

I/60291/2019

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

No. Labr./ ~~822~~/(LC-IR)/22015(16)/661/2019

Date : 04-9-19.

ORDER

WHEREAS an industrial dispute existed between M/s Medical Rehabilitation Centre 7, Dr. Biresh Guha Road, Kolkata – 700 017 and their workman Sri Vishwa Mohan Bharti, C/c Debasish Saha, C/20, Lake View Park, P.O. - ISI, P.S. - Baranagar, Kolkata – 700 038 regarding the issues being a matter specified in the second schedule of the Industrial Dispute act, 1947 (14of 1947);

AND WHEREAS the workman has filed an application directly under sub-section 2 c Section 2A of the Industrial Dispute act, 1947 (14of 1947) to the Judge, Seventh Industrial Tribunal Specified for this purpose under this Department Notification No. 101-IR dated 2.2.12;

AND WHEREAS the said Judge, Seventh Industrial Tribunal has submitted to the State Government its Award on the said Dispute.

NOW, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Disputes 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

I/60291/2019

(2)

No. 822/1(2) – IR

Dated 04-9-19

Copy forwarded for information to :

1. The Judge, Seventh Industrial Tribunal with reference to his Memo No. 1161 – L.T dated 28.08.2019.
2. The Joint Labour Commissioner (Statics), W.B., 6, Church Lane, Kolkata-700001.



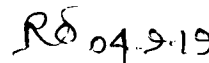
Deputy Secretary

No. 822/2(5) – IR

Date : 04-9-19

Copy with a copy of the Award is forwarded for information & necessary action to:

- 1.M/s Medical Rehabilitation Centre, 7, Dr. Biresch Guha Road, Kolkata – 700 017.
2. Sri Vishwa Mohan Bharti, C/o Debasish Saha, C/20, Lake View Park, P.O. - IS P.S. - Baranagar, Kolkata – 700 038.
3. The Assistant Labour Commissioner, W.B., In-Charge of Labour Gazette.
- 4.The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Building (11th Floor), 1, Kiran Sankar Roy Road, 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

In the Seventh Industrial Tribunal, West Bengal
New Secretariat Buildings, Kolkata

Present : Shri Ashis Kumar Das, Judge,
Seventh Industrial Tribunal,
Kolkata.

CASE NO. 19/2011

Under Section 2A (2) of the I. D. Act, 1947

Vishwa Mohan Bharti,

C/o. Debasish Saha, C/20, Lake View Park, P.O.-ISI,
P.S.-Baranagar, Kolkata-700038.

...Applicant

-Versus-

M/s. Medical Rehabilitation Centre

7, Dr. Biresh Guha Road, Kolkata – 700 017.

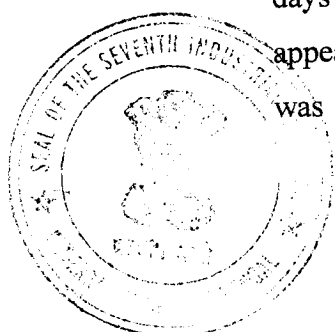
...OP/Company

A W A R D

Dated : 27-08-2019.

This case has been initiated on receiving of an application dt. 20.10.2011 u/s. 2A(2) of the Industrial Disputes Act, 1947, as amended, from the applicant Sri Vishwa Mohan Bharti against his employer M/s. Medical Rehabilitation Centre in connection with termination of his service by his employer w.e.f. 25.10.2010 is unjustified and illegal seeking order of his reinstatement in service with full back wages and consequential benefits.

The fact of the applicant's case, as made out in his written statement dated 20.10.2011, in brief, is that the applicant was employed in the OP/Centre vide letter of appointment dated MRC/22/2008 dated 23.07.2008 as an occupational Therapist. He was initially appointed on probation for six months and thereafter he was working with an entire satisfaction as a permanent workman without any blemish. The OP/Centre is very much prosperous as well as profitary concern employing more than thirty workmen regularly. The management at the time of appointed verbally assured him that the annual increment would be given Rs.1,000/- only for every completed year of service, but failed to comply their commitment. He was working in the Centre since his appointment in the year 2008 to 2010, without any benefits such as casual leave, medical leave, statutory leave, privilege leave, festival leave and also P.F. He suddenly got an information from his native village that his mother was seriously ill and he prayed before Dr. M.M. Ghatak for 15 days leave and in the month of February, 2010 Dr. Ghatak allowed his such prayer of leave for 15 days w.e.f. 24.02.2010. He came back to report to join his duty within 15 days and appeared before Dr. Ghatak, who told him that no sufficient work was available and so, he was advised to come after three months for reporting/joining his duty. As per such

