

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

No. Labr. / 964 / (LC-IR)

Date : 12.12.2018

ORDER

WHEREAS an industrial dispute existed between M/S Hiltake Electronics (P) Ltd., P-17, Misson Row Extension, Kolkata-13 and their workman Sri Rakesh Kumar Sharma, 10/B, Radhanath Mullick Lane, Ground Floor, Kolkata-12 regarding the issue, being a matter specified in the second schedule of the Industrial Dispute Act, 1947 (14 of 1947).

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

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

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

ANNEXURE

(Attached herewith)

By order of the Governor,




Deputy Secretary
to the Government of West Bengal

No. Labr. / 964 / 1 (5) / (LC-IR)

Date 12.12.2018

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

1. M/S: Hiltake Electronics (P) Ltd., P-17, Misson Row Extension, Kolkata-13.
2. Sri Rakesh Kumar Sharma, 10/B, Radhanath Mullick Lane, Ground Floor, Kolkata-12.
3. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The Labour Commissioner, W.B., New Secretariat Buildings, (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

32508/2018

No. Labr: /961/2(2)/(Le-1R)

Date 12.12.2018 .

Copy forwarded for information to :-

1. The Judge, Seventh Industrial Tribunal, West Bengal, with respect to his Memo No. 1960 dated 25/09/2018 .
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Deputy Secretary

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

Present: Shri Avani Pal Singh,
Judge, Seventh Industrial Tribunal

CASE NO. 17/2016; u/S. 10(1B)(d) of the I.D. Act, 1947

**Rakesh Kumar Sharma,
10/B, Radhanath Mullick Lane,
Ground Floor, Kolkata – 700 012.**

...Applicant.

-versus-

**M/s. Hiltake Electronics (P) Ltd.,
P-17, Misson Row Extension, Kolkata – 700 013.**

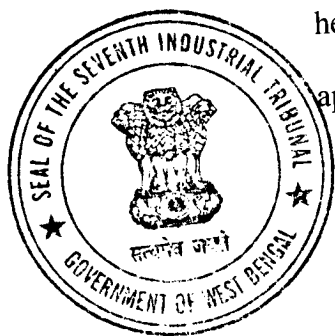
...OP/Company.

A W A R D

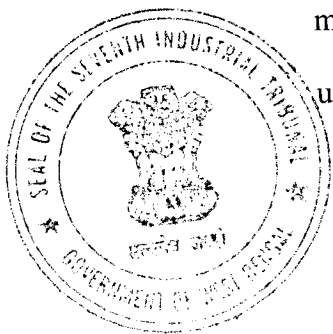
Dated : 30-08-2018

1. The instant case came to be registered when the applicant Rakesh Kumar Sharma filed an application purportedly under Section 10(1B)(d) of the Industrial Disputes Act, 1947 together with Form – T & Form – S annexed thereto, on 11.04.2016 against M/s. Hiltake Electronics (P) Ltd., hereinafter referred to as the opposite party (OP), seeking to raise dispute in connection with termination of his employment by the opposite party/employer, claiming the same to be illegal and void ab initio, with the prayers for a declaration to such effect and for grant of relief of reinstatement in his service with the opposite party, maintaining continuity of service without any break, together with payment of full back wages and consequential benefits and also prayed for cost of litigation.

2. Upon registration of the instant case, notice together with a copy of such application, was issued and sent by registered post with A.D. to the given address of the OP with the direction to appear on 25.05.2016 and to file its written statement in reply, if any, to such application. Records reveal that the A.D. card, showing due delivery of the said notice and copy of the application at the office of the OP, was received back and placed before the Tribunal on 15.06.2016; however, as none appeared on behalf of the OP/Company initially further time was granted by this Tribunal on several dates, for appearance and for filing written statement by the OP. On 13.01.2017, the OP appeared through their Ld. Advocate and thereafter, filed their written statement on 21.03.2017. On the claims of the applicant being rebutted by the OP in their written statement, this Tribunal directed the OP to file their list of documents, upon which they sought to rely upon in support of their contentions, however, the OP/Company never filed any such list of documents, and they also stopped appearing in the matter on consecutive dates and finally, taking note of such absence of the OP and their failure to file their list of documents, this Tribunal directed on 09.11.2017 that the matter shall proceed **ex-parte** against the OP, and it has proceeded as such till date.
3. The case made out by the applicant, as comes out from his said application, briefly is that the OP was a reputed concern and was an authorised business-franchisee of BSNL and used to earn good profit due to the skilful performance and hard labour of the workmen/employees employed under them, and that he was also an employee of the OP, employed as a salesman since the year 2005 and he worked continuously till termination of his services on 24.06.2015. Further, the applicant claimed to be a victim of unfair labour practice of the OP, as he was not



