

I/48646/2019

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

No. Labr/ 525/(LC-IR)/22015(16)/399/2018

Date : 04.06.19

ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. 831 - IR/11L-165/14 dated 19.08.2015 the Industrial Dispute between M/s Stoplift Infotech India Pvt. Ltd., 110/3/1, Kalikundu Lane, Howrah - 711 101 and their workman Sri Subhasis Mahindar, 135, Sri Ram Dhang Road, Salkia, Howrah - 711 106 regarding the issues mentioned in the said order, being a matter specified 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

No. Labr/ 525/1(5)/(LC-IR)

Date : 04.06.19

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

1. M/s Stoplift Infotech India Pvt. Ltd., 110/3/1, Kalikundu Lane, Howrah - 711 101.
2. Sri Subhasis Mahindar, 135, Sri Ram Dhang Road, Salkia, Howrah - 711 106.
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The Labour Commissioner, W.B. New Secretariate Buildings, 1, K. S. Roy Road, 11th Floor, Kolkata- 700001.
- ✓ 5. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Department's website.



Deputy Secretary

Date : 04.06.19

No. Labr/ 525/2(2)/(LC-IR)

Copy forwarded for information to :

1. The Judge, Third Industrial Tribunal, Kolkata with reference to his Memo No. 566 - L.T. dated 10.05.2019.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Deputy Secretary

In the matter of an Industrial dispute between M/s. Stoplift Infotech India Pvt. Ltd. 110/3/1, Kalikundu Lane, Howrah-711 101 and their workman Shri Subhasis Mahindar,135, Sri Ram Dhang Road, Salkia, Howrah – 711 106 referred before this Tribunal.

Case No. VIII-27/2015

BEFORE THE THIRD INDUSTRIAL TRIBUNAL: WEST BENGAL

PRESENT: SRI SUBERTHI SARKAR,
JUDGE, THIRD INDUSTRIAL TRIBUNAL,
KOLKATA

AWARD DATE - 29 APRIL, 2019

This case was referred by the Government of West Bengal, Labour Department, Vide G.O. No. 831-IR/IR/11L-165/14 dt. 19th August,2015 , U/s. 10 relating to an Industrial Dispute between M/s. Stoplift Infotech India Pvt. Ltd, 110/3/1, Kalikundu Lane, Howrah-711 101 and their workman Shri Subhasis Mahindar, 135, Sri Ram Dhang Road, Salkia, Howrah – 711 106 to this Tribunal for adjudication of the following issues:

ISSUE(S)

1. Whether termination of the service of the workman namely Sri Subhasis Mahindar by way of dismissal by the Mgt. of M/S Stoplift Infotech India Pvt. Ltd. W.e.f. 07.08.2014 is justified.
2. To what relief, if any, is the workman entitled?

1. The instant case was filed by the applicant/workman namely Sri Sbuhasis Mahindar against the Company i.e. Stoplift Infotech India Pvt. Ltd. challenging his dismissal order dt. 7.8.2014. The workman, after his dismissal made a representation dt. 28.8.2014 against the dismissal order, but the management did not consider his request. Thereafter, the workman sought for intervention of the Assistant Labour Commissioner, Howrah through a letter dt. 27.11.2014 and the conciliation proceeding was drawn up accordingly, but ultimately the proceeding failed which resulted this reference before this Tribunal and it has been claimed that the enquiry conducted by the Company was unjust, improper and invalid, wherein the principle of natural justice was grossly violated and accordingly the dismissal order dt. 7.8.2014 is unlawful and unjustified.
2. Accordingly, an industrial dispute was started between the workman and the Company and thus reference was made by the Government of West Bengal, Labour Department vide G.O. No. 831-IR/IR/11L-165/14 dt. 19th August,2015for adjudication on the following issues :

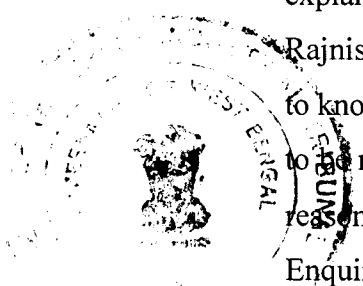
- 1) Whether termination of service of the workman namely Sri Subhasis Mahindar by way of dismissal by the Mgt. of M/S Stoplift Infotech India Pvt. Ltd. W.e.f. 7.8.2014 is justified?



