

1/444724/2023

:2:

No. Labr/ 910/1(5)/(LC-IR)

Date: 09/10/ 2023

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

1. M/s. North Dum Dum (West) Consumer's Co-operative Stores Limited, 11/1 MB Road, P.O. & P.S. Nimta, Kolkata - 700049, Dist. - North 24 Parganas.
2. Sri Mani Bhusan Mazumdar, 122, Udaypur, 2<sup>nd</sup> Lane P.O. & P.S. Nimta, Kolkata - 700049, Dist. - North 24 Parganas.
3. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Building, (11<sup>th</sup> Floor), 1, Kiran Sankar Roy Road, Kolkata - 700001.
- ✓ 5. The Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

30

Assistant Secretary

No. Labr/ 910/2(2)/(LC-IR)

Date : 09/10/ 2023

Copy forwarded for information to: -

1. The Judge, Second Labour Court, West Bengal, with respect to his Memo No. 1261 -L.T. dated 27/09/2023.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Assistant Secretary

H.A.(IT)  
09/10/2023Dibankar  
KS  
09/10/2023

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

No. Labr/.<sup>910</sup> ./ (LC-IR)/22015(16)/50/2023 Date: <sup>09/10/</sup> 2023

**ORDER**

WHEREAS an industrial dispute existed between M/s. North Dum Dum (West) Consumer's Co-operative Stores Limited, 11/1 MB Road, P.O. & P.S. Nimta, Kolkata - 700049, Dist. - North 24 Parganas and Sri Mani Bhusan Mazumdar, 122, Udaypur, 2<sup>nd</sup> Lane P.O. & P.S. Nimta, Kolkata - 700049, Dist. - North 24 Parganas regarding the issue, being a matter specified in the second schedule to 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, Second Labour Court, Kolkata specified for this purpose under this Deptt.'s Notification No. 1085-IR/12L-9/95 dated 25.07.1997.

AND WHEREAS, Second Labour Court, Kolkata heard the parties under section 10(1B) (d) of the I.D. Act, 1947 (14 of 1947).

AND WHEREAS Second Labour Court, Kolkata 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 dated 20/09/2023 in case No. 33/2003 under section 10(1B) (d) as shown in the Annexure hereto vide memo no. 1261 - L.T. dated - 27/09/2023.

**ANNEXURE**

(Attached herewith)

By order of the Governor,

*Sd/-*  
Assistant Secretary  
to the Government of West Bengal



In the matter of an Industrial Dispute between Sri Mani Bhusan Majumdar, residing at 122, Udaypur, 2<sup>nd</sup> Lane Post Office and Police Station: Nimta, Kolkata -700049, District- North 24 Parganas against M/s. North Dum Dum (West) Consumer's Co-operative Stores Limited, 11/1 MB Road, Post Office and Police Station: Nimta, Kolkata 700 049, District: North 24 Parganas.

---

[Case No. 33/2003 U/s 10(1B)(d) of the Industrial Disputes Act, 1947]

**BEFORE THE SECOND LABOUR COURT, WEST BENGAL, KOLKATA**

**PRESENT: SRI ARGHA BANERJEE, JUDGE**

**SECOND LABOUR COURT**

**KOLKATA.**

**DATED: 20/09/2023**

**A W A R D**

This industrial disputes in between Sri Mani Bhusan Majumdar, residing at 122, Udaypur, 2<sup>nd</sup> Lane Post Office and Police Station: Nimta, Kolkata -700049, District- North 24 Parganas against M/s. North Dum Dum (West) Consumers' Co-oprative Stores Limited, 11/1 MB Road, Post Office and Police Station: Nimta, Kolkata 700 049, District North 24 Parganas was directly filed before this Ld. Second Labour Court.

**FACTS IN BRIEF**

**THE CASE OF THE APPLICANT**

The applicant as stated in the application had been working with the Opposite Party No.1 which happens to be a Consumer Co-operative hereinafter referred as "The O.P. No. 1" being duly Registered under the West Bengal Co-operative Laws, having its office at 11/A, M.B. Road, Nimta, Kolkata- 700 049 and the Opposite Party Nos. 2 and 3 are the Secretary and Chairman respectively of the said Co-operative. That the applicant since his appointment had been working with the said O.P No. 1 concern sincerely, honestly, diligently without any blemishes since 01.10.1964 as an employee and was in-charge of Area Ration Shop No. 814. That the applicant as contended was drawing monthly salary and the last drawn salary was Rs. 900/-(Rupees Nine Hundred) only per month.





That the applicant as contended was seriously ill on 04.12.2001 and had applied for leave to undergo medical treatment; accordingly the said leave was granted for a period of 7 days by the O.P. No. 1 concern. That, thereafter owing to the changed circumstances the applicant had applied for an extension of medical leave up to 31.12.2001 and had intimated the O.P. No. 1 concern. That, your petitioner had not received any reply of his intimation and the same being unaware about the fate of his prayer for extension of his medical leave and being compelled wanted to join his duty on and from 11.12.2001; however the Opposite Party had not permitted him to resume his duty and had ill-treated him without any cogent reason. Accordingly, the applicant inspite of reporting for his respective duty was not allowed to join and resume his work. The applicant had further contended the fact that, the same had once again fallen ill and wad unable to report about his joining in the service on and from 12<sup>th</sup> of May 2002 to 21<sup>st</sup> of May, 2002 as the same was bed ridden and seriously ill. That, thereafter after his recovery the applicant on 22<sup>nd</sup> May, 2002 had went to the office of the O.P. NO. 1 and had showed his willingness to join his duty but the same was not allowed to do so.

It is the contention of the applicant that out of personal malice and grudge the Secretary of the O.P. No. 1 by his letter 06.05.2002 had issued a show cause notice to the applicant asking him to show the proper cause for not resuming his respective duty on and from 11.12.2001. That, the applicant had replied to such show cause notice on 06.05.2002 wherein he stated all the facts including his willingness to resume his respective duty. The applicant had contended that not only the management of the O.P. No. 1 had not permitted the applicant to join his duty but also, in an illegal manner vide their letter dated 03.07.2002 issued a charge sheet, giving certain allegations against the applicant. That the applicant had denied all the allegations raised by the O.P. No. 1 against the same and had sent a reply to the charge sheet of the O.P. That upon receipt of the reply from the applicant that O.P had not enquired into the matter properly and in an illegal and arbitrary manner vide letter dated 07.07.2002 had dismissed the applicant from his service which according to the applicant is illegal and bad in law. That no enquiry was ever held against the applicant and the same has not been served with any second show cause notice which is required and/or mandatory for dismissing an employee from his service.

That, an industrial disputes was raised before the Labour Commissioner, Govt. of West Bengal, N.S. Building, Kolkata- 1, by your petitioner on 26.8.2002 being conciliation file no. N-135/02 and being satisfied about prima facie case the authority concerned had issued a certificate in terms of Rule 12A(3) of W.B. Industrial Disputes Rules relating to alleged illegal and wrongful dismissal of your petitioner's service. That the applicant contended that the said order of dismissal as made by the O.P No. 1 concern is illegal and unlawful and the applicant is entitled for reinstatement along with full back wages for the period of forced unemployment.

**THE CASE OF THE OPPOSITE PARTIES**





The Opposite Parties submit that the instant case is not maintainable since Sri Mani Bhushan Majumdar is not a 'workman' as contemplated Under Section 2(s) of the Industrial Disputes Act, 1947 and accordingly there is no Industrial Dispute in between the parties. The Opposite parties contended the fact that North Dum-Dum (West) Consumer's Co-operative Stores Ltd is not an 'industry' within the meaning of section 2(J) of the act. The Opposite Parties submitted the fact that the service conditions of the Applicant were governed by the provisions of the West Bengal Co-operative Societies Act, 1983 and the said Act is a complete statute and has got overriding effect of any other Acts or enactment and in the matter of provisions of the said Act are supreme nature in view of the overriding effect.