issued any appointment letter, was paid very poor emoluments and had to work hard without proper and adequate facilities and though the OP had been unfair and exploitative to the applicant, yet the applicant had all along been sincere, hard-working and had rendered satisfactory service to the OP. It is the further case that, without assigning any reason, the OP had illegally withheld the monthly salary of the applicant for May, 2015 and in such circumstances the applicant had made a representation on 08.06.2015 requesting the OP to release his said salary, but the OP instead of releasing such salary, sent a letter dated 17.06.2015 levelling baseless, false and imaginary allegations against the applicant to which the applicant sent a reply dated 22.06.2015, denying each of such allegations. It is the further case of the applicant that on 24.06.2015, consequential and subsequent to the demand of salary made by the applicant, the OP terminated the services of the applicant verbally on 24.06.2015, though no charge-sheet was issued neither any domestic enquiry conducted against the applicant, who was neither given any notice nor any notice-pay nor any compensation and/or monetary benefit by the OP prior to his such termination, at which time his salary was Rs.7500/- per month. It is the further case that the applicant, being aggrieved by such illegal termination, personally approached the management and also sent a letter of protest dated 16.07.2015, demanding *inter-alia* his reinstatement in service with full back wages, together with his unpaid salary for the month of May, 2016, however, despite receipt of the said letter at their office, the OP did not respond in any manner to the said letter, and accordingly the applicant submitted his representation dated 10.08.2015 to the Labour Commissioner, Government of West Bengal seeking intervention of the said authority and for conciliation in the matter, though nothing was achieved in the joint conciliatory conference due to unreasonable and adamant attitude of the OP and hence, the applicant made a



prayer in Form 'P-4' on 27.01.2016 for issuance of pendency certificate, which was duly issued by the conciliatory authority in the prescribed Form-S under Section 10(1B) of the Industrial Disputes Act, 1947 on 03.02.2016, and accordingly the said application has been filed by the applicant, with the said prayers made therein.

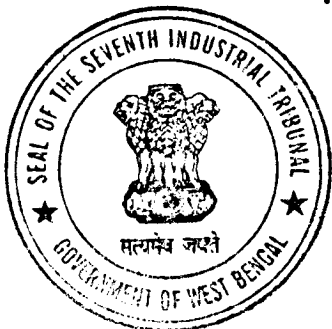
4. Leading evidence in support of his aforesaid case, the applicant Rakesh Kumar Sharma examined himself as PW-1 by filing his affidavit-in-chief, which was tendered on 17.05.2018 by him, at the time of his examination on oath, and further PW-1 also identified a copy of letter dated 08.06.2015 (**Exhibit-1**), copy of letter dated 17.06.2015 (**Exhibit-2**) issued by the OP to the applicant, copy of the letter dated 22.06.2015 (**Exhibit-3**) with copy of the A.D. card (**Exhibit-3/1**) showing receipt of such letter by OP on 24.06.2015 and copy of letter dated 16.07.2015 of the applicant and A.D. card showing receipt of the letter on 17.07.2015 by the OP (**Exhibit-4**). PW-1 further identified a copy of his representation to the Labour Commissioner, Govt. of West Bengal dated 10.08.2015 (**Exhibit-5**), copy of his application before Conciliation Officer on 29.01.2016 (**Exhibit-6**), copies of his Provident Fund Deposit Slips for the year 2011-12 and 2012-2013 (**Exhibit-7**) and copy of Identity Certificate (**Exhibit-8**) showing registration of the applicant and his family members with the ESI Corporation, through the OP. All of such documents, as identified by PW-1, have been taken into evidence and marked in the case, **ex-parte**.
5. From the testimony of PW-1, Rakesh Kumar Sharma, it comes out that he was aged about forty(40) years old (*affirmed on 14th December, 2017*) and that, he was an employee engaged by the OP to work under them as 'salesman' in the year



