.05.1999 is justified?
2. What relief, if any, is he entitled to?

1. The case of the petitioner/union is that Shri Saibal Chatterjee was appointed by the OP/Company on probation w.e.f. 04.06.1991 and his head quarter was at Calcutta. The Company issued letter dt. 01.11.1991 and the head quarter of the workman was changed from Kolkata to Ranchi w.e.f. 02.12.1991. The Company confirmed him in service w.e.f. 01.04.1993. The name of the Company was changed from "M/s. Dalmia Dairy Industries Ltd.," to "M/s. Dalmia Industries Ltd.". Further, case is that the said workman's duty was to promote Company's product like baby food, nutrition supplement, cereal foods and medicine to doctors' level and visit chemist shop to book the orders and generate doctor's prescription. There was no staff under him. He had no subordinate staff. He has to report to the First Line Manager, Marketing Sales Executive (MSE) at Patna and Regional Manager at Kolkata. He had no power to take independent decision, which could bind upon the Management. It is the case of the Union that the Company again transferred



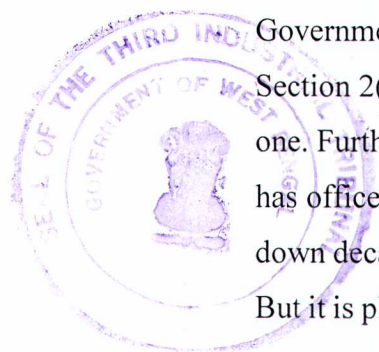
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Mr. Chatterjee from Ranchi to Kolkata w.e.f 01.04.1998 and since then he had been performing his duty at Kolkata head quarter. Being a very efficient worker and good performer in duty, he was allowed increment by the Company. But, said workman became seriously ill from 20.07.1998 due to his spinal cord problem and as such he could not report for duty and such fact was duly informed to the Management of the Company over telephone as well as in writing by letter dt. 15.08.1998 requesting the Management for granting him leave. As per the advice of the doctors, the workman Mr. Chatterjee undergone for surgery on 12.04.1999 in Apollo Speciality Hospital at Chennai. He there after returned back to Kolkata on 09.05.1999 and informed the same to the Management of the Company by letter dt. 12.05.1999. It is further case of the union that without considering the ailing condition of the workman, the Company illegally terminated his service w.e.f. 12.05.1999, violating the principle of natural justice. No show-cause notice or charge-sheet was issued against him nor any enquiry was held before such termination. The union raised protest in writing before the Management against such illegal dismissal. The concerned workman also made several calls at the office of the Company demanding restoration of his service and for the due salaries, but the Management did not allow such prayer. Ultimately, the union raised dispute before the Asstt. Labour Commissioner, Kolkata and the later initiated conciliation proceeding and issued notice to the Company, but due to the adamant attitude of the Management the dispute could not be settled. Thus, the Conciliation Officer submitted report to the State Government U/s. 12(4) of the Industrial Disputes Act, 1947 and the matter was referred before this Tribunal for adjudication as to the aforementioned issues. The union contends that the workman used to get salary of Rs. 3053.20 (Rupees three thousand fifty-three and twenty paise) per month at the material period. The union has prayed for reinstatement with full back wages of the said workman.

2. The Company contested the case by filing written statement denying the case as well as the allegation of the petitioner. Part-I of the written statement is about maintainability of the case whereas Part-II narrates the facts of the case in brief and Part-III deals with the averments made by the union in its written statement. It is specifically pleaded by the Company that the applicant was not a workman within the meaning and scope of Section 2(s) of Industrial Disputes Act, 1947 as he was a staff of managerial and supervisory category of the Company. It is contended that, there was no mandatory espousal of any alleged dispute with the management of the Company, either by workman or by the union before raising of an Industrial Dispute which lead to the order of reference. The union has no representative character to validly espouse the cause of the applicant. It is contended that the case is not maintainable due to lack of jurisdiction and that the appropriate Government constituting this Tribunal is not the appropriate Government in view of Section 2(a) of the Industrial Disputes Act, 1947. The present dispute is stated to be a stale one. Further case of the Company is that it has Regd. Office at Bharatpur, Rajasthan and it has office at all big Metropolitan cities of the country and that Calcutta office was closed down decades back. It is admitted that the applicant was appointed as a Promotion Officer. But it is pleaded that it was a post of managerial and supervisory category and accordingly,