The O.P contended the fact that North Dum Dum (West) Consumers' Co-operative Stores Ltd. was formed as Co-operative Society and the same was registered under the West Bengal Co-operative Societies Act and has been serving the area and/or locality by the adoption of a Co-operative strategy evolved for supplying the essential commodities through its ration shops and/or shops where the stationery and/or grocery items or commodities are being sold at reduced price in comparison with the value of those items available in the market with a view to serve the Society to buy the items at a cheaper rate on the strength of Co-operative effect and attitude. That, the applicant was inducted as an employee of the society in the year 1964 as In-Charge and was served with three show cause notices during the period from 1967 to 1969 for breach of discipline and financial irregularities. That, on 11/12/2001 the applicant had applied for a leave of seven (07) days with effect from 11/12/2001 owing to his illness and had remained absent without any prior intimation on 8.12.2001; 9.12.2001 and 10.12.2001. That the applicant had further prayed for leave vide his letter dated 18/12/2001 till his further recovery. The applicant vide a letter dated 08/01/2002 had showed his willingness to join his duties and after receiving the said application the Secretary of the Opposite Parties No. 1 had approved his prayer. However, the applicant had neither reported for duty nor had he performed any work in the Society. That, the applicant being an in charge of the Society and Ration Shops had not handed over the charge to the Management and had kept the stock and cash under his control without giving any charge to the authority of the Society. That, by a letter dated 6.5.2002 the applicant was asked to submit his reply to the allegation to the effect that he was absent from duty.

That, the applicant had not carried forward a less amount in the previous DSR up to 07.12.2001 involving huge amount of Rs. 18,633/- as short in cash, a show cause notice dated 06.05.2002 was served upon the applicant giving the same an opportunity to submit his explanation within a period of fortnight to the said allegations. That, the applicant on receipt of the said show cause notice dated 06.05.2002 had replied by his letter dated 22.5.2002 with a request to give extension of leave for 2 days so that he can prepare and submit his effective reply





to the show cause dated 06.05.2002. That, on consideration of the reply to the show cause notice dated 06.05.2002 the O.P had sent a letter dated 05.06.2002 intimating him that his reply has been received by the O.P on 28.05.2002. That, the said matter was discussed in the meeting of the Board of Directors wherein it was resolved that since his reply is quite baseless and far from the truth he was asked to turn up at 9-00 A.M. on 9<sup>th</sup> June, 2002 at the office to make his submission or explanation before the Board of Directors. That, the applicant had failed to clarify his position before the Board of Directors on 09.06.2002 and had not turned up later for inspection of books and record.

That, owing to the non-appearance of the applicant a charge-sheet was served upon the same wherein it was alleged that the applicant had wrongfully misappropriated the funds of the society amounting to Rs. 18,633/-; was habitual in taking leave without obtaining proper sanction; was a habitually giving late attendance; and had caused wilful in-subordination or disobedience of members of the Board of Directors of the Society. It was further alleged that the applicant had been disclosing business confidential and informations of the business of the Society which is detrimental to the interest of the Society and had been committing continuous bad propaganda against the Directors of the Society; was indulging in scrupulous attacks upon the members of the Board of Directors and superiors; was wilfully avoiding day to day work of the Society and had been abetting other co-employees of the Society which is injurious to the Society. The applicant had submitted false medical certificate before the Secretary of the Society; entered false entries in the daily sales register. That the applicant being in-charge of the A. R. Shop (Ration Shop) No. 814 had continued to enjoy unauthorised prolonged leave without making any information to the Secretary of the Board of Directors and without handing over the keys, accounts, cash and stock of the aforesaid Ration Shop.

That, the applicant was asked to submit his explanation within three days from the date of receipt of the said charge sheet dated 03.07.2002 however the applicant had failed to submit any explanation. That accordingly in the absence of any reply/ explanation from the applicant The Board of Directors in its meeting dated 07.07.2002 unanimously had decided that the retention in service of the applicant in the Society was not desirable. The allegations against the applicant as apparent from the record tend to prove the fact that the applicant had betrayed the confidence reposed on him and on consideration of the entire aspect and for the sake of interest of the Society the Board had unanimously decided to dismiss the applicant from service with effect from 07.07.2002 and a letter was sent to him dated 09.07.2002 advising him to collect his dues if any, and/or to refund to the Office of the Society the sum of Rs. 18,633/- that as alleged was misappropriated by him within fifteen days from the date of receipt of this notice.





The Opposite Parties submitted that the purported dispute cannot assume the character of Industrial Dispute. The purported conciliation proceeding is based on without jurisdiction. The interpretation as sought to be projected that the Conciliation Officer being satisfied about the prima facie case issued the certificate is misconceived since the Conciliation Officer has not been conferred with any power to adjudge the prima facie case of the representation. Issuance of certificate is absolutely a routine job and no inference can be drawn that the issuance of certificate shows prima facie case and lead to dismissal illegal. It is denied that the dismissal is illegal and unlawful. The prayers for reinstatement and back wages have no basis. Moreover, it transpires that the applicant is gainfully employed elsewhere. The prayer made in the said statement are disputed and the dismissal is legal, valid and proper.

The Opposite Parties, therefore, submit that the Learned Court may be graciously pleased to hold in answer to; the issue under reference that the case is not maintainable and the Opposite Party Co-operative Stores is not an 'industry' within the meaning of Section 2(J) of the industrial Disputes Act and the Applicant is not entitled any relief as sought for. The Opposite Parties pray for an award dismissing the claim of the applicant.

**The following issues were framed to come to a decision of this instant matter.**

#### ISSUES

- 1) Whether the application u/s. 10(1B)(d) of the Industrial Disputes Act, 1947 filed by the applicant is the case maintainable in the present form?
- 2) Is the O.P. Co-operative Stores is an industry within the meaning of 2(J) of the Industrial Dispute?
- 3) To what other relief is the applicant entitled?

#### EVIDENCE ON THE RECORD

In order to substantiate the case the applicant had adduced himself as the sole witness in this case and on the other hand the O.P had adduced two witnesses namely O.P.W. 1 Sri Bimal Kumar Chakraborty and O.P.W 2 Thakurdas Dutta. The documents produced before this Court were marked in the following manner:

#### EXHIBITS ON BEHALF OF APPLICANT

**Exhibit 1** – Copy of dismissal letter dated 07.07.2002;



**Exhibit 2 –** Photo Copy of issued show-cause dated 06.05.2002;

**Exhibit 2/1 –** Photo copy of reply dated 21.05.2002

**Exhibit 3 –** The copy of turn up before the Board of Directors dated 05.06.2002.

**Exhibit 3/1 –** Copy of written submission dated 09.06.2002.

**Exhibit 4 –** The copy of charge-sheet dated 03.07.2002

**Exhibit 4/1 –** Copy of reply dated 06.07.2002.

**Exhibit 5 –** Copy of Representation before the Assistant Labour Commissioner dated.26.08.2002.

**Exhibit 6 –** Copy of O.P.'s document dated 11. 12.2001

**Exhibit 6/1** Copy of Medical Certificate dated 11.12.2001

**Exhibit 7 -** Copy of intimation due to illness dated 18.12.2001(O.P.'s document)

**Exhibit 8 -** Copy of superannuation was issued by Secretary of O.P dated 23.09.2003.

**Exhibit 9 &9/A -** Copy of Admit Card dated 18.10.2003.

**Exhibit 10 -** Copy of postal receipt along with A/D Card

**EXHIBITS ON BEHALF OF O.P. COMPANY**

**Exhibit A –** Copy of letter dated 03.12.1969.

**Exhibit B –** Copy of leave letter dated 08.01.200.

**Exhibit B/1-** Copy of Medical Fitness Certificate

**Exhibit C –** Copy of Attendance Register of the O.P. Management.





- Exhibit D** – Copy of first show-cause notice in the year 1967.
- Exhibit E** - Copy of reply by the applicant.
- Exhibit F**- Copy of Second show cause notice.
- Exhibit G**- Copy of reply of the show cause.
- Exhibit H** – Copy of absent letter
- Exhibit I** - Copy of reply by the applicant.
- Exhibit J** - Copy of Daily Sales Register (DSR)
- Exhibit K** - Copy of Summary of DSR for the period 01.04.2000 -07.12.2001.
- Exhibit L & L/1**- Copy of two registers contain the summary of the Sales of four departments including two ration shops, one kerosene shops and one consumer co-operative on daily basis.
- Exhibit M & M/1** - Copy of two registers are the ledgers of our Society.
- Exhibit N** - Copy of letter issued to the applicant on 05.06.2002 received on 06.06.2002.
- Exhibit O** - Copy of the proceedings dated 09.06.2002.
- Exhibit P** - Copy of charge-sheet issued to the applicant dated 03.07.2002.
- Exhibit Q** - Copy of dismissal letter dated 09.07.2002.
- Exhibit R** - Copy of resolution dated 07.07.2002

### EVIDENCE OF THE WITNESSES

#### EVIDENCE OF THE APPLICANT

*From the substantive evidence of the P.W. 1 Sri Mani Bhusan Majumder it is clear that :*

- 1) The same had passed Matriculation from the Board of Higher Secondary Education, Kumilla, Bangladesh in the year 1964 and in the year 1965, Consumers' Co-operative Society Ltd., North





Dum Dum (West) had started functioning. The applicant had completed the Matriculation Examination in the month of March, 1964 and had migrated to India in May, 1964 where the same had joined the O.P. Management and was a Citizen of East Pakistan at that point of time.

