

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

**WPA 20335 of 2014
with
IA No. CAN 1 of 2021**

**M/s Aditya Birla Insulators (previously known as Jayashree In)
Versus
Learned Seventh Industrial Tribunal & Ors.**

For the petitioner : Mr. Ranjay De
Mr. Basbjit Banerjee
Mr. A.A.Bose

For the respondent : Mr. Jayanta Dasgupta
No. 3 Mr. Balaram Patra

Heard on : 8th January 2024

Judgment on : **8th January 2024.**

Raja Basu Chowdhury, J:

1. The instant writ petition has been filed, *inter alia*, challenging the award dated 23rd August, 2013 passed by the Learned Seventh Industrial Tribunal, West Bengal.
2. Shorn of unnecessary details, the facts are that the respondent no. 3 happens to be an ex-employee of the writ petitioner. It is the petitioner's case that at the material point of time, the respondent

no. 3 was engaged as a supervisor of the cleaning department of the petitioner at its factory at Rishra.

3. In course of employment, by a notice in writing dated 6th October, 1997, it was notified that during the Pujas on 9th October, 1997, 10th October, 1997 and 11th October, 1997, certain departments of the petitioner including the department where the respondent no. 3 was engaged, will be kept functional and that the workmen concerned will be paid one and a half time of the wages for working on paid holidays, in addition to their usual wages paid on holidays. Inasmuch as the respondent no. 3 did not report for duty on the aforesaid three dates despite instruction from his superior without any intimation in that regard, by a written order dated 14th October, 1997, he was locked-out with immediate effect till further notice. Simultaneously, a charge sheet of even date was also issued calling upon the respondent no. 3 to explain within 48 hours from the date of receipt of the charge sheet as to why disciplinary action shall not be taken against him.
4. The relevant clauses of the standing orders were also noted in the said charge sheet. The respondent no. 3 had duly responded to the said charge sheet, by a correspondence dated 27th October, 1997. Subsequently on 26th October, 1998, after a lapse of a year therefrom, on the basis of the reply given by the respondent no. 3 to the charge sheet dated 14th October, 1997, a fresh charge sheet was issued. The charge sheet appears to have been issued in

response to a demand made by the respondent no.3 vide his letter dated 29th August, 1998. The respondent no. 3 had duly responded to the aforesaid charge sheet by his reply dated 7th November, 1998. By such response, the respondent no. 3 had also called upon the petitioner to withdraw the charge sheet and permit him to join duty. Subsequently, however, at the instance of the respondent no. 3, a statutory conciliation proceeding was initiated. Such conciliation having failed, the appropriate Government by an order dated 31st March, 2003 was, *inter alia*, pleased to refer the disputes between the parties to the Learned Seventh Industrial Tribunal, West Bengal in terms of Section 10(2A) of the Industrial Disputes Act, 1947 (hereinafter referred to as the “said Act”) by framing the following issues:-

“ ISSUES

1. Whether refusal by the management to continue to employ Shri Uday shankar Kundu w.e.f. 13.10.1997 is justified?

2. What relief, if any, is the workman entitled to? ”

5. Pursuant to and in terms of the order of reference, the respondent no. 3 had filed his written statement, *inter alia*, praying therein as follows:-

“ Under the circumstances the workman humbly prays before the Ld. Tribunal that this Tribunal would be pleased to answer the reference in favour of the workman and would be pleased to pass as Award holding therein that the

termination/refusal of employment of the workman Sri Uday Sankar Kundu by the employer Jayashree Insulators unit of India Rayon and Industries Limited is unjustified illegal and void and the workman is entitled to the relief of reinstatement in his employment under the said employer with all back wages with other benefits and/or fringe benefits retrospectively from the date of refusal of service to the date of reinstatement including unpaid wages for the period from 1997 – 1998 with plus compensation and the interest subsistence allowance as this Ld. Tribunal may deem fit and proper and to pass such order or orders as to this Tribunal may deem fit and proper.”