2) To what relief, if any, is the workman entitled?

- 3) After receiving the reference, summons were served upon both the parties who thereafter put in their appearance and filed separate written statement.
- 4) The issue of validity of Domestic Enquiry was taken up first by this Tribunal and after consideration of all the materials on record and submission of respective parties, this Tribunal by Order no.27 dt. 30.12.2016 hold that the Domestic Enquiry conducted by the Company is invalid. The Tribunal thereafter directed hearing the case on merit.
- 5) As per the written statement of the workman, he was employed in the Company on 18.10.2010 and was working with the designation 'Video Analyst' and his employment continued up to 7.8.2014. He performed his duty at a stretch with satisfaction with the Company but the Company surprisingly issued one charge sheet-cum-suspension order dt. 24.7.2013 on the allegation that while staying off days at his residence the workman was sending lengthy e-mails to the Manager Debdatta Roy and Rajnish Misra causing disturbance to them and in most of the case the contents of e-mails were not connected with the affairs of the Company. Further, allegation was that the workman prayed for a loan of Rs.50,000/- (Fifty thousand) for his mother's treatment with the knowledge that there is no system of loan in the Company but on enquiry it was revealed that the cost of such treatment was estimated at Rs.25,000/-(Rupees twenty five thousand) and the management agreed to give him three month's salary as advance (Rs.22,710/-)and he has drawn two month's salary (Rs.15,140/-) and after drawing the same he made false allegation against the management and threatened the staffs of the management saying that he had capacity to close down the operation of the Company and he sent e-mails demanding particulars of the employee of the U.S. team and Stoplift Checkout Vision System with whom he had no connection with the working activity of the Company and such act endangered the secrecy of the Company and that from January,2013 to July,2014 he exhausted all his leaves and started himself absenting from duty without pay. On the basis of such allegation four charges were framed up and thereafter the workman was placed under suspension.

Further case of the workman is that on 28.7.2013 through e-mail he denied all allegation levelled against him stating that there is no word limit in sending any e-mail either in the Rules and Regulation in the Company, pasted in the notice board or in the appointment letter. But the Company instead of closing the chapter, started domestic enquiry through one Sib Shankar Roy, Advocate by a letter dt. 16.08.2013 and the workman also submitted his explanation through registered post. The enquiry was commenced on 27.08.2013 and Mr. Rajnish Misra was acting as Presenting Officer. By letter dt. 4.9.2013 the workman wanted to know his educational qualification. And by another letter the workman sought permission to be represented through a lawyer but he was not allowed by the Enquiry Officer showing reason that the Management was not willing to allow in Advocate which shows that the Enquiry Officer had no independence in taking decision. The workman also claimed that the



Enquiry Officer was not at all justified rejecting the prayer of the workman and that the Presenting Officer was examined as a Management witness for which the workman recorded his protest by a letter dt. 16.10.2013 but that was not considered by the Enquiry Officer. The workman protested the departmental proceeding through several letters. But from the findings of the E.O. dt. 9.6.2014 it appears that the workman found guilty of 3(three) charges, out of 4(four). However, he submitted written representation against the findings of E.O. on 15.07.2014. He also requested to withdraw the alleged charge sheet-cum-suspension order dt. 24.07.2013, but instead of doing the same, the Management dismissed him from service through a letter dt. 7.8.2014 with immediate effect. Such order of dismissal is unlawful and unjustified and against the principle of natural justice

Thus, the workman prayed for granting relief of reinstatement in service with full back wages alongwith other consequential relief.