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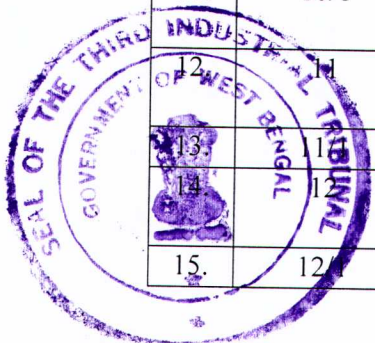




the applicant was in independent charge of his team of Sales Representatives and he had the power to take each and every decision with regard to his team members including appointments, granting of leaves, initiating disciplinary proceedings etc. The profits earned by the Company were distributed amongst its employees including the applicant by payment of salaries. It is alleged that the applicant started absenting from his service from July, 1998 without any information, due to which the functioning of the team was hampered causing immense disruption and great financial loss to the Company. The Company made stop gap arrangements in his place and tried to contact him, but the applicant remained silent which led the company to presume that the applicant was not interested in the service of the Company and so he was requested to collect his full and final dues from the Company by its' communication dt. 12.05.1999, which he did. He did not make any representation to the Company or corresponded with the Company. However, all of a sudden in the year 2011, the Company received a notice from the Ld. 1<sup>st</sup> Labour Court, West Bengal directing it to appear before it. On enquiry it was revealed that the said case was disposed of 'ex-parte'. The Company ultimately filed W.P. No. 127 of 2013 before the Hon'ble High Court, Calcutta and the 'ex-parte' was set aside directing the Ld. Tribunal to hear the matter 'on merit'. Thus, denying the case as well as the allegation of the applicant/union, the Company has prayed for dismissal of the case.

3. The contesting parties were given chance to adduce their evidence. Accordingly, the union adduced PW-1, Shri Saibal Chatterjee. The following documents were produced and proved from the side of the Union: -

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
1.	1	Copy of Appointment letter of Mr. Saibal Chatterjee	04.06.1991	14.12.2015
2.	2	Copy of Transfer order of Mr. Saibal Chatterjee	01.11.1991	14.12.2015
3.	3	Copy of Confirmation letter of Mr. Saibal Chatterjee	19.04.1993	14.12.2015
4.	4	Copy of Transfer Letter Mr. Saibal Chatterjee	31.03.1998	14.12.2015
5.	5	Copy of letter of appraisal of salary of Mr. Chatterjee	24.04.1998	14.12.2015
6.	6.	Copy of termination letter	12.05.1999	14.12.2015
7.	7.	Copy of Medical paper of Appollo Speciality Hospital, Chennai	17.08.1999	14.12.2015
8.	8	Copy of letter addressed to the Regional Manager of the Company	15.08.1998	14.12.2015
9.	9	Copy of letter addressed to the Accounts Manager of the Company	12.05.1999	14.12.2015
10.	10	Copy of letter addressed to the Dy. General Manager of the Company	28.05.1999	14.12.2015
11.	10/1	Copy of postal slip bearing no. 1812	29.05.1999	01.04.2016
12.	11	Copy of letter addressed to the General Manager of the Company	06.09.1999	14.12.2015
13.	11	Copy of postal slip bearing no. 1937	06.09.1999	01.04.2016
14.	12	Copy of letter addressed to the Company	20.12.2002	14.12.2015
15.	12	Copy of postal slip bearing no. 3525	20.12.2002	01.04.2016





