

I/519324/2024

LABR-22015(12)/1/2021-IR SEC-Dept. Of LABOUR

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

No. Labr/ 506 /(LC-IR)/22015(12)/1/2021

Date : 30-05-2024

ORDER

WHEREAS an industrial dispute existed between M/s Vijay Shree Limited, Fort William Jute Mill Division, 47, & 48, R.N.R.C. Ghat Road, Shibpur, Howrah – 711102 and Fara Naz Khan and Another, W/o Late Shamim Khan, 7, Dr. Gangadhar Mukherjee Road, Banstala Ghat, Howrah (M. Corporation), Ramkrishnapur, Howrah - 711101 regarding the issues, being a matter specified in the second schedule to the Industrial Dispute Act, 1947 (14 of 1947) ;

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

AND WHEREAS the said Second Industrial Tribunal, Kolkata has submitted to the State Government its Award dated 22.05.2024 in case No. - 05 of 2012 under section 10(1B)(d) of the I.D. Act, 1947 (14 of 1947) on the said Industrial Dispute vide Memo No. Dte/2nd I.T./051/2024 dated 24.05.2024 ;

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

ANNEXURE

(Attached herewith)

By order of the Governor,

Sd/-

Deputy Secretary

to the Government of West Bengal

No. Labr/ 506 /1(5)/(LC-IR)

Date : 30-05-2024

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

1. M/s Vijay Shree Limited, Fort William Jute Mill Division, 47, & 48, R.N.R.C. Ghat Road, Shibpur, Howrah – 711102.
2. Fara Naz Khan and Another, W/o Late Shamim Khan, 7, Dr. Gangadhar Mukherjee Road, Banstala Ghat, Howrah (M. Corporation), Ramkrishnapur, Howrah - 711101.
3. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The OSD & EO Labour Commissioner, W.B., New Secretariat Building, 11th 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.

Sd/-
Deputy Secretary

No. Labr/ 506 /2(3)/(LC-IR)

Date : 30-05-2024

Copy forwarded for information to :-

1. The Judge, Second Industrial Tribunal, N. S. Building, 3rd Floor, 1, K.S. Roy Road, Kolkata - 700001 with respect to his Memo No. Dte/2nd IT/051/2024 dated 24.05.2024.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.
3. Office Copy.

Deputy Secretary

H.A. (IT) 06/03/2024

Dipankar 03/06/2024

Before the 2nd Industrial Tribunal, Kolkata

Present : Shri Partha Sarathi Mukhopadhyay, Judge

2nd Industrial Tribunal, Kolkata

Case No. 05 of 2012

Under Section 10(1B)(d) of The Industrial Disputes Act, 1947

Fara Naz Khan and Another

..... **Petitioners.**

-Vs-

M/S. Vijay Shree Limited

..... **Opposite Party.**

Date: 22.05.2024

J U D G E M E N T

The substituted petitioners have filed this case Under Section 10(1B)(d) of The Industrial Disputes Act, 1947 and submitted that the deceased petitioner Samim Khan was a regular employee under the O.P. company since 21.09.1984 and became the member of the Provident Fund, ESI and availed the benefit of earned leave etc.

The substituted petitioners further submitted that vide letter dated 01.11.2011, the Opposite Party terminated deceased petitioner's service w.e.f. 01.11.2011 by making some false allegations without giving the deceased petitioner an opportunity of hearing and then by a letter dated 05.12.2011 the deceased workman challenged the said order of termination and requested for reinstatement with full back wages and then he approached the office of the Deputy Labour Commissioner for intervention and finding that there was no chance of settlement of the dispute, he requested for issuance of a certificate over pendency of conciliation to enable him to file the case directly without waiting for reference by the Government and on and from 30.05.2011 the O.P. company did not allow him to enter into the company and the allegations as made in the letter dt. 01.11.2011 by the O.P. company are false and baseless and no domestic enquiry was held regarding the alleged incident and on the above mentioned grounds the workman has filed this case praying for reinstatement and declaration that the termination of his service w.e.f. 01.11.2011 is illegal and unjustified.

The O.P. company has contested this case by filling a written statement denying therein all the material allegations in the written statement of the petitioners.