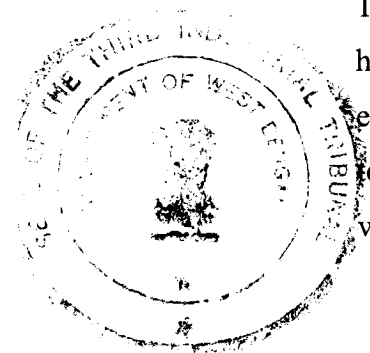
- 6) By filing written statement, the Company denied the averments of the workman as well as prayed for dismissal of the prayer of the workman. It is admitted that the workman was engaged by the Company to work as 'Video Analyst' by its appointment letter dt. 18.10.2010. It is contended that the applicant was charge sheeted by the Company by issuing a letter dt. 24.7.2013, framing the 4 (four) charges, the details of which have been narrated in the said charge-sheet. It is contended that the applicant replied the said charge-sheet by letter dt. 28.07.2013 wherein the applicant admitted most of the charges such as :
- a) He sent lengthy e-mails in as much as there was no Rules incorporated in the service rule.
 - b) He did not draw the advance but he had received the cheque which had not been encashed.
 - c) The applicant admitted that he tried to contact with M/s. Stoplift Checkout Vision Systems situated at U.S.

Further the applicant denied the charge about his absence frequently.

The Company further stated that the workman is not eligible to get loan for his mother's sickness due to the effects that –

- a) There was no system of the Company to provide loan to any employee and;
- b) The applicant was covered by the Employees' State Insurance Act,1948 and the Company and employees' contribution @6.50% had been deposited by the Company for providing every shorts of medical benefit for his mother's illness.

The Company further stated that they intimated the workman by e-mail that the Company had no option to grant him loan but on 4.07.2013 the workman hurriedly made a lengthy e-mail to the Company requesting to give advance of Rs.50,000/-. The Company agreed to pay Rs. 15,140/- (two month's salary) but the applicant did not agree to receive as he was not paid 3 month's salary (Rupees 22,710/-). However, the Company sent



Rs.15,140/- by a cheque dt. 8.7.2013 which was received by the applicant. On 24.7.2013 the applicant again sent an e-mail containing eighteen pages using the word 'inhuman' which is very abusive in nature. It is further contended that the applicant had habit to disturb the Management vide sending e-mails consecutively containing abusing and defamatory language. The Company had to take shelter in the local P.S. for protection from the applicant who used to threat the managerial staff and the Company lodged complaint vide G.D.E. No. 952 dt. 21.07.2013. The Company further alleged that the applicant used to be absent frequently to disturb the work of the establishment. Thus, the Company prayed for dismissal of the prayer of the workman.

7. On behalf of the Company 3 witnesses were examined and they are - P.W.1 – Debdatta Roy, P.W.-2 Rajnish Misra, P.W.3- Sri Abinash Gupta.

On the other hand, the workman Subhasis Mahindar examined himself as O.P.W.1

The following documents were produced and proved on behalf of the Company-

On Merit

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
01	1	Appointment letter of workman	18.10.2010	30.05.2017
02	2	Charge sheet-cum Suspension order (3 sheets)	24.07.2013	30.05.2017
03	3	Bunch of documents exhibited in domestic enquiry (57 sheets)	-	30.05.2017
04	4	Enquiry proceedings (59 sheets)	27.08.2013 To 03.04.2014	30.05.2017
05	5	Report and findings of Enquiry Officer (15 sheets)	09.06.2014	30.05.2017
06	6	Company's letter to workman inviting comment on report	18.06.2014	30.05.2017
07	7	Workman's letter to company praying for time to reply	27.06.2014	30.05.2017
08	8	Company's letter to workman granting 15 days time for reply	07.07.2014	30.05.2017
09	9	Company's letter to workman informing about dismissal	07.08.2014	30.05.2017
10	10	Workman's letter to company opposing the dismissal	28.08.2014	30.05.2017
11	11	Company's letter to workman	04.09.2014	30.05.2017
12	12	Workman's letter to company	14.10.2014	30.05.2017
13	13	Company's letter to workman	20.10.2014	30.05.2017
14	14	Workman's letter to the A.L.C., Howrah raising dispute	27.11.2014	30.05.2017
15	15	Company's letter to A.L.C., Howrah	11.12.2014	30.05.2017