6. The said proceeding was contested by the writ petitioner by filing its written statement whereby, while denying all material allegations it was *inter alia*, contended that despite repeated requests for reporting to duty, the respondent no. 3 had failed to report to duty and accordingly, the reference should be dismissed.
7. The said reference ultimately culminated in an award dated 23rd August, 2013 which is impugned in the instant writ petition.
8. Mr. De, learned advocate appearing for the writ petitioner, submits that what was referred to the Tribunal was the issue of refusal of employment by the petitioner with effect from 13th October, 1997. By referring to the notice dated 6th October, 1997 and the subsequent locked-out notice dated 14th October, 1997, it is submitted that the respondent no. 3 was aware with regard to

the decision of the petitioner to keep its department open on the dates indicated in the aforesaid notice. Notwithstanding the aforesaid, the respondent no. 3 did not report for duty, nor did he provide any intimation as regards his absence from duty and for reasons whereof, the locked-out notice was issued.

9. By referring to the response given by the respondent no. 3 to the charge sheet dated 14th October, 1997, it is submitted that the respondent no. 3 had himself admitted that he was called upon by his superior to report for duty. Despite the aforesaid, he did not report for duty. It is submitted that the Tribunal had overlooked the scope of the reference and had returned a finding that the respondent no. 3 was terminated from service. The termination from service was never an issue before the learned Tribunal.
10. By placing reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***Oshiar Prasad & Ors. v. Employers in relation to Management of Sudamdih Coal Washery of M/s BCCL, Dhanbad, Jharkhand***, reported in **(2015) 4 SCC 71**, it is submitted by Mr. De that the learned Tribunal while answering the reference, has to confine its enquiry to the questions referred to and has no jurisdiction to travel beyond the terms of reference. It is based on the finding of the Tribunal in relation to the questions referred that consequential relief can be granted in favour of the respondent no. 3. Since, the learned Tribunal did not answer the reference, no consequential

relief in the form of back wages could be granted to the respondent no.3. Independent of the above, it is submitted that before awarding back wages, the Tribunal had to ascertain whether the workman concerned had both pleaded and proved with the aid of evidence that after his dismissal from service he is not gainfully employed anywhere and has no earnings to maintain himself.

11. Admittedly, in this case there is no such pleading, only it had been stated in the deposition, claiming that the respondent no. 3 is not gainfully employed. In any event, admittedly the respondent no. 3's wife is a Government servant and such fact had been admitted by the respondent no. 3 in his cross-examination and as such it cannot be said that the respondent no. 3 has no earnings to maintain himself and his family. To buttress his case that in absence of pleading and proof, back wages cannot be awarded, he has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***Management of Regional Chief Engineer, Public Health and Engineering Department, Ranchi, v. Their Workmen***, reported in **(2019) 18 SCC 814**. It is submitted that the award passed by the Learned Tribunal is perverse and the same should be set aside.

12. He has, however, been candid enough to draw the attention of this Court to a notice dated 4th August, 2012 to highlight the fact that the respondent no. 3 stood superannuated from service on 3rd July, 2009, in usual course upon reaching the retiral age of 58

years. He, therefore, submits that in the given facts, the respondent no. 3, at best, can be entitled to gratuity on the basis of his last drawn wages in the year 1997, by treating him to be in continuous service till the date of his retirement.

13. *Per contra*, Mr. Dasgupta, learned advocate representing the respondent no.3, has taken this Court through the documents on record. It is submitted that it was never in dispute that the respondent no.3 was not permitted to join his duties since, the date of issuance of locked-out order. By drawing attention of this Court to the deposition of Mr. Surendra Prasad Singh on 26th April, 2012, it is submitted that in course of cross-examination, the management's witness had admitted that no letter was issued to the respondent no.3 informing him that he had attained the age of superannuation during the pendency of the case and that he had no knowledge whether any letter was given to the respondent no.3 giving him offer to avail the benefits of provident fund and gratuity. It is still further submitted that the aforesaid management witness had also admitted in course of his cross-examination that neither in the charge-sheet dated 26th October, 1998, was the respondent no.3 directed to join his duty nor does such charge-sheet mention that he was repeatedly requested to join his duty. It has also been stated that no letter was issued separately requesting the respondent no.3 to join duty.