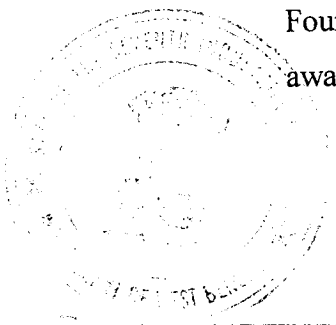


direction/order, he became forceful unemployed without any reason. Thereafter, he came back to join his duties after three months, when Dr. Ghatak again told him to come to join his duty after Durga Puja. Thereafter, on 19.10.2010 he met with Dr. M.M. Ghatak, who told him that he was very much busy and he could not talk with him and he was again advised to come on 25.10.2010 and thereafter, he met with Dr. Ghatak on 25.10.2010 at 12 Noon, when Dr. Ghatak told him that his service had been terminated by the management and so, he need not come to report for his duty further. Then, he requested Dr. Ghatak to give him a letter of termination, but Dr. Ghatak told him that "nothing will be given to you, do whatever you like". Then, he requested Dr. Ghatak to pay his due salary and bonus for the month of February and for the year 2019, but Dr. Ghatak did not care about such request. It is also stated that at the time of verbal termination of service on 25.10.2010, the management did not issue any letter of charges or did not conduct any domestic enquiry against him. They did not pay his salary or comply with the provision laid down under the Industrial Disputes Act, 1947 and Rules made thereunder for termination of his service. He also wrote a letter under registered post with A.D. dated 28.10.2010 to the management, but the said letter was refused by the OP/Centre with the postal remark 'refused'. Then, he raised the dispute before the Labour Commissioner, Government of West Bengal, Labour Department, N. S. Buildings, 11th Floor, 1, Kiran Sankar Roy Road, Kolkata-700001. According to him, he is totally unemployed since the termination of his service and passing his days with acute financial hardship with his family members. His last salary was of Rs.6000/- per month. After expiry of 45 days from the date of raising dispute before the Labour Commissioner, Appropriate Government, this case has been filed by him for proper adjudication. Hence, this case for reinstatement of the applicant in his service with full back wages and consequential reliefs with the findings that the termination of his service w.e.f. 25.10.2010 is illegal and unjustified.

The OP/Centre appeared on receiving notice and filed written statement against the written statement so filed by the applicant, wherein they have denied each and every allegations brought against them by the applicant. According to O.P., the application filed by the applicant is not maintainable as the applicant is not a workman in terms of the Section 2(s) of the I. D. Act, 1947; that the instant dispute is not an industrial dispute in terms of Section 2A(2) of the said Act; that the service of the applicant has never been terminated particularly on 25.10.2010; that in spite of pending of one dispute before the office of the Labour Commissioner being File No. 08 of 2011, the applicant raised another dispute before the same authority being File No. 56 of 2011, which hits the principles of res judicata and estoppels; that this case was not filed within three years from the date of alleged termination as specified in sub-Section 3 of Section 2A of the Industrial Disputes Act, 1947. The specific case of the OP/Centre is that the applicant worked under the OP/Centre as an Occupational Therapist. He has never worked for 240 days in the preceding 12 months from the alleged date of termination and so, he is not entitled to raise