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
16	16	Company's letter to A.L.C., Howrah	07.01.2015	30.05.2017
17	17	Workman's letter to A.L.C., Howrah (2 sheets)	07.04.2015	30.05.2017
18	18	Company's letter to A.L.C., Howrah (3 sheets)	29.04.2015	30.05.2017
19	19	Company's letter to Electronic Complex, Police Station	21.07.2013	30.05.2017
20	20	Copy of paper mentioning General Diary by Police Station	21.07.2013	30.05.2017
21	21	Company's letter to Electronic Complex Police Station	25.07.2013	30.05.2017
22	22 to 22/F	Copy of Daily Attendance Register from January, 2013 to July, 2013	-	30.05.2017
23	23	Copy of Leave Register of Privilege Leave from 07.01.2013 to 14.07.2013	-	30.05.2017
24	24	Copy of Casual Leave Register from 07.01.2013 to 29.06.2013 of the workman	-	30.05.2017
25	25	Copy of E-mail print out from the workman to Sri Debdatta Roy (2 sheets)	18.02.2017	30.05.2017
26	26	Copy of E-mail print out from workman to the Branch Manager of company	18.02.2017	30.05.2017
27	27	Copy of E-mail print out from Sri Debdatta Roy to the workman	18.02.2017	30.05.2017
28	28	Copy of E-mail print out from the workman to the company (5 sheets)	18.02.2017	30.05.2017

The following documents were produced and proved on behalf of the workman:

On Merit

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
1.	A	Copy of Appointment Letter	18.10.10	15.12.17
2.	B (3 Sheets)	Copy of Charge sheet	24.07.13	15.12.17
3.	C (2 sheets)	Copy of Reply of the Charge Sheet	28.07.13	15.12.17
4.	D	Copy of dismissal letter	07.08.14	15.12.17
5.	E (2 sheets)	Copy of letter addressed by Subhasis Mahindar to the Manager of the Company	28.08.14	15.12.17
6.	F (2 sheets)	Copy of letter addressed by the Manager of the Company to Subhasis Mahindar	04.09.14	15.12.17
7.	G (2 sheets)	Copy of letter addressed by Subhasis Mahindar to the Company	14.10.14	15.12.17
8.	H	Copy of letter addressed to the ALC, Howrah, Office of DLC, Howrah by Subhasis Mahindar	27.11.14	15.12.17

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
9.	I	Copy of letter addressed to the ALC, Howrah, office of DLC, Howrah by the Company	07.01.15	15.12.17
10.	J (3 sheets)	Copy of letter addressed to the ALC, Howrah, by the Company	29.04.15	15.12.17
11.	K	Copy of letter addressed to the ALC, Howrah, office of DLC, Howrah by Subhasis Mahindar	28.01.15	15.12.17
12.	L (2 sheets)	Copy of letter addressed to the ALC, Howrah, office of DLC, Howrah by Subhasis Mahindar	07.04.15	15.12.17
13.	M (2 sheets)	Copy of letter addressed to the ALC, Howrah by Subhasis Mahindar	08.05.14 (Received by Office of DLC, Howrah on 08.05.15)	15.12.17
14.	N (9 sheets)	Copy of reply of Show-cause dt. 18.06.2014 and letter dt. 7.7.14 addressed to the Manager of the Company by Subhasis Mahindar	15.7.14	15.12.17
15.	O (5 sheets)	Copy of PAN Card , IT Return of Subhasis Mahindar		15.06.18

8. Argument on behalf of the Workman

During the course of argument Ld. Advocate for the applicant/workman submitted that the OP/Company has miserably failed to prove all the charges which were levelled against the workman. In his view the management had failed to corroborate their illegal decision of termination of the workman from service, by adducing evidence. Rather the workman has been victimised by the hands of the Company. Accordingly, the workman should be awarded the relief of reinstatement alongwith the full back wages. In support of the argument he referred decision reported in :-