14. It is still further submitted that refusal of employment is akin to termination. The learned Tribunal after taking note of the failure on the part of the respondent no.3 to join his duties on 9th, 10th and 11th October, 1997, and the locked-out notice dated 14th October, 1997, has concluded that the same would in effect amount to termination from service. Though, the aforesaid word 'termination' has been loosely used in second paragraph of page 35 of the award, an overall reading of the aforesaid award would in no uncertain terms indicate that the learned Tribunal by treating the respondent no.3 to have been denied employment, had granted consequential relief in the form of back wages. There is no irregularity in the award. The award should not be read as statute. This Court should take note of the factual findings returned by the learned Tribunal on the basis of the evidence on record and should uphold the same. The respondent no.3 had prayed for back wages in his written statement. To corroborate his claim in course of examination, the respondent no.3 had deposed that he was not gainfully employed elsewhere and that his refusal to employment is still continuing. Once, the respondent no.3 had discharged his obligation in support of his claim for back wages, it was for the petitioner to place cogent evidence to prove that the respondent no.3 was gainfully employed during the relevant period so as to deny the claim for back wages. Admittedly, no such evidence had been led. The objection raised by and on behalf of the petitioner cannot be sustained. In fact, no case

for interference has been made out. The writ petition should accordingly be dismissed.

15. Heard the learned advocates appearing for the respective parties and considered the materials on record. Admittedly, in this case it is noticed that despite the notice dated 6th October, 1997, the respondent no.3 had failed to be present in his department on the dates mentioned in the notice. He did not provide any intimation in this regard to the petitioner. As a consequence of the aforesaid failure on the part of the respondent no.3, not only did the petitioner locked-out the respondent no.3, by issuing the order dated 14th October, 1997 till further notice but a charge-sheet dated 14th October, 1997 had also been issued. Records reveal that the said charge-sheet was responded to by the respondent no.3 by his reply dated 27th October, 1997. No proceeding appears to have taken place in furtherance to the aforesaid charge-sheet, at least, no disclosure in this regard has been made by any of the parties. It, however, appears that after lapse of a year therefrom on 26th October, 1998, a fresh charge-sheet was issued which apparently appears to have been issued in response to the letter dated 29th August, 1998, issued by the respondent no.3. Although, the said charge-sheet was responded to by the respondent no.3, the same was not taken to its logical conclusion.

16. In the interregnum, on the basis of the failure of conciliation, as noted hereinabove, the appropriate Government by an order in

writing dated 25th September, 2013, had referred the disputes to the learned Seventh Industrial Tribunal. On contest, the award impugned has been passed.

17. Admittedly, the respondent no. 3 had prayed for back wages in the written statement. From the sequence of the events narrated hereinabove and the evidence on record, it appears that no further notice was issued recalling the locked-out notice dated 14th August, 1997. Having regard to the aforesaid and taking note of the oral testimony of the management's witness Mr. Surendra Prasad Singh, on 26th April, 2012, it cannot be said that the respondent no.3 had ever been called upon to report back to duty. Records further reveal that the petitioner contends that the charge-sheet did not reach its logical conclusion and that the respondent no.3 was superannuated in usual course on attaining the age of 58 years on 3rd July, 2009. Such fact would corroborate from the notice dated 4th August, 2012 forming first Annexure to the affidavit in reply filed on behalf of the writ petitioner. Although, lot of arguments have been advanced as to whether the Tribunal could go beyond the scope of reference and declare whether the respondent no.3 had been terminated or not, I do not find the Tribunal to have travelled beyond the scope of the reference, reasons whereof, are discussed hereinafter.
18. On the basis of the admitted facts as disclosed by the writ petitioner and on the basis of the evidence led before the Tribunal as noted hereinabove, two important facts emerge -

- a) That the respondent no.3 had been locked-out from service vide notice in writing dated 14th October, 1997 which invariably recorded that such notice shall continue until further orders,
- b) The aforesaid locked-out notice was never recalled, nor was the respondent no. 3 directed to rejoin the service.