S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
16.	12/2	Copy of letter of Postal Deptt. addressed to Mr. Chatterjee	24.02.2003	01.04.2016
17.	13	Copy of letter issued by W.B.M.S. R's Union addressed to the Company	03.02.2003	14.12.2015
18.	13/1	Copy of postal slip bearing no. 3069	04.02.2003	01.04.2016
19.	14	Copy of certificate of Madhyamik Pariksha under WBBSE of Mr. Chatterjee	—	16.02.2016

On the contrary Shri Virender Singh was examined as O.P.W.-1 and Shri Sudip Karmakar was examined as O.P.W-2 from the side of the Company. The following documents were produced and proved from the side of the O.P/Company

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
1.	A	Copy of letter issued by Company to Mr. Saibal Chatterjee	12.05.1999	22.06.2016
2.	B	Copy of sales tax registration certificate of Company relating to Delhi Office		20.03.2017
3.	C [ 3 sheets ]	Copy of sales tax receipt of Company relating to Ambala City, Haryana		20.03.2017
4.	D [ 3 sheets ]	Copy of the document of sales tax relating to Mumbai, Maharashtra		20.03.2017
5.	E [ 6 sheets ]	Copy of sale tax registration certificate of the Company relating to Chennai, Tamilnadu		20.03.2017
6.	F	Actual Conciliation File being no. 113/2003 consisting of 10 note-sheet pages and 72 other relevant pages		13.04.2018
7.	X (for identification)	Copy of document of sales tax relating to Bharatpur, Rajasthan		20.03.2017

#### 4. Decisions with reason

During the course of argument, it was contended from the side of the Company that the union did not file any document to show proper representation of individual. Accordingly, the case is barred by Section 2(k) as well as Section 2A and Section 10 of the Industrial Disputes Act, 1947. The Ld. Advocate submitted that the post of the applicant was most responsible post and his long absence in the service caused loss to the Company. Thus, in his view no punitive reason but the just reason is given in **Exhibit'6'**. The Ld. Advocate submitted that the applicant is not a workman as defined in Section 2(s) of the Act and he was a staff of the managerial and supervisory category. He also submitted that this Tribunal lacks territorial jurisdiction to decide the case. The Ld. Advocate further submitted that the applicant not being able to prove its case, not entitled to any relief, far to speak of any back wages. He referred decisions reported in –

- i) 1963(1) LLJ 679 ( P.H. Kalyani-vs- Air France, Calcutta )
- ii) 2006 (1) LLJ 496 ((U.P. State Brassware Corporation Ltd.– vs- Udai Narain Pandey).



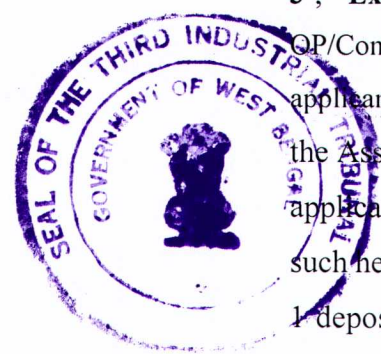
- iii) 2008(3) LLJ 562 (Rajasthan Lalit Kala Academy vs Radhey Shyam)
- iv) 2005(104) FLR 108 (Kaliram-vs- Hissar Central Cooperative Bank Ltd.)
- v) 2010 (4) LLJ 617(In-Charge Officer-Vs, Shankar Shetty)

On the Contrary the Ld. Advocate on behalf of the applicant submitted during the course of argument that the applicant being successful in proving its case, this Tribunal should award reinstatement with full back wages. He submitted that the applicant is a workman as defined U/s. 2(s) of the Act and that he was employed under the OP/Company near about 7 years continuously. However, the workman became seriously ill and due to his such ailing condition he could not attend his job and had to undergo a surgery. The OP/Company did not deny such ailing condition of the workman, but without conducting any enquiry at all and in violation of Section 25F of the Industrial Disputes Act, 1947, the OP/Company had retrenched the workman which is beyond the principle of natural justice and accordingly the termination is *ab initio void*. The Ld. Advocate for the workman argued that it is not the Central Government, but the Government of West Bengal is the appropriate Government in the instant case and accordingly, this Tribunal has ample jurisdiction to decide the instant case. He also submitted that the Limitation Act, 1963 is not applicable in this case and that the claim is not at all raised in belated stage.