any dispute challenging his alleged termination under Industrial Disputes Act, 1947. The OP/Centre is a small proprietorship organization and engaged in the business of running a rehabilitation centre. The applicant was appointed in the establishment w.e.f. 23.07.2008 as an occupational therapist for a period of six months on a consolidated service charge of Rs.5,500/- per month. Initially, he was appointed for three months, but in the first three months when it was observed by the authority that he was not having the service mentality and minimum disciplined attitudes, his contractual service was not renewed and only on sympathetic ground he was allowed time to rectify himself and learn how to give service to such depressed patients. His other colleagues also repeatedly complaint against him. His service had never been confirmed by the management verbally or in writing and he was just allowed in his duty on verbal extension. He was in the habit of making absence in his duty without submitting any leave application and not even any verbal information. He suddenly disappeared on and from 24.02.2010 and even no telephonic information was given to the management staff. He was tried to contact repeatedly through mobile, but he could not be contacted. After interval of nearly two months, he suddenly appeared in the last week of April, 2010 and met with Dr. M.M. Ghatak, when he was asked to receive show-cause letter and to submit reply explaining reasons of his unauthorized absence, he left the centre and thereafter, he did not come to join and so, question of termination of his service w.e.f. 25.10.2010 does not arise at all. The management also issued a certificate in his favour as he asked for a favour for some other good job available to him elsewhere. The job of the Occupational Therapist is not perennial in nature and it is highly specialized skilled job and is in the nature of a job of a Doctor. So, it cannot be said that a person holding a degree of Occupational Therapist / Physiotherapist is a workman, because, he was carrying on a work of helping and giving the patient to exercise to make them capable. The applicant did not join his duty on his own accord with some mal-intention. The applicant being an Occupational Therapist still have private practice and earning more than the salary he used to receive from the centre. On receiving a letter being No.169/08/11/LCC dated 17.02.2011 from the Assistant Labour Commissioner, Govt. of West Bengal, the management submitted their comments vide their letter dated 10.06.2011. Surprisingly, pending the above matter, the applicant raised another dispute on the selfsame cause of action before the Assistant Labour Commissioner as Dispute File No.56 of 11. The management during the conciliation meeting asked the applicant for several times to join the duty, which he refused. During pendency of this case, the applicant joined in his service with an increased salary, but he refused to sign on the memorandum of settlement and left again the service of the company on his own accord after taking his due salary and again raised another dispute of his alleged illegal termination of service. In view of the order of the Hon'ble High Court, Calcutta, this case has been transferred to this Tribunal from the Fourth Industrial Tribunal, Kolkata. In the circumstances, OP/Company has prayed for an award holding that the present application under Section 2A(2) of the Industrial Disputes



Act, 1947 is not maintainable and the service of the applicant has never been terminated by the management of the OP/Centre particularly on 25.10.2010 and also not to grant any relief, as prayed for.

Upon considering the pleadings of both the parties, the following issues have been framed for proper adjudication of this case :-

1. Whether the application filed by the applicant is maintainable ?
2. Whether the applicant herein is a 'workman' in terms of Section 2(s) of the Industrial Disputes Act, 1947 ?
3. Whether the present dispute is an 'industrial dispute' ?
4. Whether the workman Sri Vishwa Mohan Bharti was refused employment since 25.10.2010 by the management in legal and just manner ?
5. Whether the management issued any notice / show-cause / charge-sheet to the applicant on or before 25.10.2010 or any provision under the Industrial Disputes Act, 1947 or Rules made thereunder was followed in terminating the service of workman on and from 25.10.2010 ?
6. To what relief, is the applicant / workman entitled ?

DECISION WITH REASONS

Issue Nos. 1 to 6 :

All these issues being interlinked character are taken up together for the sake of brevity and for the convenience of consideration.

In course of hearing argument, Ld. Advocate for the OP/Centre submitted that the applicant is not a 'workman' in terms of the Section 2(s) of the I. D. Act, 1947. He further submitted that the applicant was appointed on 23.07.2008 as an Occupational Therapist and he worked till 24.02.2010 in the OP/Centre as an Occupational Therapist. It was his duty to deal with various therapists both manually and/or with some kits to improve the functional capability of a disabled / paralyzed and/or any person having physical impairment and he also used to give exercise to the patients to make a person capable of doing work or regain activities of daily living. Therefore, according to him, the job of the Occupational Therapist is not perennial in nature and it is highly specialized skilled job and is in the nature of the job of a Doctor. So, a person like the present applicant holding a degree of Occupational Therapy cannot be said to be a workman. In support of his above contention, he has also cited a decision reported in 2006 (110) FLR 468. He further submitted that since the applicant is not a 'workman' as defined under Section 2(s) of the Industrial Disputes Act, 1947, and the dispute raised by him cannot be said to be an Industrial Dispute, the application, filed by him, is not maintainable in law.

On the other hand, Ld. Advocate for the applicant submitted that it is admitted position that the applicant was appointed as an Occupational Therapist in the OP/Centre and started working there as an Occupational Therapist w.e.f. 23.07.2008. He further submitted that though the applicant is a skilled person having a degree of Bachelor of Occupational Therapy, but his job in the OP/Centre was to treat the patients with daily business from morning to night including massage, if required, and thus, the work carried out by him was of perennial in nature and so, he was/is a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. Therefore, this case is maintainable both in law and fact.