19. To morefully appreciate the aforesaid, the contents of such notice is extracted hereinbelow: -

“It has been reported that on 07.10.97 while you were in ‘A’ Shift Duty from 6.00 A.M. to 2.00 P.M, you were instructed by your superior Mr. D. K. Khetri, Kiln Engineer to report for duty on 9th, 10th and 11th October, 1997 for emergency work. You did not report for duty on the said dates nor you had sent any information about your absence. You are, therefore, lockedout with immediate effect till further notice”.

20. From the materials on record including the admission of the management’s witness, Surendra Prasad Singh, it would appear that he had specifically admitted that no letter had been issued calling upon the respondent no.3 to join his duties. Although, the award passed by the Tribunal may not be happily worded, it is not difficult to ascertain the basis of the award passed by the learned Tribunal. Simply because in one particular paragraph the learned Tribunal has treated the denial/refusal of employment as termination, the same does not alter either the scope of enquiry or the findings reached by the Tribunal. The award passed by the Tribunal when read as a whole would in no uncertain terms demonstrate that the

petitioner had refused employment to respondent no. 3. The pleadings and the evidence on record also support such a conclusion. The learned Tribunal in my view did not exceed the scope of enquiry as referred to by the appropriate Government. The judgment relied on in the case of **Oshiar Prasad** (*supra*) in my view is not applicable in the facts of the case.

21. Having regard to the above, the only question that remains to be answered is to the extent the consequential relief that could be given by the learned Tribunal. Admittedly, in this case the respondent no.3 had prayed for back wages. In response to such claim, the petitioner had only stated that the respondent no.3 is not entitled to such relief.

22. It is, however, an admitted position that a statement had been made by the respondent no. 3 that the management did not send him any letter directing him to join his duties, and that after 13th October, 1997 he is not gainfully employed elsewhere and that refusal of employment is continuing.

23. Although, Mr. De, learned advocate by placing reliance on the judgment delivered in the case of **Management of Regional Chief Engineer, Public Health and Engineering Department, Ranchi** (*supra*) has tried to impress upon this Court that the respondent no.3 having failed to plead that he is gainfully employed, the relief of back wages should be denied to him, I am afraid and I am unable to accept the same. I find that the judgment in the case of

Management of Regional Chief Engineer, Public Health and Engineering Department, Ranchi (*supra*) arise out of an award passed by the Tribunal concerning dismissal and non-absorption of 37 acting daily wages employees of the Public Health and Engineering Department. The question that fell for consideration in the appeal before the Hon'ble Supreme Court was whether the courts below were justified in awarding full back wages to the 37 workmen upon setting aside the order of dismissal by holding the same to be passed in contravention of Section 25F of the said Act, and consequentially directing reinstatement. It is, while deciding and answering such question the Hon'ble Supreme Court in paragraphs 10 and 11 had, *inter alia*, observed as follows:

“10. *In our considered opinion, the courts below completely failed to see that the back wages could not be awarded by the Court as of right to the workman consequent upon setting aside of his dismissal/termination order. In other words, a workman has no right to claim back wages from his employer as of right only because the Court has set aside his dismissal order in his favour and directed his reinstatement in service.*

11. *It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer is also entitled to prove it otherwise against the employee, namely, that the employee was gainfully employed during the*

relevant period and hence not entitled to claim any back wages. Initial burden is, however, on the employee.”