5. Having heard the submission of both the side and going through the evidence and materials on record, it appears that this case has a checkered history. The reference was received by this Tribunal from the Government on 30.04.2007. The Opposite Party did not appear and accordingly the case was proceeded 'Ex-parte' against the OP/Company. Thereafter, ex-parte award was passed by this Tribunal on 17.04.2008, allowing the prayer of the workman. The Company was directed to reinstate the workman Shri Saibal Chatterjee in service and to pay full back wages from the date of termination, till reinstatement. From the case record it appears that the Hon'ble High Court in W.P.127 of 2013/GA-629 of 2013 Dt. 26.09.2013 was pleased to set aside the Ex-parte award passed by this Tribunal. Thereafter, the Company appeared before the Tribunal and contested this case.

First of all, let us consider as to whether the applicant is a 'workman' or not. The applicant Shri Saibal Chatterjee was examined as PW-1. He deposed that he joined the OP/Company on 04.06.2091 as 'Promotion Officer' on probation in Kolkata Head Quarter. He was transferred from Kolkata to Ranchi on 02.12.1991. In the year 1993 his service was confirmed. In the month of April, 1998 he was transferred back to Calcutta from Ranchi. 'Exhibit-1' ; 'Exhibit-2' ; 'Exhibit-3'; 'Exhibit-4' corroborate the contention of PW-1. From 'Exhibit-5' it appears that the OP/Company allowed increment to the applicant. From all the documents, it appears that the applicant was employed under the OP/Company. Now, it appears that Shri Virender Singh i.e. the Assistant Manager of the OP/Company was examined as OPW-1 and deposed that the applicant was a staff of the managerial and supervisory category of the Company and as such he was not a workman within the meaning of Section 2(s). In cross-examination, PW-1 deposed that his main function was to visit the Doctors and counters of chemists. His function was more important for promoting sales of the products of Company.

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Since Industrial Disputes Act, 1947 is a piece of beneficial legislation, the Courts have enlarged the scope and applicability of this Act by giving wide interpretation to the term 'workman'. Section 2(s) defines 'workman' as *any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment by express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-*

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

Section 2(s) being amended for the State of West Bengal as :-

- (1) *In sub-clause (iv) of clause (s) of section 2 of the principal Act, for the words, "five hundred" the words "one thousand" shall be substituted – See W.B. act 30 of 1980 (2.9.1980).*
- (2) *In section 2 of the principal Act in clause (s) after the words "or supervisory work" the words "or any work for the promotion of sales" shall be inserted – W.B. Act.33 of 1986(w.e.f. 21.8.1984).*
- (3) *In clause (s) after the words "technical" the words "sales promotions" shall be inserted – W.B. act 57 of 1980 (30.11.1981).*

In view of such amendment, the work of promotion of sales is included in the nature of job of a workman. On the contrary the management has failed to produce any document to show that the applicant was holding the managerial post having control and supervision over other staff of the Company. Thus, considering the nature of job performed by the applicant in the OP/Company, I am inclined to hold that he is a workman.