In the instant case, there is no dispute on the point that the applicant Shri Vishwa Mohan Bharti was appointed as an Occupational Therapist in the OP / M/s. Medical Rehabilitation Centre w.e.f. 23.07.2008 for a period of six months on a consolidated service charge of Rs.5,500/- per month. It is also admitted position that initially, such appointment was for three months, as it also appears from the letter of appointment (Exhibit-1). According to the applicant (PW-1), in course of his employment, one Identity Card (Exhibit-2) was issued by the management of the OP in his favour and also on appreciation of his service, one Certificate (Exhibit-3) was also issued on 18.11.2008 by Dr. Mouli Madhab Ghatak, Director and Chief Consultant of the OP/Centre. It appears from the Exhibit-3 / Certificate dated 18.11.2008 that he was working in the OP/Centre as an Occupational Therapist since 23.07.2008 and he was working there with sincerity. It further appears from the Exhibit-1 / letter of appointment that 'Initially the appointment will be for 3 (three) months, which may be renewed on the basis of your performance and as per requirement of the Centre'. I find from the Exhibit-3 / Certificate that he was working there with sincerity till issuance of such certificate i.e. till 18.11.2008. Therefore, it can safely be presumed that his service was renewed till 18.11.2008 on the basis of his performance and as per the requirement of the Centre, after completion of three months of his service. According to the OP/Centre, the applicant suddenly disappeared on and from 24.02.2010. Therefore, it can safely be said again that his appointment / service was further renewed from time to time verbally, without any written order of renew / extension of service. It is further case of the OP that the service of the applicant had never been confirmed. In this case, no letter of confirmation of service of the applicant, issued by the OP/Centre, has been filed by the applicant. In absence of such document, this Tribunal has no other alternative but to hold that the service of the applicant has not yet been confirmed. Rather, it can safely be said that he was allowed in his duty on verbal extension.

Now, the question which comes for consideration is that as to whether the applicant, who was appointed and worked in the OP/Centre as an Occupational Therapist, is a 'workman' in terms of the Section 2(s) of the I. D. Act, 1947 or not.

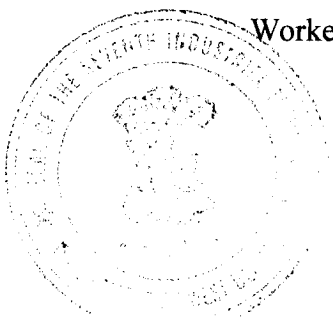
According to Section 2(s) of the Industrial Disputes Act, 1947, “**workman**” means *any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--*

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

No doubt the job of an Occupational Therapist is a highly specialised and skilled job. Now, I have to consider as to whether a skilled person like the applicant, who is an Occupational Therapist, will come under the purview of Section 2(s) of the Industrial Disputes Act, 1947 or not.

In this regard, PW-1 has admitted during his cross-examination that he is a Bachelor of Occupational Therapy and he used to treat the patients with daily business from morning to night and also used to massage as and when required.

There is no dispute on the point that the duties of Occupational Therapists are to treat the injured, ill or disabled patients through the therapeutic use of everyday activities. They help these patients to develop, recover, improve as well as maintain the skills needed for daily living and working. Occupational Therapist also may work in mental health settings, where they help patients who suffered from development disabilities, mental illness or emotional problems. They may also work with people who have been through a traumatic event, such as a car accident. Some Occupational Therapists, such as those employed in Hospitals, work as part of a health care team along with Doctors, registered Nurses and other types of therapists. They may work also with patients who have chronic conditions, such as diabetes or help, rehabilitate a patient recovering from hip replacement surgery. Their job is similar to the jobs of (i) Athletic Trainers, (ii) **Physical Therapists**, (iii) Recreational Therapists, (iv) Social and Human Service Assistants, (v) Social Workers, (vi) Occupational Therapist Assistants, (vii) Orthotic and Prosthetic Specialists,



(viii) Speech Pathologists and Audiologists, (ix) Rehabilitation Counselors, (x) Art Therapists, (xi) Music Therapists.