2) The applicant was working as a Sales Clerk since 1964 and was also the shop-in-charge. The consumer articles and food grains, pulses, mustered oil and all other eatable items were being sold from the O.P concern. In the year 2002, there were altogether 13 employees under the North Dum Dum Consumer's Co-operative Society Ltd. There were one grocery outlet, one kerosene outlet and two ration shops of the O.P concern. The applicant used to maintain the Cash Book of the shop.

3) The applicant was in-charge of the Co-operative Stores for more than 25 years. The shop number where the applicant used to work was A/R814 and the same was situated at Nimta crossing Calcutta – 700049. A daily sales register was being maintained in the aforesaid shop and Mr. Rabindra Bhowmick, Shibananda Paul, Ashok Dey were permanent weigh man of the co-operative who were working under the applicant. That, Mr. Netai Chandra Das and Rabindra Nath Dey were the temporary weigh men and Mr. Joydeb Basak clerk/ memo writer also worked under the applicant.

4) The applicant was an in-charge of the Co-operative Shop. The weighs man used to work under the same and the applicant used to give bills to the consumer. The articles and commodities were Government Supply and the applicant used to inform the memo man to rate the required stock of essential commodities. The applicant used to prepare the indent for the co-operative and the Inspector used to prepare the estimate of stocks for the up coming weeks. That, the applicant had remained present in the Co-operative Board meetings but had no function to perform there owing to the fact that in the board meetings all the employees remained present but had no role to play.

5) The applicant had fell ill on 04/12/2001 and had applied for medical leave vide his letter dated 10/12/2001 and 31/12/2001 and had been to the O.P concern to resume his duties on 02/01/2002 alongwith the exhibit – 6/1. The then Secretary of the society Sri Bimal Kumar Chakraborty had issued a show cause notice that is the exhibit – 2 dated 06/05/2002 and the applicant had given his reply vide exhibit 2/1 that is his letter dated 21/05/2002.

6) The O.P concern had requested the applicant to turn up before the board of directors vide exhibit – 3 on 09/06/2002 and the applicant had submitted the exhibit 3/1 which was written submission on his behalf. However, the exhibit – 4 (charge – sheet) was being issued. The applicant had given his reply vide the exhibit 4/1 but instead of initiating a domestic enquiry the applicant was dismissed vide exhibit – 1.





7) The applicant being dissatisfied against the order of dismissal had raised an industrial dispute before the Assistant Labour Commissioner vide exhibit – 5. The applicant had relied upon the exhibit – 6/1 and exhibit – B/1 from which it is clear that the same was undergoing medical treatment. The applicant had admitted the fact that the exhibit – 6 was written by the same. The retirement age of the O.P concern was 60 (sixty) years and the applicant on 09.06.2004 had not attained the age of superannuation. That in respect of the exhibit- 8 the applicant had sent the exhibit – 9 alongwith exhibit – 9A which happened to be the admit card showing the age of the applicant.

8) The applicant had not given any reply to the exhibit – 2 owing to his ill health and neither had maintained or had written the Sales Register, Cash Sales Register and the ledger book of the O.P concern but used to maintain adaily cash book 'kachha khata'. The applicant had not given any reply in respect of the exhibit – A. The applicant had not filed any letter of protest addressed to the O.P concern for not allowing the same to resume his the duty towards the company. The exhibit – C was being maintained at the office of the O.P concern.

9) The O.P concern had issued a charge-sheet (exhibit- 4) against the applicant and the same had failed to state the fact as to whether the same had given any reply to the same. The witness used to stay in the board meeting during his service tenure as over all in-charge from the year 1995 to 2000, and used to fill up the forms and applications; which were to be filed before the proper Government authority for running the ration shop and/or for renewal under the signature of the Secretary. That, after being terminated from the service the same was not allowed to take his position.

10) The applicant had failed to state as to whether the same had submitted any explanation to the O.P concern in respect of their letter for excess shortage of wheat (vide letter dated 03.12.1969 marked as exhibit - A).

**From the Substantive Evidence of the O.P.W 1 Bimal Kumar Chakraborty it is clear that: -**

1) That the same was associated with M/s. North Dum Dum Consumers Co-operative Stores Ltd. by way of a membership from the year 1992 and presently was the cashier of the O.P. No.1. Prior to being a Cashier the witness was one of the directors of the O.P. society which is a registered society under the West Bengal Co-operative Society Registration Act. That, the O.P. No.1 owned a kerosene dealership, two ration shops and the same also has a co-operative Society for the welfare of the members. The O.P concern used to buy the articles from outside market and runs the shop at a very less margin of profit.





2) The witness knew the applicant of this case who was associated with the society as an employee and was holding the post of Manager-in-Charge of the society. The applicant was attached to the Ration Shop No. A.R. 814; at present the address of the building where the Ration Shop No. AR 814 is situated, is "Ward No. 29 Culture More". There was a Manager of in the O.P Co-operative Society who used to supervises all the divisions including one grocery, two ration shops and one kerosene shop. The applicant used to work in the main ration shop in the main building and the aforesaid manager also holds his office in the main building. The applicant was discharging his functions as cashier, salesman and looking after the overall business of the society. Apart from the applicant there were two weigh men under the applicant, who used to weigh the articles and help the same, save and except weigh men no any other employee used to work under Sri the applicant. The two weigh men used to work under the instructions of this applicant.

3) This witness was one of the then Board of Directors of M/s. North Dum Dum Consumer Co-operative Society (duly registered under the West Bengal Co-Operative Societies Act) and presently the Chairman of that concern. The said concern consisted of seven employees who were deputed to perform their respective duties in two ration shops, shops where groceries and kerosene were being sold. There was one manager, shop-in-charge, helper and temporary staff in the said concern. The witness knew the applicant who was the shop-in-charge in the Co-operative and whose duty was to perform certain administrative works like informing the respective Government by indent the demand and supplies of the said concern.

4) The Manager, weigh man, helper and the temporary staff used to work under the applicant who used to sanction leave to the employees. That, Direct Sales Register (DSR), cash book and non-control register was being duly maintained in the O.P concern. That, such registers were maintained under the guidance of the applicant and after entry in those register the same used to verify on a regular basis.

5) That during the service of the applicant was same was directed to file was show caused on four occasions. The **exhibit - D** which was the first show-cause issued by the O.P concern was in the year 1967. The applicant was given an opportunity to file his reply the accordingly the applicant had filed the **exhibit - E** wherein the same had given an undertaking for rectifying his errors in future and had further given an undertaking to maintain proper discipline of the O.P concern. Subsequently, the **exhibit - F** (the second notice of show cause) was being issued and an opportunity was given to the applicant file his reply in default the applicant will be punished accordingly. The applicant had filed the **exhibit - G** wherein the same had not denied the allegations levelled by the company and had admitted the same. Thereafter, in the month of December, 1969 another show-cause notice was issued to the applicant. However, no documents





were produced to show the fact that this applicant had prayed for an apology from the O.P concern.

6) The exhibit – H that is a letter was given to the applicant mentioning his absence for the period 11.12.2001 to 06.05.2002. An allegation in regard to the financial irregularity of Rs. 18,633/- was raised against the applicant and an opportunity was given to the same reply to the letter by the applicant. The applicant had given the exhibit – I in reply to such charges. From the exhibit – C it is clear that in the month of December, 2001 the applicant was absent for twenty one (21) days. A medical certificate was attached by the applicant alongwith the exhibit – B.

7) The date mentioned in the medical certificate is on 07.12.2002 and the O.P concern had received the letter from the applicant on 08.01.2002 in the afternoon approximately at 4 :30 P.M. On 08.01.2002 the applicant had informed the O.P his inability to join the duty owing to his illness during the period of his absence; and the same was fit to resume his respective duty. The applicant had sought for permission from the O.P concern to join his duty and accordingly his prayer was allowed. The applicant had not handed over the charge of his office to anybody.

8) That from the exhibit – H and the exhibits - 6 & 6/1 it is clear that the applicant had given an explanation along with the medical certificate showing the reason for his absence and the O.P had not sent any notice to the applicant mentioning that the explanation given for his absence was not satisfactory. The witness failed to state whether after receiving the exhibit - 6 & 6/1 the O.P concerned had sent any intimation to the applicant refusing his prayer for leave. There was no proper mentioning in the prescription that the applicant had to take rest for 7 days. From the exhibit - 7 it is clear that the applicant had further prayed for extension of time and the witness failed to state as to whether after getting such intimation the O.P concern had rejected the prayer of leave of the applicant or not.