6. The Company has challenged the territorial jurisdiction of this Tribunal by contending that the Company is concerned and having business throughout India and thus, Central Government will be the appropriate Government. Such submission of the Company has not leg to stand, if we consider the evidence and materials on record coupled with Section 2(a) of the Industrial Disputes Act, 1947. The said provision defines the term "appropriate Government". From the evidence of PW-1, it appears that he joined the OP/Company on 04.06.1991 in Kolkata Head Quarter. Thereafter, he was transferred to

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Ranchi. Again, in the month of April, 1998 he was transferred back to Calcutta from Ranchi. The documents tendered by PW-1 also corroborates such facts. OPW-1 in Para-5 of his evidence by way of affidavit-in-chief, deposed that the applicant started absenting from his service from July, 1998. The termination of the applicant has also been admitted by the Company. Thus, from the evidence on record it is apparent and clear that during the time of termination of service, the applicant was working in Kolkata. In view of such fact and in view of Section 2(a)(ii), I am of the view that the appropriate Government is the Government of West Bengal in the instant case and so, the present case is not barred by territorial jurisdiction.

7. Another point of argument raised by the Company is that the Union has no positive character in relation to the employees of the Company to validly espouse the cause of the concerned applicant. With regard to such submission made from the side of the Company, I find that the applicant Shri Saibal Chattejee is a member of the said Union. 'Exhibit -13' is the demand letter issued by the Secretary of the Union to the OP/Company for malafide termination of the applicant and requested the OP/Company for reinstatement of the applicant. The evidence and materials on record coupled with the facts and circumstances of the instant case shows that there is an Industrial Dispute between the applicant and the OP/Company. Moreover, this Tribunal is dealing with the social beneficial legislation which is enacted for the purpose of protection of the weaker section and thus, technicalities will not be a bar from rendering justice. It is true that this Tribunal can not go beyond the order of reference. In *Steel Authority of India Ltd. -vs- Hindustan Steel Employees' Union and Others* [1997] (3) L.L.N. 869 the Hon'ble High Court, Calcutta was pleased to observe in Para 15 " *The constitutionality of S.2A was challenged in State of West Bengal v. Jute and Jute Goods Buffer Stock Association and others [ 1977 C.W.N. 809], but it has been held that S.2A of the Industrial Disputes Act of when read with S.10 of the Industrial Disputes Act, 1947, is not discriminatory and does not offend against Art. 14 of the Constitution and consequently is not unconstitutional or ultra vires. Their Lordship further observed as follows:*

*"It appears to us the object of making a classification in S.2A, is to protect an individual workman, deprived of his employment, to get the benefits of Industrial Disputes Act and to eliminate the seed of dissatisfaction and industrial unrest at their very root, before it is aggravated or spread over to a large body of workman, apprehending threat of industrial strike. Where group interest of the union and other workmen does not support an individual dispute, substantive right has been created in favour of an individual worker to have recourse to redress his grievance before the Industrial Tribunal under the provisions of the Act. In S.2A, individual dispute is 'deemed' to be an industrial dispute notwithstanding that no other workman or any union of workmen is a party to the dispute."* Thus, going through the case laws referred by the workman reported in : -





- *AIR 1970 (MAD) 305 The Coimbatore Co-operative Milk Supply Union Ltd. Coimbatore vs S. Siluvaimuthu & Ors.*
- *1997 (3) LLN 869 Calcutta High Court Division Bench.*
- *FLR 1982 (45) 160 M.N. Pramanick & Ors vs The Eight Industrial Tribunal & Ors.*
- *(1960) (2) LLJ 37 Para-4 Newspaper Ltd Allahabad vs Uttar Pradesh State Industrial Tribunal.*
- *(1961) 2 SCR 1 State of Bihar vs Kripa Shankar Jaiswal.*

and considering the evidence and the materials on record, I am of the view, the objection made by the Company is a mere technical objection, which, in no way, effect the order of reference. Accordingly, I am not inclined to accept such objection of the Company.

8. It is well settled principle that, it is not the nomenclature of the post held, but it is the nature of duties which are the guiding facts to decide whether the person is a workman or not. The main function of the applicant was to visit the doctors and counters of Chemist for promoting sales of the products of the Company. It has already been held by this Tribunal that in view of Section 2(s) of the Industrial Disputes Act, 1947, as amended for the State of West Bengal, the applicant is a workman. It has already been held that the appropriate Government is the Government of West Bengal and accordingly this Tribunal has territorial jurisdiction to decide the present dispute. The mere technicalities will be no bar to give adequate relief to the workman, if gross injustice is done to him by the OP, because this Tribunal is dealing with the beneficial legislation. Now, let us find out why the dispute cropped up between the parties in the instant case.