The O.P. company submits that the case is not maintainable in its present form and law and the deceased petitioner was a badli workman for which the instant dispute cannot be termed as Industrial dispute and a badli workman is not entitled to get any protection under the Industrial Disputes Act, 1947.

The O.P. company has further submitted in its written statement that the deceased petitioner had been enrolled in the employment of the O.P. company w.e.f. 01.02.1997 as badli worker and thereafter

he had worked intermittently as and when the vacancy arose but he never worked continuously for 240 days at a stretch and on 29.05.2011 at about 7:00 a.m. this deceased petitioner along with other badli workers wrongfully confined one D.R. Thakur of the Weaving Section for half an hour in the Weaving Department and forced him to mark their attendance despite the facts that they had refused to work at their allotted places of work on that date and had tried to work forcefully at the places of their own choice and when said Thakur tried to convince them, they assaulted him physically by fists & blows causing serious injuries to him and those acts of the said workers are major misconducts within the meaning of Certified Standing Orders and for this reason this deceased petitioner along with others were asked on 30.05.2011 not to enter the company premises for work and thereafter through **internal enquiry**, the O.P. company came to the conclusion that this petitioner along with others wrongfully confined and assaulted said Thakur and then the Disciplinary Authority by its letter dt. 01.11.2011 delisted the petitioner and other persons from the list of badli workers according to the Certified Standing Orders followed by the O.P. company and all the allegations made by the deceased petitioner in his written statement are totally false and baseless. Hence, the O.P. company has prayed for dismissal of the case.

Record shows that by order dated 29.01.2024 in WPA 1510/2022, the Hon'ble High Court, Calcutta has been pleased to set aside the award dated 29.09.2021 passed by this Tribunal earlier and direct this Tribunal to bring the legal heirs of the deceased workman on record in this case and dispose of this case on remand within 02 months from the date of receipt of copy of this order and then on 09.02.2024, the OP company filed the above mentioned order of the Hon'ble High Court Calcutta before this Tribunal and 15.02.2024 was fixed for placing the matter before the regular PO and on 15.02.2024 notice was sent by speed post to the wife of the deceased

petitioner namely Fara Naz Khan directing her to appear before this Tribunal on 14.03.2024 and **then on 21.02.2024, the tenure of the present Tribunal was completed** and from 22.02.2024 he did not attend this Tribunal as his service was not extended by the State Government though the petition for extension of his service was filed by him much earlier before 21.02.2024 before the State Government.

However, record shows that on 14.03.2024 the envelope containing the notice sent to the said Fara Naz Khan was received with the postal remark "no such address" and then again fresh notice was served upon her by speed post to appear before this Tribunal on 03.04.2024 but on 03.04.2024 she did not attend this Tribunal and the envelope containing one fresh notice was received by this Tribunal with a postal remark "**refused**".

In this case one petition was filed by the wife of the deceased petitioner praying for substituting her and her minor son in place of her deceased husband Samim Khan on 04.09.2018 and that petition was allowed on 09.10.2018 by the erstwhile Tribunal but neither in the said petition of the wife of the deceased petitioner nor in the order dated 09.10.2018 passed by the erstwhile Tribunal, the name of the minor son of the deceased petitioner was mentioned and though the said son was minor at the time of death of his father and though his mother can represent her said minor son in this case, mention of name of said minor son in the said petition of the petitioner and the order dated 09.10.2018 was a must because in case of representation of a minor son by his mother, name of the said minor son is required to be noted in the cause title of the written statement of the deceased petitioner and in the petition dated 09.02.2024 filed by the OP company, the name of the said minor son has also not been mentioned and on enquiry from the erstwhile Ld. lawyer of the petitioner and the present lawyer of the OP company, the said name of the minor son could not be collected.