2005 and he worked continuously till termination of his services w.e.f. 24.06.2015 and further, PW-1 deposed that OP was a well reputed concern carrying on business as an authorised franchisee of BSNL earning huge profits due to the skilful performance and hard labour so rendered by the employees under them. In this regard, though the applicant did not mention about the address of his workplace, this Tribunal noted from the application that the address of the OP is given as P-17, Mission Row Extension, Kolkata – 700013 and the same address also appears in various letters which have been exhibited (Exhibits - 1 & Exhibit - 2). That apart, this Tribunal noted from Exhibit-2, being a letter issued by the OP to the applicant on 17.06.2015 (*at last para. thereof*) that it was stated therein “amount lying with you on account of sales made by you to the retailer on behalf of the company” by the OP, while corresponding with regard to certain claim it purportedly had with the applicant. Clearly, from the evidence on record, it appears that the OP was carrying-out ‘**industry**’ within the jurisdiction of this Tribunal and the applicant was a ‘**workman**’ under the OP, both such terms being defined under Section 2(j) and Section 2(s) respectively of the Industrial Disputes Act, 1947; further, since the matter relates to termination of such service of the applicant, this Tribunal is satisfied that the instant dispute is an ‘**industrial dispute**’ as defined by Section 2(k) read with Section 10(1B)(a) of the said Act, as amended, and this Tribunal would have jurisdiction to entertain the same under Section 7A of the said Act. That apart, from the uncontroverted evidence of PW-1 as well as from the Form – ‘S’ submitted with the application, this Tribunal is satisfied that there has been due compliance of provisions under Section 10(1B) of the said Act, though admittedly the applicant did not file his application within 60 (sixty) days from receipt of the certificate in Form – S on 03.02.2016, as has been prescribed under Section 10(1B)(c) of the said Act. In that regard, this

Tribunal noted that the applicant has stated in his application (*para. 14*) that he could not file the application within the stipulated period due to extreme difficulties he was facing and the filing was delayed by a few days, and testifying in support of such contention, PW-1 stated (*para. 14 of his affidavit*) that such delay be condoned by this Tribunal for the ends of justice. Having noted such prayer and having examined the provisions of law, this Tribunal is of the view that the provisions of Section 10(1B)(c) of the said Act begin with the use of the word '**may**' and that clearly makes it a '**directory**' provision and a few days delay, which has been duly explained with a prayer for condonation thereof, cannot be held to be fatal to an application being made thereunder, and this Tribunal accordingly holds so and, in view of such explanation being found satisfactory, condones such delay.

6. Further, from the unchallenged testimony of PW-1 (*para. 7*) it also stands established that the services of the applicant were terminated verbally on 24.06.2015 by the OP, for the reason and as a consequence of his demand for release of his withheld salary, and it is also established that the OP had not issued any charge-sheet, or any show-cause notice, nor conducted any domestic-enquiry and neither did the OP take any disciplinary action against the applicant, prior to such termination of the services of the applicant, and hence such termination cannot be called or held to be punitive or by way of any disciplinary action; accordingly, on the basis of the uncontroverted evidence on record, this Tribunal holds that the such termination of the services of the applicant by the OP would be a case of '**retrenchment**', falling squarely within the definition of the term '**retrenchment**' under Section 2(oo) of the Industrial Disputes Act, 1947.



7. In respect of length of service of the applicant under the OP, this Tribunal finds from the uncontroverted evidence of PW-1 that the applicant was appointed in the year 2005 and worked uninterrupted under the OP till such termination of his services w.e.f. 24.06.2015. Such uninterrupted service of nearly ten (10) years of the workman would qualify as '**continuous service**' as laid down under Section 25B of the said Act, and this Tribunal holds, on the basis of uncontroverted evidence on record, that the applicant, as a workman under the OP, rendered '**continuous service**' to them for a period of around ten years and as such, this Tribunal further holds that the services of the applicant would come under the protection of Section 25F of the said Act, which lays down the condition(s) precedent for retrenchment, if any, of a workman employed in any industry who has been in continuous service for not less than one year under his employer.
8. From the testimony of PW-1 (*para. 7*) it further came out that at the time of the verbal termination of his services on 24.06.2015 by the OP, he was neither given any notice nor any notice-pay nor was offered any compensation or monetary benefit by the OP, prior to such termination and hence, in light of such uncontroverted evidence, this Tribunal holds that the said **retrenchment of the applicant/workman** by the OP was not in accordance with the conditions laid down by provisions of Section 25F of the said Act and clearly the act of such retrenchment was unlawful, being violative of express provisions thereof.
9. In light of the aforesaid discussion, this Tribunal holds that the applicant has established by way of evidence that the termination of his services by the OP on 24.06.2015 was **unlawful and void ab initio**, for being contrary to and violative



of the express provisions of law being **Section 25F** and such other provisions of the Industrial Disputes Act, 1947.