The applicant was appointed by the OP/Company on 10.06.1991. Since then he was in continuous service till 12.05.1999. He was transferred to Ranchi and thereafter again he was transferred from Ranchi to Kolkata. From "**Exhibit 5**" it appears on 24.04.1998 the Company, basing upon the performance of the applicant, allowed an increment to the applicant w.e.f. 1.04.1998. So, there was no dispute till that period. But curious enough that on 12.05.1999 the Company issued a letter to the applicant stating that the applicant was not reporting for duties more than last 6(six) months and it was presumed by the Company that the applicant is no longer interested in the employment and had voluntarily abandoned the service. Thus, the Company requested him to collect full and final dues. Now, it is the evidence of PW-1 that due to spinal cord problem, he fell seriously ill from 20.07.1998 and he was under the treatment of Appollo Speciality Hospital, Chennai and had to undergo surgery there on 12.04.1999. PW-1 deposed that he reported his illness to the Management of the company by letter dt. 15.08.1998 (**Exhibit 8**) and 12.05.1999 (**Exhibit 9**). PW-1 deposed that the Management without considering his health condition illegally terminated from his service w.e.f. 12.05.1999. PW-1 by letter dt. 28.05.1999 (**Exhibit 10**) denied the allegation of the Company that he had abandoned the service. By such letter PW-1 requested the Company to allow him to join the Company stating in details as to the cause of his absence due to medical ground. **Exhibit '7'** is the





certificate issued by Appolo Speciality Hospital, Chennai in favour of PW-1. Curious enough that these documents have not been challenged by the Opposite Party in evidence. From the evidence on record, it is apparent and clear that the applicant was suffering from seriously ailing condition and he was advised to take bed rest by the Doctors. The medical documents and the medical ground of the applicant are not being challenged by the Company during the course of evidence, it is presumed that the OP/Company has accepted the ground of the workman. Such medical ground of the applicant is seemed before this Tribunal as reasonable one for his absence on duty. However, had the management felt such ground as unreasonable one, it was necessary for the management to conduct an enquiry, but the Management had failed to do so. The applicant has relied upon the case laws reported in :-

1. *LAWS(Cal) 2005 1 32 Sikha Rani Singha vs G.M. Cal Tramways Co. (1978) Ltd.*
2. *LAWS (SC) 2009 5 240 Jagdish Singh vs Punjab Engineering College.*

I have gone through the aforesaid case laws referred on behalf of the applicant. Both these case laws are nicely applicable in the present case in hand. In the instant case the applicant is not habitual absentee. Due to his track report he was allowed increment which is apparent from **Exhibit '5'**. In his long career of service, he was absent for the last few months due to his ailing condition and accordingly the situation was beyond his control. But it is very surprising that there was no enquiry held by the OP/Company due to the absence of the applicant to attend duty. Without any charge-sheet, enquiry and even without any warning letter, **Exhibit '6'** was issued by the Company impliedly terminating him from service. The applicant raised several requests by issuing letter to the Management of the Company to allow him to join after his recovery from illness, but the Management of the Company turned a deaf ear and accordingly such termination is beyond the principle of natural justice and thus Section 2(oo) of the Industrial Dispute Act, 1947 is attracted which provides that -

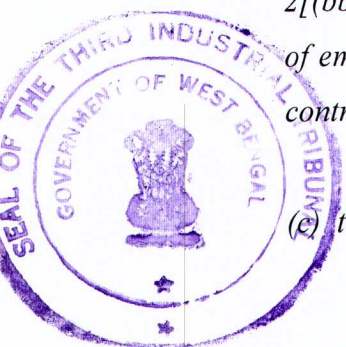
1[(oo) "*retrenchment*" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) *voluntary retirement of the workman; or*