9) The responsibility of handling the cash and the management of the respective ration shop lies upon the applicant. The applicant had carried forward a shortage of fund of Rs. 18,633/- and from the exhibit – J which is the Daily Sales Register, it is clear that the alleged misappropriation of fund was caused between 01.04.2000 and 07.12.2001. The exhibit – J was being maintained by this applicant. However, the witness had failed to produce any document specifically admitting the allegations as stated above raised against the applicant. It is being admitted by the witness that, at the relevant point of time, among the Manager and Shop In-Charge, the shop-in-charge was the superior and overall authority over the co-operative. The said witness could not produce any document to show that the applicant sanctioned leave of any employee.

10) The exhibit – K shows the summary of Daily Sales Register on and from 01/04/2000 to 07/12/2001. The applicant used to prepare the summary of D.S.R and on the basis of the original





D.S.R. the summary of the D.S.R. had been prepared. The applicant had never informed the applicant regarding the alleged shortage of fund and after detection of shortage the same was informed to the applicant vide the exhibit – H (which is a notice); and the applicant had given a reply vide exhibit – I. The O.P had also produced the exhibit – L & L/1, M & M/1 respectively and a Board meeting was being held 09/06/2002 wherein the applicant was given an opportunity to explain the shortage of funds.

11) That, such matter was being duly intimated vide the exhibit – N to the applicant. The applicant was present in the board meeting which is clear from the exhibit – O but had failed to give any proper explanation regarding the shortage of funds and had asked for some time to enquire into the matter and submit a report. From the exhibit - 3 which is the copy of turn up before the Board of Directors dated 05.06.2002 it is clear that the O.P concern had given a letter to the applicant on the basis of which the same had given sufficient replies vide the exhibit - 3/1.

12) Subsequently, the applicant had failed to provide any proper and satisfactory explanation and on 03.07.2002, the exhibit – P which is the charge-sheet was being issued. An opportunity was given to the applicant to give reply to the charge-sheet and the applicant in his reply had denied all the allegation and had stated that either the charge-sheet be withdrawn or he be exempted from the allegation in the charge sheet (which is clear from the exhibit - 4/1). Thereafter, on the basis of the reply the Board of Directors took the decision and as per the resolution dated 07.07.2002 (which was marked as exhibit -O) the applicant was being dismissed from 09.07.2002 and the exhibit – Q was being issued.

13) The fact of denial and of unsatisfactory reply from the applicant had not been mentioned by the O.P in any of the documents. That the witness had admitted the fact that no domestic enquiry was conducted by the O.P. Management prior to the dismissal and there was no mentioning of any explanation for non-conducting the domestic enquiry in the dismissal letter. From the exhibit - O it is clear that no enquiry was held before the termination of the workman on the basis of the two allegations as mentioned in the same.

14) It is a fact that the applicant had mentioned in his reply that is the exhibit - E that the allegations, raised against the same are not proper; since the witnesses were not attached with the Co-operative at the relevant time it was not possible for the witness to state as to whether on the basis of exhibit - D any punishment was being inflicted upon the applicant even after receiving exhibit – E (which is the reply). That, during the service tenure of the applicant warnings for three times were given to the applicant, but no demotion or dismissal of the applicant was inflicted by way of punishment by the O.P concern.

15) The witness neither had filed any document in order to show that during the tenure of the service the applicant had granted any leave or overtime to any employee; nor, had filed any





document in order to show that the applicant had signed any document as Salary Disbursing Officer of any employee. Furthermore, no documents were filed in order to show that the weigh man, helper, temporary staff used to work under the supervision of the applicant. No documents were relied upon by the O.P concern to the effect that the applicant was the Reporting Officer of any weigh man, helper, and temporary staff; neither any documents were submitted in order to show that the applicant used to assess the jobs, performance of any weigh man, temporary staff and helper and to report the same to the higher authority.

16) The witness had not filed any document in order to show that a written direction was given to the applicant to do the said jobs to weigh man, helper, temporary staff as his duty; no documents were relied upon by the O.P concern in order to show that during the tenure of the service the applicant had given any written instruction to any weigh man, helper and temporary staff regarding his job.

**From the Substantive Evidence of the O.P.W 2 Thakurdas Dutta it is clear that: -**

1) The witness was the next Shop In-charge of Ration Shop No. FPS 814 of North Dum Dum (West) Consumer's Cooperative Stores Limited, who was appointed immediately after the dismissal of the applicant from the service by way of promotion. However, no documents were filed in order to show the nature of the job and the duties as Shop-in-charge of Ration Shop No. FPS 814 of this witness. That, during his employment the same was subordinate to the applicant.

2) The applicant as stated by the witness had to perform administrative-cum-managerial-cum-supervisory work. The applicant used to instruct the employee of the stores in discharging their day to day work and was holding the responsibility to deal with the Government officials in the matter of preparing and placement of indent for supplying of the rationing goods. The staff's subordinate to him were working as per his instruction and the applicant had the authority to sanction leave to the employees of the co-operative. However, the witness had not filed any papers before this court in order to; show that after dismissal of the applicant immediately the same was promoted as Shop-in-charge; the same was working under the applicant and the applicant had sanctioned his leave or had granted any over time or issued any written direction upon him. The witness failed to produce any papers in order to show that the applicant had sanctioned any leave to any other employee, sanctioned any overtime or issued any written direction to any employee.

3) That during the tenure of service, the O.P concern had levelled an allegation against the applicant for his absence from duty on and from 11.12.2001 to 06.05.2002 along with an allegation as regards to financial irregularities amounting to Rs. 18,633/-. The applicant had not applied for any leave during the period 04.12.2001 to 10.12.2001. The applicant had not joined his duty on 11.12.2001 and in the month of December 2001 the applicant was absent for 21 days.





That on 11.12.2001 the applicant never came to resume his duty and had remained absent on and from 08.12.2001, 09.12.2001 & 10.12.2001 without any proper sanctioning. The applicant remained absent without any leave for 21 days commenced from December 2001 and by his letter 18.12.2001 (which was received by the Society on 22.12.2001) had applied for leave further till the date of his recovery from illness.

4) The applicant by a letter dated 08.01.2002 had informed the O.P concern that the was eager to join his duty on 08.01.2002 but had failed to report for his duty on that day. The applicant being in charge of the Society and Ration shop, had not handed over the charge to the O.P concern and had kept the stock and cash under his control without giving any charge to the authority of the Co-operative Society. That, vide a letter dated 06.05.2002 the applicant was asked to submit his reply to the effect that he was absent from his duty without intimation and he had carried forwarded less amount in the previous DSR (upto 07.12.2001) involving an deficit amount of Rs. 18,633/-. That, for this reason a show cause notice dated 6.5.2002 was served upon him and a reply was given to that effect.

5) The O.P concern had issued a charge sheet on 03.07.2002 and inspite of opportunity given to the same to submit his explanation in writing and being cautioned the same had failed to submit his explanation. The applicant had not given any reply and as such, the Board of Directors in its meeting dated 07.07.2002 had unanimously decided that his retention in the Cooperative is not desirable and the same was dismissed from service w.e.f. 07.07.2002 for which a dismissal letter was sent to him vide letter dated 09.07.2002 advising him to collect his dues. However, the same had failed to state as to whether prior to the dismissal any enquiry was held against the applicant for allegations as mentioned in the charge sheet. The witness had not seen the reply which was submitted by the applicant alleging the fact that the same had not handed over the charge sheet to the management and had kept the stock and cash under his control.

6) The witness failed to produce any document to show that the duties and responsibilities which were entrusted upon the applicant and was also unable to produce any document to establish the fact that applicant used to assess the performance of his sub-ordinate staffs. No documents could be produced to establish the fact that the applicant had issued any instruction to any staff in black and white. The witness had failed to state whether, the O.P concern had lodged a diary before the P.S. alleging that there was financial irregularities of Rs. 18,633/-. The witness failed to state as to whether his prayer for leave was rejecting or granted, or the same was informed in this regard. The Daily Sales Register (DSR) and for the present was being maintained by him and for the alleged relevant period the audit firm had audited the accounts but did not find any irregularity for Rs. 18,633/-.