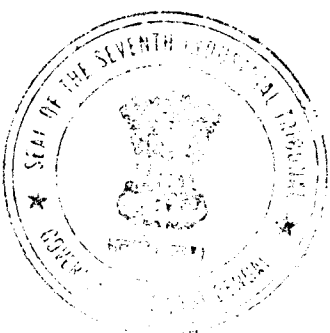
10. In view of the aforesaid findings, this Tribunal would proceed to examine the relief that the applicant may be entitled to. Law, in this regard, has been laid down in various pronouncements of the Hon'ble Supreme Court, applying to various fact-situations. Discussing the law laid down through various pronouncements, the Hon'ble Supreme Court, while rendering the judgment in Civil Appeal No. 6767 of 2013 *Deepali Gundu Surwase vs Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors*, as reported in (2013) 10 Supreme Court Cases 324, was pleased to hold, inter alia, at **para 38** thereof :

38. The propositions which can be culled out from the aforementioned judgments 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 [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53].

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal [(2007) 2 SCC 433 : (2007) 1 SCC (L&S) 651] that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches [Hindustan Tin Works (P) Ltd. v. Employees, (1979) 2 SCC 80 : 1979 SCC (L&S) 53], [Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443 : 1981 SCC (L&S) 16] referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

11. Having examined the provisions of law, it is imperative to examine the stand and evidence of the applicant/workman on the issue of relief(s) to which he may be entitled to as per law. As has been noted earlier, the applicant / workman in his application prayed for reinstatement in his services forthwith, while maintaining continuity thereof, together with full back wages along with all consequential benefits accrued to him for reasons of his such services. Testifying in support of such contention, PW-1 deposed that (*para. 21*) he may be granted the relief of reinstatement in his services with full back wages along with all consequential benefits.
12. Having noted the prayer made by the workman, this Tribunal examined other evidence and found that in his ESI Identity Certificate (*Exhibit-8*), his date of birth appears as 09.03.1974 and hence he would be around 44 years of age presently. That apart, it is also established in evidence that he has rendered over ten years of service to the OP without any break. That apart, it also comes out in

the evidence of PW-1 that the OP was a franchisee of BSNL and was earning good profit and there is no contra-evidence to show that the OP has been undergoing financial stringency or there has been a reduction of staff-strength on that account. Further, it has come out from the testimony of PW-1 (*para. 12*) that he has been fully unemployed since such termination of his services by the OP and has failed to obtain any job and/or any other avenue of earning and was hence passing his days in great hardship.

13. Considering the length of service rendered as well as the present age (about 44) of the applicant as well as the fact that he has remained unemployed since after such termination of his services by the OP, and in the absence of any contra-evidence and/or any mitigating circumstances as discussed hereinbefore, this Tribunal is of the view that the ends of justice would be served if the services of the applicant would be directed to be reinstated with the OP w.e.f. 24.06.2015, with continuity in service, and with a direction upon the OP to pay full back wages and consequential benefits to the applicant, arising out of his such reinstatement.

Hence, it is,

Ordered

- (i) That, the termination of the services of the applicant Rakesh Kumar Sharma by the OP M/s. Hiltake Electronics (P) Ltd. on 24.06.2015 is found and held to be unjustified and unlawful, and is hereby set aside for it being illegal and unsustainable in terms of Section 25F and such other provisions of the Industrial Disputes Act, 1947;



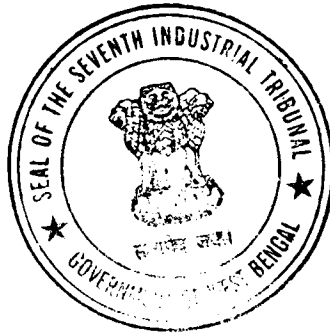
- (ii) That, the applicant / workman Sri Rakesh Kumar Sharma shall be reinstated in his services under the OP M/s. Hiltake Electronics (P) Ltd. with effect from 24.06.2015, and the OP shall pay full back wages, from 24.06.2015 till date, and all consequential benefits arising out of such reinstatement of Rakesh Kumar Sharma;
- (iii) That, there shall be no order as to costs.

The prayers in the application are answered accordingly. The aforesaid shall constitute the Award of this Tribunal passed in the instant Case No. **17/ 10(1B)(d)/ 2016**, which shall stand disposed of, *ex-parte*.

Dictated & corrected by me

sd/-
Judge

Seventh Industrial Tribunal



sd/-
Judge,
Seventh Industrial Tribunal
Kolkata
30/08/2018

Seventh Industrial Tribunal