(b) *retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or*

2[(bb) *termination of the service of the workman as a result of the on-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]*

(c) *termination of the service of a workman on the ground of continued ill-health;]*





Even the Management of the Company did not consider the medical ground. Section 25 F has also not been complied with. No notice of retrenchment, no compensation etc. were given to the workman. The applicant/workman relied upon the following judgements on this ground:-

1. *Mohal Lal vs Management of M/s. Bharat Electronics Ltd. reported in 1981 (3) SCC 225.*
2. *Gammon India Limited vs Niranjana Dass reported in 1984 (1) SCC 509.*
3. *Deepali Gundu Surwase vs Kranti Junior Adhyapak Mahavidyalaya (D.ED) and Others. 2013 (10) SCC 324*

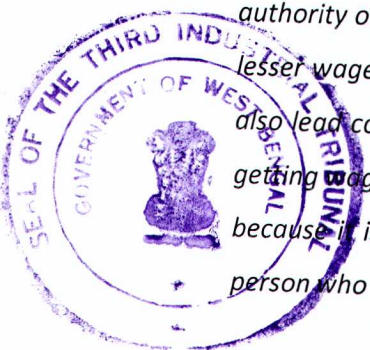
After going through these case laws it appears that ratio decidendi are suitable for this case also. In *Mohal Lal -vs- Bharat Electronics Ltd.*, the Hon'ble Apex Court was pleased to observe in Para '9' – *Reverting to the facts of this case, termination of service of the appellant does not fall within any of the excepted, or to be precise, excluded categories. Undoubtedly therefore the termination would constitute retrenchment and by a catena of decisions it is well settled that where prerequisite for valid retrenchment as laid down in Section 25-F has not been complied with, retrenchment bringing about termination of service is ab initio void. In State of Bombay v. Hospital Mazdoor Sabha, this Court held that failure to comply with the requirement of Section 25-F which prescribes a condition precedent for a valid retrenchment renders the order of retrenchment invalid and inoperative. In other words, it does not bring about a cessation of service of the workman and the workman continues to be in service. This was not even seriously controverted before us. In Deepali Gundu's case the Honb'le Apex Court was pleased to give direction in Para '38' of the judgement: -*

*"38. The propositions which can be culled out from the aforementioned judgements are:*

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

*38.2. 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.*

*38.3. 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 a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact*





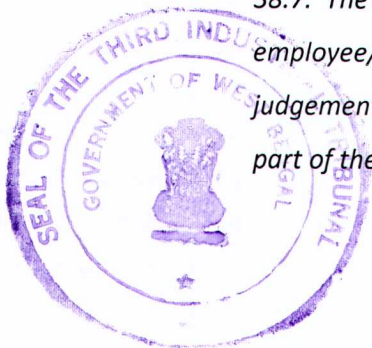
than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

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

38.5. 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 victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works(P) Ltd. V. Employees*.

38.7. The observation made in *J.K. Synthetics Ltd. V. K.P. Agarwal* that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgements of three-Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgement is also against the very concept of reinstatement of an employee/workman."





Per contra, it was submitted by the Ld. Advocate for the Company that the Company never violated the principle of natural justice and that the applicant is not entitled for back wages as well as reinstatement. In support of his contention he referred decision reported in –