**ARGUMENTS MADE BY THE PARTIES**





The Learned Counsel appearing on behalf of the applicant had argued that the applicant was an employee of the opposite party store since 01.01.1964 and he worked continuously without any break till the date of his illegal termination from service by the management and he was in charge of Area Ration Shop No. 814 at a wage of Rs 900/- per month. During his tenure of his service he had worked sincerely and diligently. That on 04.12.2001 applicant was seriously ill and for his treatment he applied for leave. The said leave was granted for a period of 7 days and he had applied for extension of medical leave up to 31.12.2001 but he did not receive leave being compelled he wanted to join his duty on and from 11.12.2001 but the opposite party did not allowed him to resume. It is relevant to mention herein that applicant had made an application for leave which had duly accompanied with medical certificate which was issued by a registered medical practitioner. Thereafter, he again became ill and unable to report to duty. That from 1<sup>st</sup> May, 2002 to 21<sup>st</sup> May, 2002 he was bed ridden after recovery from the same he again on 22<sup>nd</sup> May, 2002 went to resume his duties. That on 06.05.2002 co-operative issued a show cause notice and applicant had duly replied to the same. That on 03.07.2002 Secretary of the co-operative issued a charge sheet by levelling all false and baseless charges and on 07.07.2002 dismissed applicant from his service in a most unlawful and illegal way. It is relevant to mention herein that though it was stated that applicant was discharging duties in supervisory in nature but no documents were produced by them. Even no staffs have adduced evidence that they were controlled and supervised by the applicant. Applicant had been terminated from service by levelling allegations which were stigmatic in nature thus it was obligatory on the part of the management to conduct an enquiry which was missing in the present case. Thereafter, he verbally applied to the Secretary to allow him to resume his duties but the same was ignored. thereafter he made a complaint before the Assistant Labour Commissioner for resolving the issue which had failed due to the adamant attitude of the co-operative society and ultimately the matter was filed before the Learned 2<sup>nd</sup> Labour Court, West Bengal with a prayer that the termination may be held bad in law and direction may be passed to pay the full back wages and consequential reliefs. As the applicant was terminated by levelling stigma thus he could not secure any other job even after trying his level best to secure a job but he failed. It is relevant to mention herein that no contra evidence was adduced by the management that the applicant was working else where after his termination from service. Thus, it is a case of violation of Section 25F hence the termination is void ab initio. The order for reinstatement along with back wages should be passed and any deviation will be a premium to the wrong doer here the wrong doer is the management. In the present case there is no scope for passing an Award for reinstatement thus it is humbly prayed that the order for payment of full back wages along with consequential benefits may be passed.





The applicant had himself adduced his evidence on several dates and had exhibited several documents which were marked as exhibits. That on 27.06.2007 he had stated in evidence that “In spite of receiving my reply the company did not initiate any domestic enquiry and straightway dismissed me from service vide Ext.1”.

That on 17.02.2010 the applicant had stated that “The O.P. management produced no any piece of document to show that I have misappropriated a sum Of Rs 37,000/-“.

Cross-examination of OPW 1 dated 11.1.2013 “We issued a charge -sheet pn 03.07.2002 prior to the dismissal of the applicant Exhibit-4/1 is tendered to the witness. This is the reply dated 06.07.2002 given by the management in reply to the charge -sheet. In the reply i.e. Exhibit—4/1 the applicant denied all the allegations raised against him. Exhibit-1 is tendered to the witness. This is the dismissal letter of the applicant. Though the applicant gave reply to the charge sheet and it was not satisfactory, but there is mention in the Exhibit-1 that the management did not receive the reply. Prior to dismissal we enquire about the allegation of the applicant. Perhaps during the period from 03.-07.2002 –07.7.2002 we did not make any enquiry as regards the allegation prior to his dismissal”.

“At this moment I cannot remember as to whether the applicant used to sanction leave of the other employees. In case of paid employees, the hierarchy is such as, Manager, Supervisor, Salesman, Assistant , Weigh-man, etc. the applicant was the In-Charge of the ration shop. Then says, he also looks after the grocery shop. I shall try to produce the duty card of the applicant though it is difficult to trace out.”

Cross-Examination of OPW 1 dated 2.5.2013 “As per Exhibit-3 the O.P. Co-operative gave letter to the applicant on the basis of which he gave sufficient replies vide Exhibit-3/1. No domestic enquiry was conducted by the O.P. Management prior to the dismissal. I did not mention any explanation for non-conducting the domestic enquiry in the dismissal letter. I am not fully acquainted with the written statement filed by the O.P.”

Cross-Examination of OPW 1 dated 30.7.13 “As we were not attached with the Co-operative at the relevant time, so it is not possible for me to say as to whether on the basis of that Exhibit-D any punishment was inflicted to the applicant after receiving reply (Exhibit—E) from him or not. Exhibit-F is tendered to the witness. It is fact that there is mention that in default the applicant will be punished accordingly. There was a good relation between the applicant and Chitto Bose and Chitto Bose has a soft corner towards the applicant. As the applicant prays for apology with





fold hand, so no legal formalities have been complied with against him. The applicant did not pray for apology in my presence. I heard from other person.

At this moment I cannot produce any written document to show that the applicant prays for apology as mentioned by me. There is no document specifically admitting the allegations raised against the applicant. After execution of the Exhibit-A whether the applicant was punished or not, there is no such document to that respect.

Exhibit—H is tendered to the witness. Exhibit-6&6/1 are tendered to the witness. It is fact that the applicant gave explanation along with the medical certificates showing the reasons for his absence. We did not send any notice mentioning that his explanation, given for his absence, is not satisfactory. At the relevant time, among the Manager and shop In-charge, the shop-in-charge was the superior and overall authority over the co-operative.

**JUDGEMENTS RELIED UPON BY THE APPLICANT.**

1. **1996 (74) flr 2083 ARVIND WAMAN UNHAVANA.** Para-5

*In this case workman was terminated for unauthorized for 22 days and even an enquiry was conducted. But the punishment was set aside by the tribunal as the same was shockingly dis appropriate. In our case applicant had duly forwarded a medical certificate which was totally ignored and he was terminated by a stroke of a pen.*

2. **2011 LLR 770 MADHUKAR TULSIRAM TAYDE** Para 5 and 6.

*In the instnat case workman was terminated by conducting an oral enquiry as such no disciplinary proceeding was held. The said order was set aside the same was a non-speaking one and the same was passed in gross violation of the principles of natural justice.*

*In the present case no enquiry was conducted only a charge sheet was issued which is not a simpliciter termination . Stigma was attached to it. Thus it was compulsory for the management to conduct an enquiry which they miserable failed to do so.*

3. **2011 LLR 1247 UTTAR PRADESH CO-OPRATIVE BANK LTD.** Para-2,3,4 and 5.

*In this case also no enquiry was conducted like the case in our hand.*

4. **(1981) 3 SCC 225 Mohan Lal** full back wages was awarded since there was violation of Section 25F of the Industrial Disputes Act. Para-16

5. **(1984)1 SCC 509 Gammon India Limited** violation of Section 25 F order was passed for full back wages. Para-4

6. **2013(10)SCC 324 Deepali Gundu Surwase** full back wages was awarded Para-38.

7. **2015 (4) SCC 458 Jasmer Singh** full back wages was Awarded Para-17,20 and-23.

8. **2015(8) SCC 150 FIsheries Department**, State of Uttar Pradesh Para- 24 and 27 full back wages had been Awarded.





9. 2019 (17) SCC 184 Jayantibhai Raojibhai Patel Para- 4,6,8,15,16 and 17 full back wages was Awarded.

Hence, it is humbly prayed that an Award of payment of full back wages along with consequential benefits must be passed as the applicant had to suffer the most for no fault of his own. The allegations for defalcation could not be proved not the management produced any books of account/witness to prove the allegation of defalcation of the amount as alleged. Thus from the very conduct it is clear that the management had miserably failed to substantiate their charge with cogent evidence. Hence, any deviation from full back wages will be a premium to the management. As the applicant had to pass through untold misery for no fault of his own for more than two decades.

### **DECISION WITH REASONS**

For proper adjudication of the matter all the issues are taken up separately for coming to a just decision of the instant matter: -

1) Whether this application u/s 10(1B)(d) of the Industrial Disputes Act, 1947 is maintainable in its present form and prayer?

2) Is the O.P. Co-operative Stores is an industry within the meaning of 2(J) of the Industrial Dispute?

In order to determine whether this application is maintainable u/s 10(1B)(d) of the Industrial Disputes Act, 1947 the fact that whether this applicant is a "workman" as defined under section 2(s) of the Industrial Disputes Act, 1947 is to be determined first. Accordingly both the above mentioned issues are taken up conjointly to arrive at a just decision of the instant matter. In accordance with section 2(s) it is clear that: - "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.