From the aforesaid decision, as cited by the Ld. Advocate for the OP/Centre, reported in 2006 (110) FLR 473, I find that the Hon'ble High Court, Bombay in Bombay Hospital Trust & Anr. And Dr. Shailesh Hathi & Anr., has been pleased to observe that the Physiotherapist's job is not perennial in nature of work. It is highly specialised skilled job and is in the nature of job of a Doctor. It has also been observed that it cannot be said that the person holding a degree of Physiotherapist is a workman, because he is carrying on work of helping the patients to exercise.

Here in this case, the applicant is an Occupational Therapist having a degree of Bachelor of Occupational Therapy. The job of an Occupational Therapist is similar to the job of a Physiotherapist, as discussed above. Therefore, in view of the aforesaid observation of the Hon'ble Bombay High Court, I am of the opinion that the Occupational Therapist's job is not perennial in nature of work. It is highly specialised, skilled job and is in the nature of job of a Doctor. Apart from the aforesaid, it cannot be said that the applicant holding a degree of Bachelor of Occupational Therapy is a workman, because he was carrying on work of helping the patients by way of rendering specialised professional service like a Doctor. So, in view of my above made discussions, basing on the aforesaid observation of the Hon'ble High Court, Bombay as well as accepting the above referred argument, as advanced by the Ld. Advocate for the OP/Centre, I have no other alternative but to hold that the applicant is not a workman in terms of Section 2(s) of the Industrial Disputes Act, 1947. In other words, he will not come within the purview of the definition of 'workman' under Section 2(s) of the Industrial Disputes Act, 1947. So, the argument, as advanced by the Ld. Advocate for the applicant, as referred above, is not accepted.

This case has been filed by the applicant under Section 2A(2) of the Industrial Disputes Act, 1947.

Section 2A (1) of the Act (As amended) runs as follows :-

*"Where any employer discharges, dismisses, retrenches, refuses employment or otherwise terminates the services of an individual **workman**, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment, refusal of employment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute."*

Section 2A(2) of the said Act runs as follows :-

*"Notwithstanding anything contained in Section 10, any such **workman**, as is specified in sub-Section (1) may, make an application direct to the Labour Court or Tribunal for adjudication of the dispute referred to therein after the expiry of*



forty-five days from the date he has made the application to the Conciliation Officer of the appropriate Government for conciliation of the dispute, and in receipt of such application the Labour Court or Tribunal shall have powers and jurisdiction to adjudicate upon the dispute, as if it were a dispute referred to it by the appropriate Government in accordance with the provisions of this Act and all the provisions of this Act shall apply in relation to such adjudication as they apply in relation to an industrial dispute referred to it by the appropriate Government."

Therefore, to attract the provisions of Section 2A(2) of the Industrial Disputes Act, 1947, the applicant, at first, has to prove that he is a 'workman' in terms of Section 2(s) of the Industrial Disputes Act, 1947. In the instant case, the applicant has failed to prove that he is a **workman** in terms of Section 2(s) of the Industrial Disputes Act, 1947 and so, the dispute in between the applicant and his employer / OP in connection with refusal of his employment, as alleged, cannot be said to be an industrial dispute in view of provision of Section 2A(1) of the Act. Therefore, I have no other alternative but to hold that this Tribunal has no power and jurisdiction to adjudicate the alleged dispute in between the applicant and the OP/Centre, in view of the provisions of Section 2A(2) of the Act. Consequently, I hold further that the application under Section 2A(2) of the Act, so filed by the applicant, is not maintainable in law.

In view of my above made discussions and findings, I need not discuss or give any findings with regard Issue Nos. 4 & 5 unnecessarily to make the judgment lengthy.

Therefore, applicant is not entitled to get any relief, as prayed for.

All the issues are thus disposed of.

In the result, the case fails.

Hence, it is,

ORDERED

that the case being No. 19 of 2011 under Section 2A(2) of the Industrial Disputes Act, 1947 be and the same is dismissed on contest without any order as to costs.

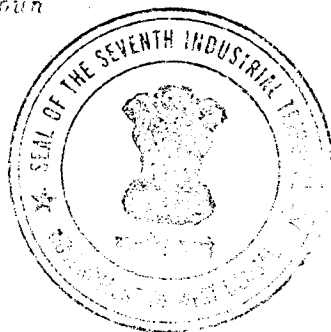
This is my Award.

Dictated & corrected by me

sd/-

Judge

Judge
Seventh Industrial Tribunal



sd/-

(ASHIS KUMAR DAS)

Judge,
Seventh Industrial Tribunal,
Kolkata
27/08/2019

Judge
Seventh Industrial Tribunal