24. In paragraphs 12 and 13 of the said judgment the Hon’ble Supreme Court, however, while noting that grant or non-grant of back wages would depend on the facts of each case was pleased to observed as follows:

“12. *In some cases, the Court may decline to award the back wages in its entirety whereas in some cases, it may award partial depending upon the facts of each case by exercising its judicial discretion in the light of the facts and evidence. The questions, how the back wages are required to be decided, what are the factors to be taken into consideration awarding back wages, on whom the initial burden lies, etc. were elaborately discussed in several cases by this Court wherein the law on these questions has been settled. Indeed, it is no longer res integra. These cases are, M.P. SEB v. Jarina Bee [M.P. SEB v. Jarina Bee, (2003) 6 SCC 141 : 2003 SCC (L&S) 833] , Haryana Roadways v. Rudhan Singh [Haryana Roadways v. Rudhan Singh, (2005) 5 SCC 591 : 2005 SCC (L&S) 716] , U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey [U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey, (2006) 1 SCC 479 : 2006 SCC (L&S) 250] , J.K. Synthetics Ltd. v. K.P. Agrawal [J.K. Synthetics Ltd. v. K.P. Agrawal, (2007) 2 SCC 433 : (2007) 1 SCC (L&S) 651] , Metropolitan Transport Corpn. v. V. Venkatesan [Metropolitan Transport Corpn. v. V. Venkatesan, (2009) 9 SCC 601 : (2009) 2 SCC (L&S) 719] , Jagbir Singh v. Haryana State Agriculture Mktg. Board [Jagbir Singh v. Haryana State Agriculture Mktg. Board, (2009) 15 SCC 327 : (2010) 1 SCC (L&S) 545] and Deepali Gundu*

Surwase v. Kranti Junior Adhyapak Mahavidyalaya [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184] .

13. *The Court is, therefore, required to keep in consideration several factors, which are set out in the aforementioned cases, and then to record a finding as to whether it is a fit case for award of the back wages and, if so, to what extent.”*

25. In this context it will be profitable to refer to the judgment delivered by the Hon’ble Supreme Court in the case of **Deepali Gundu Surwase v. Kranti Junior Adhyapak (D. Ed.) & Ors**, reported in **(2013) 10 SCC 324** as referred to in the aforesaid judgment, which also considered the factors to be taken into consideration for grant of back wages. The Hon’ble Supreme Court in paragraphs 38 to 38.4 of the said judgment was pleased to observe as follows:-

“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.”

26. Having regard to the aforesaid and taking note of the claim for back wages by the respondent no.3, the evidence led by the respondent no.3, the language used in his evidence/deposition that the respondent no.3 is not gainfully employed elsewhere and the refusal of employment is continuing, I am of the view that the respondent no.3 has been able to discharge his initial onus to prove that he was not gainfully employed elsewhere and as such is entitled to maintain his claim for back wages. The petitioner, however, did not seriously challenge the same by producing cogent evidence to disprove the case of non-employment of the respondent no.3. However, taking into consideration the fact that the respondent no.3 had not worked for the petitioner since 1997, I am of the view that in the facts of the case payment of 50% of the back wages to the respondent no. 3 would be just and equitable. The respondent no.3 shall be entitled to all other consequential benefits at the rate at which back wages are paid, however, insofar as gratuity and provident fund is concerned, the same shall be computed by treating the said respondent to have continued in service till the date of superannuation i.e., 3rd July, 2009 in terms of the Payment of Gratuity Act, 1972 and the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. The provident fund shall be computed on notional full salary. Gratuity shall be computed on the

notionally last drawn full salary at the time of superannuation and shall carry statutory interest of 10% from the date of superannuation till the same is actually disbursed.

27. With the above observations and/or directions the writ petition stands disposed of along with the connected application, being CAN 1 of 2021.

28. Urgent photostat certified copy of this order, if applied for, be made available to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)

Saswata/sb