On a fair reading of the provisions in section 2(s) of the Act it is clear that 'workman' means any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward including any such person who has been dismissed, discharged or retrenched.

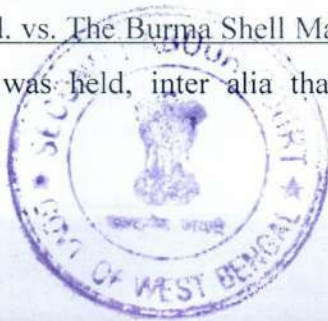
The latter part of the section excludes 4 classes of employees including

- a) a person employed mainly in a managerial or administrative capacity,
- b) a person employed in a supervisory capacity drawing wages exceeding Rs.1600/- per month or exercises functions mainly of a managerial nature.

The Hon'ble Apex Court in Sharad Kumar -vs- Govt. Of NCT of Delhi reported in 2002(93) FLR 826 had opined that: - It has to be taken as an accepted principle that in order to come within the meaning of the expression 'workman' in section 2(s) the person has to be discharging any one of the types of the works enumerated in the first portion of the section. If the person does not come within the first portion of the section then it is not necessary to consider the further question whether he comes within any of the classes of workmen excluded under the latter part of the section.

The question whether the person concerned comes within the first part of the section depends upon the nature of duties assigned to him and/or discharged by him. The duties of the employee may be spelt out in the service rules or regulations or standing order or the appointment order or in any other material in which the duties assigned to him may be found. When the employee is assigned a particular type of duty and has been discharging the same till date of the dispute then there may not be any difficulty in coming to a conclusion whether he is a workman within the meaning of section 2(s).

If on the other hand the nature of duties discharged by the employees is multifarious then the further question that may arise for consideration is which of them is his principal duty and which are the ancillary duties performed by him. While deciding the question, designation of the employee is not of much importance and certainly not conclusive in the matter as to whether or not he is a workman under section 2(s) of the Act. A similar question came up for consideration before a Bench of three learned Judges of the Hon'ble Apex Court in Burmah Shell Oil Storage and Distribution Company of India Ltd. vs. The Burma Shell Management Staff Association and others 1970(3) SCC 378, wherein it was held, inter alia that if a person is mainly doing





supervisory work and incidentally or for a fraction of the time also does some clerical work, it would have to be held that he is employed in a supervisory capacity, and conversely, if the main work done is of clerical nature the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity. **In Management of M/s May and Baker (India) Ltd. vs. Their Workmen AIR 1967 SC 678** a Bench of three learned Judge of this Court construed the provision of section 2(s) (as it stood before the Amendment of 1956) in order to ascertain whether the manual or clerical work done was merely of an incidental nature and whether the employee was not a workman as defined under the section. The Court made the following observations:

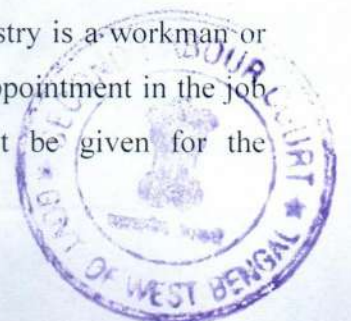
".....9. The company's case is that Mukerjee was discharged with effect from April 1, 1954. At that time the definition of the word "workman" under Section 2(s) of the Industrial Disputes Act did not include employees like Mukerjee who was a representative. A "workman" was then defined as any person employed in any industry to do any skilled or unskilled manual or clerical work for hire or reward. Therefore, doing manual or clerical work was necessary before a person could be called a workman. This definition came for consideration before industrial tribunals and it was consistently held that the designation of the employee was not of great moment and what was of importance was the nature of his duties. If the nature of the duties is manual or clerical then the person must be held to be a workman. On the other hand if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work which is not manual or clerical, then such a person would not be workman. It has, therefore, to be seen in each case from the nature of the duties whether a person employed is a workman or not, under the definition of that word as it existed before the amendment of 1956....."

**The Hon'ble Apex Court in Anand Regional Co-Op Oil Seeds Growers Union Ltd. Vs Shailesh Kumar Harshad Bhai Shah the Hon'ble Court held that: -**

The ingredients of the definition of 'workman' must be considered having regard to the following factors: -

- i) Any person employed to do any skilled or unskilled work, but does not include any such person employed in any industry for hire or reward;
- ii) There, must exist a relationship of employer and employee;
- iii) The persons inter alia excluded are those who are employed mainly in a managerial or administrative capacity.

For determining the question, as to whether a person employed in an industry is a workman or not; not only the nature of work performed by him but also terms of the appointment in the job performed are relevant considerations. An undue importance need not be given for the





designation of an employee or the name assigned to, the class to which he belongs. What is needed to be asked is as to what are the primary duties he, performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work is required to be supervised.

**The words and phrases 'Supervisor' meaning and expression**

Supervision contemplates direction and control. While determining the nature of the work performed by an employee, the essence of the matter should call for consideration.

A person disputably carries on supervisory work if he has power of control or supervision in regard to recruitment, promotion, etc; The work involves exercise of tact and independence.

**In S.K. Maini vs Carona Sahu Co. Ltd reported in AIR 1994 SC 1824** The Hon'ble Apex Court had opined that ".....whether or not an employee is a workman under Section 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any straitjacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases.

When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organisations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it

***The obligation to prove a fact or the burden of proof is always upon the person who claims the same. In the present scenario it is seen from the application filed by the applicant u/s 10(1B)(d), the written statement filed by the opposite party, the evidence and the exhibits adduced by the parties to the proceeding and all other matters in the record that:***

1) That the O.P concern is a co-operative having the business of a kerosene dealership, two ration shops and the same also has a co-operative Society for the welfare of the members. The O.P concern used to buy the articles from outside market and runs the shop at a very less margin of profit.





2) The applicant was discharging his functions as cashier, salesman and looking after the overall business of the society. Apart from the applicant there were two weigh men under the applicant, who used to weigh the articles and help the same, save and except weigh men no any other employee used to work under Sri the applicant. The two weigh men used to work under the instructions of this applicant.3) This witness was one of the then Board of Directors of M/s. North Dum Dum Consumer Co-operative Society (duly registered under the West Bengal Co-Operative Societies Act) and presently the Chairman of that concern. The said concern consisted of seven employees who were deputed to perform their respective duties in two ration shops, shops where groceries and kerosene were being sold. There was one manager, shop-in-charge, helper and temporary staff in the said concern. The witness knew the applicant who was the shop-in-charge in the Co-operative and whose duty was to perform certain administrative works like informing the respective Government by indent the demand and supplies of the said concern.

4) The Manager, weigh man, helper and the temporary staff used to work under the applicant who used to sanction leave to the employees. That, Direct Sales Register (DSR), cash book and non-control register was being duly maintained in the O.P concern. That, such registers were maintained under the guidance of the applicant and after entry in those register the same used to verify on a regular basis.

Accordingly, both the parties to the proceeding had admitted the fact that the main moto of the O.P concern was 'business' with the moto of earning a 'profit' be it very much less or more. That, from the definition of the term "Industry" which clearly indicates means "any business, trade, undertaking, manufacture, or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workman". From the substantive evidences and the materials on the record it is clearly seen that the O.P concern working under the name and style of "M/s. North Dum Dum Consumer Co-operative Society (duly registered under the West Bengal Co-Operative Societies Act)" is an industry. Thus, from the definition of the term 'industry' and from the nature of the business of the O.P concern it is clearly proved that **this application u/s 10(1B)(d) of the Industrial Disputes Act, 1947 is maintainable in its present form and prayer and the O.P. Co-operative Stores is an industry within the meaning of 2(J) of the Industrial Dispute.**

### **3) To what other relief is the applicant entitled to?**

a) The applicant was working as a Sales Clerk since 1964 (working for 25 years) and was also the shop-in-charge. The consumer articles and food grains, pulses, mustered oil and all other eatable items were being sold from the O.P concern. In the year 2002, there were altogether 13 employees under the North Dum Dum Consumer's Co-operative Society Ltd. There were one grocery outlet, one kerosene outlet and two ration shops of the O.P concern. The applicant used to maintain the Cash Book of the shop.





b) The shop number where the applicant used to work was A/R814 and the same was situated at Nimta crossing Calcutta – 700049. A daily sales register was being maintained in the aforesaid shop and Mr. Rabindra Bhowmick, Shibananda Paul , Ashok Dey were permanent weigh man of the co-operative who were working under the applicant. That, Mr. Netai Chandra Das and Rabindra Nath Dey were the temporary weigh men and Mr. Joydeb Basak clerk/ memo writer also worked under the applicant.