- 1) (2013) 10 SCC 324 (DEEPALI GUNDU SURWASE -VS- KRANTI JUNIOR ADHYAPAK MAHAVIDYALAYA AND OTHERS.)
- 2) (2015) 4 SCC 458 (JASMER SINGH -VS- STATE OF HARIYANA AND ANOTHER)
- 3) (2015) 8 SCC 150 (FISHERIES DEPARTMENT, STATE OF UTTAR PRADESH -VS- CHARAN SINGH)
- 4) (2014)15 SCC 313 (TAPASH KUMAR PAUL – VS – BHARAT SANCHAR NIGAM LIMITED AND ANOTHER)
- 5) One unreported judgement passed in M.A.T. 923 of 2018 (M/S. UNI-CRYSTAL TECHNOCHEM HALDIA INDUSTRIAL ESTATE – VS – THE LD. SECOND LABOUR COURT & ORS). is also referred.

9. Argument on behalf of the Company

The Ld. Advocate on behalf of the Company strenuously argued that the Company has been able to prove all the charges against the workman.

He argued that the applicant would not be treated as workman as he did not continue his service 240 days, preceding 1 year and accordingly the case is not maintainable at all and the

workman is not entitled to get any relief as sought for. In support of his argument the Ld. Advocate relied upon the case laws reported in:

- 1) 2007 Vol-1-LLJ 1013 (NORTH EAST KARNATAKA ROAD TRANSPORT CORPORATION -VS – M..NAGANGOUDA.)
- 2) 2006 (110) F.L.R. 622 (U.P.S.R.T.C. LTD. -VS – SARADA PRASAD MISRA AND ANR.)
- 3) 2006 (110) F.L.R 198 (MUNICIPAL COUNCIL, SUJANPUR – VS – SURINDER KUMAR)
- 4) 2014 LLR 576 (STATE OF U.P. THROUGH DIRECTOR, PRINTING AND STATIONERY, ALLAHABAD -VS- UMA PATI PANDEY & OTHERS)
- 5) One un reported judgement passed in M.A.T. 923 of 2018 (M/S. UNI-CRYSTAL TECHNOCHEM HALDIA INDUSTRIAL ESTATE – VS – THE LD. SECOND LABOUR COURT & ORS.) is also referred.

10. Counter Argument by the workman :

The Ld. Advocate for the workman submitted that a new case has been made out by the management by raising a new issue of 240 days which has no basis at all. He submitted that the Company failed to prove by adducing documentary or oral evidence to show that the workman has been gainfully employed. He submitted that the workman was a permanent employee. He further submitted that the case laws relied upon by the Company are not applicable in the facts and circumstances of the present case.

11. Decision with reasons

Having heard the arguments of both the side and going through the evidence and materials on record it appears to me that :-

1. It is an admitted fact that applicant/workman was an employee of the OP/Company. He was given employment by the OP/Company by issuing appointment letter on 18.10.2010 (Exhibit 1/Exhibit A). He was posted as 'Video Analyst'.
2. That on some allegation against the workman, a Domestic Enquiry was held by the Company against him after conclusion of which, the Management of the Company dismissed the workman from service by letter dt. 07.08.2014 with immediate effect (Exhibit 9/Exhibit D).

The Four charges were levelled against the workman and they are:

1. Causing serious disturbance to the Managers Debdatta Roy and Rajnish Misra by sending lengthy e-mails instead of personal discussion.
2. Trying to divulge secrecy of the Company to the others.
3. Threatening to cause disturbance of the establishment.
4. Absenting frequently causing disturbance of work in the establishment.

Now, while considering the matter of validity of Domestic Enquiry, this Tribunal by Order. No. 27 dt. 30.12.2016 held that the said Departmental Enquiry against the workman is found invalid and directed the parties for hearing on merit. Accordingly, the parties adduced evidence on merit. Now let us decide the two issues under reference as to :

- 1) Whether termination of the service of the workman namely Sri Subhasis Mahindar by way of dismissal by the Mgt. of M/S Stoplift Infotech India Pvt. Ltd. w.e.f. 7.8.2014 is justified?
- 2) To what relief, if any, is the workman entitled?

Let us consider the evidence adduced by both the side on merit to come to the conclusion as to whether the charges levelled against the workman is proved or not.