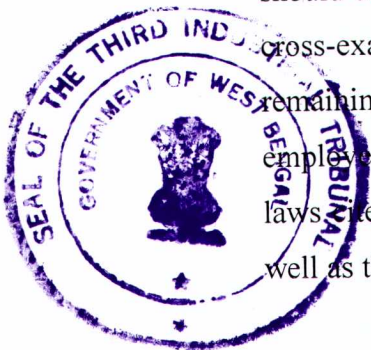
- i) 1963(1) LLJ 679 ( P.H. Kalyani-vs- Air France, Calcutta )
- ii) 2006 (1) LLJ 496 ((U.P. State Brassware Corporation Ltd.– vs- Udai Narain Pandey).
- iii) 2008(3) LLJ 562 (Rajasthan Lalit Kala Academy vs Radhey Shyam)
- iv) 2009 (2) LLJ. 562 P.V.K. Distillery Ltd. vs Mahendra Ram
- v) FLR 2005(104) 108 (Kali Ram-vs- Hissar Central Cooperative Bank Ltd.)
- vi) 2010 (4) LLJ 617(In-Charge Officer-Vs, Shankar Shetty)

Having heard the submission of both the side and going through the aforesaid case laws, it appears, that in '*Kalyani's*' case the domestic enquiry was challenged being defective. So, it is clear that there was an enquiry held by the Management, but in that case no such enquiry against the applicant was held at all. Moreover, the said case law dealt with Section 33 of the Industrial Disputes Act, 1947. In the case of '*U.P. State Brassware Corporation Ltd.*,' the respondent was a contractual employee, but in the present case the applicant is a permanent employee. In '*P.V.K. Distillery Ltd. vs Mahendra Ram*' and in the case of '*In-Charge Officer-Vs, Shankar Shetty*' the concerned workmen were either engaged as daily wager or on temporary basis, but in the present case, the workman is an employee on permanent basis.

Accordingly, the aforesaid case laws will not be applicable in the facts and circumstances of the present case.

In the case of '*Rajasthan Lalit Kala Academy vs Radhey Shyam*' in Para 19 it has been held that - *though illegality of the order of termination is one of the prime considerations for determining the question and quantum of back wages, but it can not be the sole criterion. A host of other factors, a few enumerated - in that case law - are required to be taken into consideration before issuing directions in that behalf* – In the present case, it is found that the order of termination by the OP/Company against the concerned workman is totally illegal and accordingly void ab initio. In view of the judgement passed in *Deepali Gundu's* case - *. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule* - Accordingly, the present workman is entitled to reinstatement with continuity of service, but so far as the back wages is concerned, there should be a balance considering the facts and circumstances of the instant case. From the

cross-examination of OPW-1 it appears that at present the production of the Company is remaining stopped and nothing is being sold at present in any State of India. There is no employee in West Bengal working in this Company at present. Thus, considering the case laws cited by the workman, specially the judgement passed in *Deepali Gundu's* case as well as the case laws referred by the Company in '*Rajasthan Lalit Kala Academy's*' case





I am of the view that 50% of the back wages will be appropriate and proper for the workman, specially considering the fact that he is not gainfully employed anywhere.

Accordingly, the issues under reference are all decided in favour of the workman. Thus, the case succeeds in favour of workman.

Hence it is -

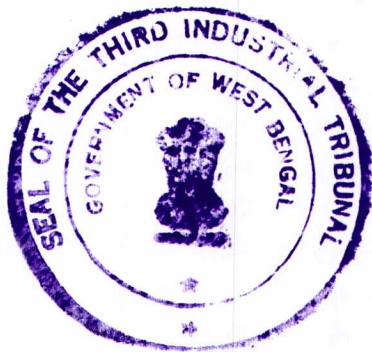
**Ordered**


That the written statement filed by the union/applicant is allowed on contest, but without cost. The workman, Shri Saibal Chatterjee is entitled to get reinstatement with 50% of the back wages since the termination of service w.e.f. 12.05.1999. The O.P./Company is hereby directed to reinstate the applicant and to pay 50% of the back wages to the applicant within a period of 90 (Ninety) days from the date of passing of this award, in default the workman is entitled to put the award in execution.

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

Dictated and corrected by me.

  
Judge



  
( Suberthi Sarkar )  
Judge  
3<sup>rd</sup> Industrial Tribunal  
Kolkata  
( 31.10.2019 )