c) The applicant was an in-charge of the Co-operative Shop. The weighs man used to work under the same and the applicant used to give bills to the consumer. The articles and commodities were Government Supply and the applicant used to inform the memo man to rate the required stock of essential commodities. The applicant used to prepare the indent for the co-operative and the Inspector used to prepare the estimate of stocks for the up coming weeks. That, the applicant had remained present in the Co-operative Board meetings but had no function to perform there owing to the fact that in the board meetings all the employees remained present but had no role to play.

d) The applicant had fell ill on 04/12/2001 and had applied for medical leave vide his letter dated 10/12/2001 and 31/12/2001 and had been to the O.P concern to resume his duties on 02/01/2002 alongwith the exhibit – 6/1. The then Secretary of the society Sri Bimal Kumar Chakraborty had issued a show cause notice that is the exhibit – 2 dated 06/05/2002 and the applicant had given his reply vide exhibit 2/1 that is his letter dated 21/05/2002.

e) That from the exhibit – H and the exhibits - 6 & 6/1 it is clear that the applicant had given an explanation along with the medical certificate showing the reason for his absence and the O.P had not sent any notice to the applicant mentioning that the explanation given for his absence was not satisfactory. The O.P failed to state whether after receiving the exhibit - 6 & 6/1 the O.P concerned had sent any intimation to the applicant refusing his prayer for leave. There was no proper mentioning in the prescription that the applicant had to take rest for 7 days. From the exhibit - 7 it is clear that the applicant had further prayed for extension of time and the O.P failed to state as to whether after getting such intimation the O.P concern had rejected the prayer of leave of the applicant or not.

f) The O.P concern had requested the applicant to turn up before the board of directors vide exhibit – 3 on 09/06/2002 and the applicant had submitted the exhibit 3/1 which was written submission on his behalf. However, the exhibit – 4 (charge – sheet) was being issued. The applicant had given his reply vide the exhibit 4/1 but instead of initiating a domestic enquiry the applicant was dismissed vide exhibit – 1.

g) The responsibility of handling the cash and the management of the respective ration shop lied upon the applicant. The applicant as alleged by the O.P had carried forward a shortage of fund of Rs. 18,633/- and from the exhibit – J which is the Daily Sales Register, it is clear that the alleged





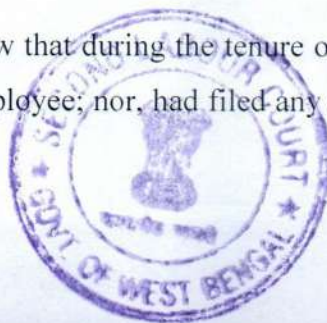
misappropriation of fund was caused between 01.04.2000 and 07.12.2001. The exhibit – J was being maintained by this applicant. However, no documents were produced which specifically admitted the allegations against the applicant. It is being admitted by the O.P that, at the relevant point of time, among the Manager and Shop In-Charge, the shop-in-charge was the superior and overall authority over the co-operative. The said witness could not produce any document to show that the applicant sanctioned leave of any employee.

h) That, such matter was being duly intimated vide the exhibit – N to the applicant. The applicant was present in the board meeting which is clear from the exhibit – O but had failed to give any proper explanation regarding the shortage of funds and had asked for some time to enquire into the matter and submit a report. From the exhibit - 3 which is the copy of turn up before the Board of Directors dated 05.06.2002 it is clear that the O.P concern had given a letter to the applicant on the basis of which the same had given sufficient replies vide the exhibit - 3/1.

i) Subsequently, the applicant had failed to provide any proper and satisfactory explanation and on 03.07.2002, the exhibit – P which is the charge-sheet was being issued. An opportunity was given to the applicant to give reply to the charge-sheet and the applicant in his reply had denied all the allegation and had stated that either the charge-sheet be withdrawn or he be exempted from the allegation in the charge sheet (which is clear from the exhibit - 4/1). Thereafter, on the basis of the reply the Board of Directors took the decision and as per the resolution dated 07.07.2002 (which was marked as exhibit -O) the applicant was being dismissed from 09.07.2002 and the exhibit – Q was being issued.13) The fact of denial and of unsatisfactory reply from the applicant had not been mentioned by the O.P in any of the documents. That the witness had admitted the fact that no domestic enquiry was conducted by the O.P. Management prior to the dismissal and there was no mentioning of any explanation for non-conducting the domestic enquiry in the dismissal letter. From the exhibit - O it is clear that no enquiry was held before the termination of the workman on the basis of the two allegations as mentioned in the same.

j) It is a fact that the applicant had mentioned in his reply that is the exhibit - E that the allegations, raised against the same are not proper; since the witnesses were not attached with the Co-operative at the relevant time it was not possible for the witness to state as to whether on the basis of exhibit - D any punishment was being inflicted upon the applicant even after receiving exhibit – E (which is the reply). That, during the service tenure of the applicant warnings for three times were given to the applicant, but no demotion or dismissal of the applicant was inflicted by way of punishment by the O.P concern.

k) The O.P had neither filed any document in order to show that during the tenure of the service the applicant had granted any leave or overtime to any employee; nor, had filed any document in





order to show that the applicant had signed any document as Salary Disbursing Officer of any employee. Furthermore, no documents were filed in order to show that the weigh man, helper, temporary staff used to work under the supervision of the applicant. No documents were relied upon by the O.P concern to the effect that the applicant was the Reporting Officer of any weigh man, helper, and temporary staff; neither any documents were submitted in order to show that the applicant used to assess the jobs, performance of any weigh man, temporary staff and helper and to report the same to the higher authority.

l) The O.P had not filed any document in order to show that a written direction was given to the applicant to do the said jobs to weigh man, helper, temporary staff as his duty; no documents were relied upon by the O.P concern in order to show that during the tenure of the service the applicant had given any written instruction to any weigh man, helper and temporary staff regarding his job.

m) The O.P had not filed any papers before this court in order to; show that after dismissal of the applicant immediately the O.P.W 2 was promoted as Shop-in-charge; the same was working under the applicant and the applicant had sanctioned his leave or had granted any over time or issued any written direction upon him. The witness failed to produce any papers in order to show that the applicant had sanctioned any leave to any other employee, sanctioned any overtime or issued any written direction to any employee.

n) The O.P had failed to state as to whether prior to the dismissal any enquiry was held against the applicant for allegations as mentioned in the charge sheet. The O.P.W 2 had not seen the reply which was submitted by the applicant alleging the fact that the same had not handed over the charge sheet to the management and had kept the stock and cash under his control.

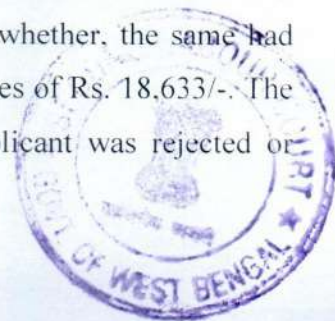
o) The O.P had failed to produce any document to show that the duties and responsibilities which were entrusted upon the applicant and was also unable to produce any document to establish the fact that applicant used to assess the performance of his sub-ordinate staffs. No documents could be produced to establish the fact that the applicant had issued any instruction to any staff in black and white. The O.P had failed to state whether, the same had lodged a diary before the P.S. alleging that there was financial irregularities of Rs. 18,633/-. The O.P has failed to substantiate whether the prayer for leave of the applicant was rejected or granted, or the same was informed in this regard. The Daily Sales Register (DSR) and for the present was being maintained by the applicant and for the alleged relevant period the audit firm had audited the accounts but did not find any irregularity for Rs. 18,633/-.