- 12 P.W. -1 Debdatta Roy adduced his evidence-in-chief by way of affidavit, on merit. He deposed that the workman used to send lengthy e-mails preferably at night to him and also to the Asstt. Manager Shri Rajnish Misra from his residence while he was staying 3 days off in a week with the object to disturb them wasting valuable time during their working hour on diverse dates. P.W-2 Shri Rajnish Misra also stated such fact. All the e-mails have marked as Exhibit 3 (collectively- on Merit) in the instance case. These e-mails are related with the treatment of mother of the workman. He sought for a loan of Rs. 50,000/- for the purpose of medical treatment of his ailing mother. The said loan was not granted by the Company for which the workman sought for an amount of Rs.50,000/- by way of advance, but again the amount as advance was also not granted by the Company, but in lieu of that, the Company granted 2 month's salary as advance of Rs.15,140/- to the workman. All such facts have been admitted by P.W.-1 in his cross-examination. From one such e-mail dt. 4.7.2013 it also appears that the workman admitted that Doctor has given the estimate of Rs.25,000/- for the operation. But at the time of operation, if any other problem occurs, if Doctor says some extra money required, just because of that, the workman applied for Rs.50,000/- as evidence. If the operation will be completed within Rs.25,000/- then he will show the bills and the extra amount will be refunded to the Company. P.W.-1 also stated in his cross-examination that, "there was no bar against any of the workmen that he cannot send any lengthy size of e-mail to the officers concerned of the Company". Thus, it is clear that there is no rule or any limit set by the Company for sending e-mail by any employee. Moreover, it is found that the Company did not issue any warning to the workman to make him rectified or to give him any advice not to send such lengthy e-mails. Thus, I am of the opinion that the Company failed to prove such charge against the workman.
13. It is alleged that the workman tried to divulge secrecy of the Company to others. On such score PW-1 deposed that the workman sent an e-mail on 23.6.2013 at 8.44 p.m. to the Company for providing him the order of the superior of US team. It appears that through e-mail the workman wanted to know the particulars of US team but admittedly he did not get any reply. There is no evidence adduced before this Tribunal to prove that knowing particulars of US team the workman shall divulge the secrecy of the Company with some

ulterior motive. No warning was also given by the Company to the workman on this topic. There is absolutely nil evidence to prove that the workman tried to divulge secrecy of the Company to others. Thus, this charge also fails.

14. So far, the charge no. 3 is concerned, PW-1 has deposed that the workman verbally threatened the team leader Shri Abinash Gupta on 8.7.2013 that he would lock the Company and he could put the Manager, Director and also PW-1 in Jail. Shri Abinash Gupta informed PW-1 such fact over phone on that date. Said Avinash Gupta was examined as PW-3 on merit. He deposed that on 8.7.2013 the workman asked him to stay outside the office after 7.20 p.m. and threatened him that he could put the Manager, Director and P.W.-3 in jail by lodging FIR and also, he had enough documents which can lock the Company within 90 days. PW-3 became afraid due to such threatening by the workman. In the cross-examination PW-3 deposed that he did not lodge any complaint against the said workman at the local police station. From the cross-examination of different P. Ws it appears that they have no knowledge as to whether police took any action against the workman in connection with alleged G.D. entry. In the cross-examination PW-1 admitted that no document was filed to substantiate that the workman had verbally threatened PW-3 on 8.7.2013. He could identify Exhibit-19 as the letter of complaint dt. 21.7.2013 addressed to the O.C. Electronic Complex P.S., Sector-V, Salt Lake, Kolkata-91 regarding the threat to the management to close down the establishment. But, PW-1 also deposed that such letter of complaint does not contain the name of the managerial staff being threatened specifically. Thus, there appears no oral evidence of eye-witness to corroborate the evidence of PW-3. There appears no documentary evidence to substantiate such allegation against the workman. There is also now document of police case or complaint to prove such charge against the workman. Accordingly, this charge fails.
15. So far, the charge no. 4 is concerned PW-1 in his cross-examination on 24.7.2017 admitted, 'it is true that the charge framed at the time of Domestic Enquiry as regard to the absenting frequently causing disturbances of the work in establishment has been failed during the enquiry itself'. Such admission of PW-1 in the cross-examination is sufficient enough to hold that such charge is baseless. Moreover, going through the evidence on merit, I also do not find any cogent material to hold this charge in favour of the Company. Accordingly, this charge also fails.

Considering all the documents and materials on record and going through the evidence on merit I am inclined to hold that the charge framed by the Company against the delinquent workman, are all baseless and the Company has failed to prove those charges on merit. Accordingly, the termination of the service of the workman namely Shri Subhasis Mahindar by way of dismissal by the management of M/s. Stoplift Infotech India Pvt. Ltd., w.e.f. 7.8.2014 is not at all justified. Accordingly, the issue no. 1 under reference is held against the Company. So, it is needless to mention that the workman is entitled to some relief.

16. Now before considering the nature of relief which the workman is entitled, I must probe into a new matter addressed by the Ld. Advocate on behalf of the Company, during the course of argument. He submitted that in the instant case the applicant would not be treated as "workman" as he did not continue his service 240 days preceding one year. Therefore, the instant case is not maintainable at all and the workman cannot get any relief as sought for. He relied upon the judgement passed by the Hon'ble Allahabad High Court (Reported in 2014 LLR 576). In the said case law reliance, was placed on the decision of the Apex Court in the case of Chief Engineer, Ranjit Sagar Dam & Another- vs- Sham Lal. In the case under reference the case of the workmen was that they were working as daily wagers for more than 240 days in preceding calendar year and they have been retrenched without any reason. Accordingly, the Hon'ble Court was pleased to place the burden upon those workmen to establish the same. But in the case in hand the present issue of working less than 240 days by the present workman, as taken by the Company is surprising at the stage of argument. There is no such pleading, and such allegation made by the Company is totally a new fact at the argument stage. However, it appears from the evidence on record that PW-1, Debdatta Roy being the manager of the Company in Para 5 of the Evidence-in-chief deposed that their company used to be opened 7 days in a week. The employees used to work in the Company only 4 days by rotation in a week. If such evidence is relied upon then the fact remains is that in a month a workman used to work for 16 days and in a year, they worked for only 192 days as per the own statement of the Company. Then how can they expect a person to work for 240 days in a year. Accordingly, I am not inclined to accept the submission of the Ld. Advocate of the Company. The case under reference is not applicable in the facts and circumstances of the present case.

17. So far the relief to the workman is concerned, in view of the Company; the workman is not entitled to any relief at all. Now let us consider the case laws cited on behalf of the Company. In (2006) 110 FLR 622(SC) the workman was not appointed in a sanctioned post and his appointment was in violation of the rules as also in violation of constitutional scheme enshrined under Article 14 and 16 of the Constitution of India and accordingly it was void in law. But in the present case in hand the workman was appointed after taking interview by the Company and Exhibit A/ Exhibit 1 establishes the same. In (2006) 4 SCC 733 there was gross delay on the part of the workman in approaching the Conciliation Officer and the Labour Court. He raised dispute after 7 years from termination of service and he was working as temporary basis but in the present case it appears that the workman was dismissed on 7.8.2014 with immediate effect and he raised the dispute promptly and he is not a temporary staff.

18. In (2013) 10 SCC 324 (Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya), the Supreme Court upon consideration of a catena of decisions has laid down the law, inter alia, as follows :-

"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.

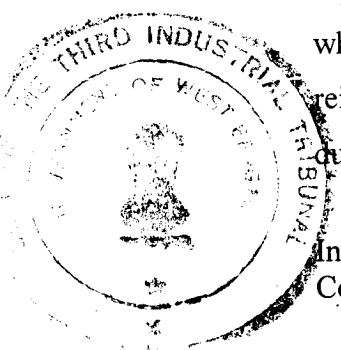
38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower 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.”

Such decision of the Supreme Court noted above has been followed in subsequent decisions of the Supreme Court in (2015) 8 SCC 150 (Fisheries Department, State of Uttar Pradesh Vs. Charan Singh) and (2015) 4 SCC 458 (Jasmer Singh Vs. State of Haryana & Anr.)