Thus, from the above discussion it is clear that: -





- 1) This applicant was working as a Sales Clerk since 1964 (working for 25 years) and was also the shop-in-charge. The consumer articles and food grains, pulses, mustered oil and all other eatable items were being sold from the O.P concern.
- 2) A daily sales register was being maintained in the aforesaid shop and Mr. Rabindra Bhowmick, Shibananda Paul , Ashok Dey were permanent weigh man of the co-operative who were working under the applicant. That, Mr. Netai Chandra Das and Rabindra Nath Dey were the temporary weigh men and Mr. Joydeb Basak clerk/ memo writer also worked under the applicant.
- 3) The applicant had fell ill on 04/12/2001 and had applied for medical leave vide his letter dated 10/12/2001 and 31/12/2001 and had been to the O.P concern to resume his duties on 02/01/2002. The applicant had given an explanation along with the medical certificate showing the reason for his absence and the O.P had not sent any notice to the applicant mentioning that the explanation given for his absence was not satisfactory.
- 4) The O.P concern had requested the applicant to turn up before the board of directors on 09/06/2002 and the applicant had submitted a written submission on his behalf. However, the charge – sheet was being issued. The applicant had given his reply but instead of initiating a domestic enquiry the applicant was dismissed.
- 5) The O.P had neither filed any document in order to show that during the tenure of the service the applicant had granted any leave or overtime to any employee; nor, had filed any document in order to show that the applicant had signed any document as Salary Disbursing Officer of any employee. Furthermore, no documents were filed in order to show that the weigh man, helper, temporary staff used to work under the supervision of the applicant. No documents were relied upon by the O.P concern to the effect that the applicant was the Reporting Officer of any weigh man, helper, and temporary staff; neither any documents were submitted in order to show that the applicant used to assess the jobs, performance of any weigh man, temporary staff and helper and to report the same to the higher authority.
- 6) The O.P had failed to state as to whether prior to the dismissal any enquiry was held against the applicant for allegations as mentioned in the charge sheet. The O.P.W 2 had not seen the reply which was submitted by the applicant alleging the fact that the same had not handed over the charge sheet to the management and had kept the stock and cash under his control.
- 7) No documents could be produced to establish the fact that the applicant had issued any instruction to any staff in black and white. The O.P had failed to state whether, the same had lodged a diary before the P.S. alleging that there was financial irregularities of Rs. 18,633/-. The O.P has failed to substantiate whether the prayer for leave of the applicant was rejected or





granted, or the same was informed in this regard. The Daily Sales Register (DSR) and for the present was being maintained by the applicant and for the alleged relevant period the audit firm had audited the accounts but did not find any irregularity for Rs. 18,633/-.

Thus, from the above discussions it is clear that this applicant was being appointed as a 'Sales Clerk' in the above concern. The said fact becomes evident from the substantive evidences of the parties wherein there is a clear admission that this applicant did not have the authority to assign duties, grant and recommend leave of the workers and initiate disciplinary actions against the same; the applicant used to manage the articles and commodities that were Government Supply and the same used to inform the memo man to rate the required stock of essential commodities. The applicant used to prepare the indent for the co-operative and the Inspector used to prepare the estimate of stocks for the up coming weeks. That, the applicant had remained present in the Co-operative Board meetings but had no function to perform there owing to the fact that in the board meetings all the employees remained present but had no role to play concern were the competent authority to take any decision.

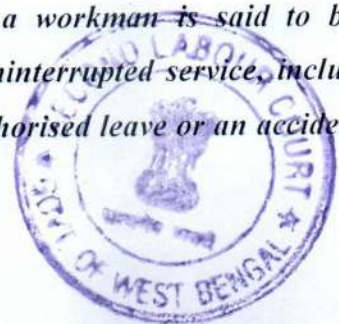
The term 'Supervision' contemplates direction and control. While determining the nature of the work performed by applicant, the essence of the matter should call for consideration. The applicant disputably carries on supervisory work if he has power of control or supervision in regard to recruitment, promotion, etc; The work involves exercise of tact and independence; however in the present scenario exercise of tact and independence by the present applicant is found absent. Accordingly, it is clear that this applicant comes under the purview of 'workman' as envisaged in section 2(s) of the Industrial Disputes Act, 1947.

Section 10(1B)(d) of the Industrial Disputes Act, 1947 clearly states that

*"Notwithstanding anything contained elsewhere in this Act, where in a conciliation proceeding of an industrial dispute relating to an individual workman, no settlement is arrived at within a period of sixty days from the date of raising of the dispute, the party raising the dispute may apply to the Conciliation Officer in such manner and in such form as may be prescribed, for a certificate about the pendency of the conciliation proceeding".*

In the present scenario it is clearly seen that the instant case the applicant herein has filed the present application on **15/07/2003** i.e. on expiry of 60 days from the date of application submitted on **02/06/2003** to the conciliation officer.

Section 25B of the Industrial Disputes Act states that *".....a workman is said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or*





*a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer--*

*(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--*

*(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and*

*(ii) two hundred and forty days, in any other case;.....”*

In the present situation it is seen that this applicant was appointed in the service of the O.P. No. 1 on and from 01/10/1964 and his service was terminated on 07/07/2002 and had been in service of the establishment for a period of 37 years 9 months and 6 days to be more precise for a period of 13793 days (thirteen thousand seven hundred and ninety three days). Thus, it is proved that the present applicant was a workman who was working permanently under the opposite party Company. No notice was being issued by the O.P. No. 1 in regard to the termination of service by the O.P. No. 1.

***Section 25F. Of the Industrial Disputes Act, 1947 clearly lays down the conditions precedent to retrenchment of workmen***“Conditions precedent to retrenchment of workmen:- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--

(a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette].”





Thus, in accordance to section 25F of the Industrial Disputes Act, 1947 the retrenchment of the applicant **Sri Mani Bhusan Majumdar** is unjustified and in-operative.

The Hon'ble Apex Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors., reported in (2013) 10 SCC 324 was of the opinion that

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

ii) 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.

iii) 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 particular fact lies on the person who makes a positive averments 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. Thus, keeping in mind the present market conditions it will be highly justified to pass an award of full back wages along with other consequential benefits if any to the applicant from the day his service was terminated (31/12/2014). Accordingly the applicant is entitled to get full back wages along with all other consequential benefits (if any) from 01/01/2015.

This court now carefully goes through the decisions held by the Hon'ble Courts in AIR 1992 Supreme Court 573 (C.E.S.C Ltd. Vs. Subhash Chandra Bose & Others), 1978 SCR (3) 1073 (Hussain Bhai Vs. Alath Factory Thozhilali Union, Kojhikode & Others), 2004) 1 Supreme Court cases 126 (Ram Singh & Others Vs. Union Territory, Chandigarh & Others).





The Hon'ble Courts were pleased to give emphasis on many factors in determining the relationship of employer and employee. According to those referred decisions, it can be mentioned clearly that

**“In determining the relationship of employer and employee, no doubt “control” is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole “tests of control”. An integrated approach is needed. “Integration” test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer’s concern or remain apart from and independent of it. The other factors which may be relevant are – who has the power to select and dismiss, to pay remuneration, deduct insurance contribution, organize the work, supply tools and materials and what are the “mutual obligations” between them”.**

**Accordingly, this issue is also decided in favour of the applicant.**

**Thus,** keeping in view the above discussions and the Principles laid down by The Hon'ble Apex Court it can be clearly said that: -

- That this applicant was being employed by the O.P. on and from **01/10/1964** as a ‘Sales Clerk’ which was not a supervisory post.
- That the applicant did not have any control to grant leave or issue any show-cause notice over the other employees
- That the applicant had performed his duties towards the O.P till **07/07/2002** and the same was refused from his employment by the opposite party without following the provisions of The Industrial Laws.
- That the Opposite Party Company had failed to comply with the conditions laid down u/s 25F(b) of the Industrial Disputes Act making the whole act of the opposite party illegal and unjustified.
- The reason for retrenchment of service of the applicant by the Opposite party Company could not be properly justified by the same.





- The applicant was not working for gain for other employer in any other concern.

Now the question that is taken is the quantum of entitlement of the applicant in respect of the claim made by him in the present application. This applicant was in service since 01/10/1964 and had delivered his service to the O.P concern for a period of more than 37 years (thirty seven year) till his dismissal that has been held to be unjustified in respect of the discussions made herein-above. The applicant had to face the stigma of deficit funds in the accounts which the O.P has miserably failed to establish. Thus, in my humble opinion after taking into consideration all the aspects the applicant is entitled to get the full back wages from date of his dismissal to the date of his superannuation.

Hence, it is

**ORDERED**

The application **u/s.10(1B)(d) of the Industrial Disputes Act, 1947** be and the same is thus **allowed on contest without costs**. The Opposite party was not justified in dismissing the applicant and is thus, directed to cause reinstatement of the applicant **Sri Mani Bhusan Majumdar** at once. The applicant shall receive **full back wages for the period from 07/07/2002** till the date of his superannuation along with all other consequential benefits if any. In the event of the age of superannuation being reached by the applicant the same shall be entitled to get the entire back wages alongwith other consequential relief as mentioned above apart from being reinstated in the O.P concern. The O.P is directed to comply with the Award.

This is my award.

Let the copies of this award be sent to the concerned authority of the Government of West Bengal.

**Dictated and corrected by me**

*Sdl-*  
Judge

*Sdl-*  
(Argha Banerjee)  
Judge, 2<sup>nd</sup> Labour Court

Judge  
Second Labour Court WB

Kolkata

Judge  
Second Labour Court WB