Moreover, the Hon'ble Supreme Court in its decision reported in 2014 LAB. I.C. 4486 (Tapash Kumar Paul Vs. BSNL & Anr.) has laid down conditions which are required to be complied with to convert an order of reinstatement into one for payment of monetary compensation, viz, (i) where the industry is closed; (ii) where the employee has superannuated or going to retire shortly and no period of service is left to his credit; (iii) where the workman has been rendered incapacitated to discharge the duties and cannot be reinstated in service; and/or (iv) when he has lost confidence of the management to discharge duties.

In the instant case there is no evidence and materials on record adduced from side of the Company that –



- (i) It is closed.
- (ii) The workman was appointed on 18.10.2010 and he was dismissed on 7.8.2014. Thus he performed considerable period of service before termination, and he has a long service period before retirement.
- (iii) From the evidence on record it also appears that the workman is presently near about 44 years of age. The Company also failed to prove the workman has been rendered incapacitated to discharge the duties and cannot be reinstated in service.
- (iv) The charges against the workman imposed by the Company failed and accordingly I do not find anything for the Company for losing confidence upon the workman to discharge his duties.

Thus, the question of direct the payment of compensation instead of reinstatement would not meet the ends of justice.

19. Now coming to the point as to whether the workman was gainfully employed or not, it appears that he is desirous of getting back wages and made a statement before this tribunal that he was not gainfully employed. The Company on the other hand, wants to avoid payment of full back wages. In (2006) 4 SCC 733 it was observed by the Hon'ble Apex Court that, while considering and determining question regarding payment of back wages the Court/Tribunal would consider all relevant circumstances and to pass an appropriate order keeping in view the principle of justice, equity and good conscience. In (2007) 10 SCC 765 the Hon'ble Apex Court was pleased to observe that gain full employment would also include self-employment where from income is generated. It was held that, regardless of the source of income, income from gain full employment is to be deducted from the award of back wages. Now coming to the present case in hand it appears that the workman Shri Subhasis Mahindar being OPW-1 admitted in cross-examination that he used to submit Income-tax return. He identified his Income-tax return and produced the same for the Assessment year 2014-2015, 2015-2016, 2016-2017 and 2017-2018 and those Income-tax returns has marked as Exhibit 'O' collectively. It further appears that the gross total income of the workman for the Assessment year 2014-15 is Rs. 1,69,188/-, for the Assessment year 2015-16 is 2,08,564/-, for the Assessment year 2016-17 is Rs.88,312/- and for the Assessment Year 2017-18 is Rs.1,36,328/-. Thus, from those documents it appears that he had a source of income and he used to earn more than his yearly salary in the O.P/Company, Thus it includes gain full employment and it would be deducted from the award of back wages.

20. So, Now after taking stock of the fact and circumstances of this case and discussions made above in the foregoing paragraphs including the cited case laws and the relevant provisions of Industrial Disputes Act,1947, this Tribunal is of the view that the workman was

wrongfully terminated from service and accordingly he is entitled to reinstatement with back wages but considering his source of income from gain full employment, I am inclined to award 50% of the back wages and not the full back wages.

All these issues are thus disposed of.

Hence it is -

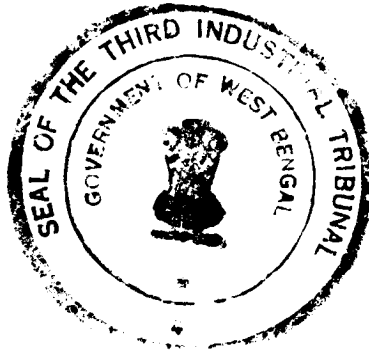
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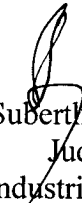
That the written statement filed by the workman is allowed on contest, but without cost. The applicant/workman is entitled to get reinstatement with 50% of the back wages since the termination of service dt. 07.08.2014. The O.P./Company is hereby directed to pay 50% of the back wages to the applicant 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
3rd Industrial Tribunal
Kolkata
29.04.2019