On 05.04.2024 after extension of his service the present Tribunal has joined and today is fixed for passing orders and on perusing the envelope containing notice sent by this Tribunal to the wife of the deceased petitioner, it is found that there is a postal remark "refused". So it is clear that the notice has been refused by the wife of the deceased petitioner and accordingly it is to be held that **notice has been served legally upon her.**

On perusing the written statement dated 21.08.2012, I find that on that date the petitioner namely Samim Khan filed this case against the opposite party and then he expired and on 09.10.2018 on the basis of petition of the wife of the said deceased petitioner, the erstwhile Tribunal allowed the said petition for substitution but the Bench Clerk concerned did not make any entry in the cause title of the written statement of the deceased petitioner regarding substitution of the name of the wife of the said deceased petitioner and her minor son and for such **serious mistake** on behalf of the said bench clerk, the names of the wife and minor son of the deceased petitioner have not been mentioned in the said written petition in place of the deceased petitioner and at the time of passing award earlier on 29.09.2021, this non-mention of the names of the wife and minor son of the deceased petitioner as the substituted petitioners in the cause title of the written statement escaped the notice of the Tribunal.

However, the Bench Clerk was now directed to mention the names of the wife and unnamed minor son as the substituted petitioners in this case in the cause title of the written statement in place of the deceased petitioner.

Considering the materials on record, the following issues have been framed in order to arrive at a decision:-

1. Whether the present case is maintainable.

2. Whether after introduction of Section 2A (2) in The Industrial Disputes Act, 1947 the provision of Section 10(1B)(d) of The Industrial Disputes Act, 1947 (W.B. Amendment) is operational.
3. Whether the applicant is a workman within the meaning of Section 2(S) of the Industrial Disputes Act, 1947.
4. Whether the termination of service of the applicant, Samim Khan by the company is justified.
5. To what relief, if any, the applicant is entitled.

ISSUES NOS. 1 TO 5

All the issues are taken up together for consideration for the sake of convenience.

In this case the deceased petitioner has examined himself as the PW 1 only and proved some documents while the OP company has examine 05 witnesses and proved some documents.

The PW 1 has started deposing on and from **22.10.2013** in this case.

On 06.02.2018 the OP company has examined one Rajat Pal but in the examination sheet he has been mentioned only as the OPW and no serial no. of the OPW has been mentioned while in the Order dated 06.02.2018 said Rajat Pal has been mentioned as the OPW No. 05.

One witness namely Arvind Kumar Rai has been examined by the OP company on 01.10.2015 but he has not been mentioned in the examination sheet as the OPW no. 01 but in the Order dated 01.10.2015 he has been mentioned as the OPW 1.

The OPW 2 Sri Babulal Chowdhury has been examined by the OP company on 23.12.2015 and he has mentioned as such in the order dated 23.12.2015.

On 15.09.2017 the OP company has examined one Dipto Narayan Mukhopadhyay as the OPW 3 and in the order dated 15.09.2017 he has been mentioned as such.

On 20.11.2017 said Dipto Narayan Mukhopadhyay has again been examined as the OPW 4 by the OP company but the order dated 20.11.2017 does not mention such examination.

Actually the OP company has examined 04(four) witnesses but the record shows that OP company has examined 05(five) witnesses.

This is the position of the record regarding examination of the witnesses showing some defects to mention the serial no. of the witnesses of the OP company in the deposition sheet and order sheet, which took place during the erstwhile Tribunal and the Bench Clerk.

Regarding Affidavit in Chief:-

According to Rule 24 of the West Bengal Industrial Disputes Rules, 1958, a Tribunal has power to consider reception of evidence taken on affidavit according to the Code of Civil Procedure, 1908 while trying a labour dispute.

Order 18 Rule 4 of the Code of Civil Procedure, 1908 is related to evidence in chief in the form of affidavit. As per this provision evidences in chief in the form of affidavit can only be in relation to the fact or facts required to be proved by the parties and the examination in chief of a witness shall be **only** on an affidavit as per order 18 Rule 4 of the Code of Civil Procedure and each witness of both sides has to submit affidavit in chief in respect fact or facts required to be proved in a case as evidence and this is a mandatory provision and without any affidavit in chief of any witness of any of the parties, his evidence in chief in court only in respect of the fact or facts and circumstances cannot be considered legally as per this provision.

The provisions of Order 18 Rule 4 of the Code of Civil Procedure, 1908 has come into force **w.e.f. 01.07.2002** and it is concerned with evidences of the witnesses of both sides in chief only by affidavit and **it is not concerned with the proof of documents in chief and cross-examination of the same witness by the other side** and if a witness does not submit his evidences in chief by affidavit, his evidences in chief cannot be considered legally as per Order 18 Rule 4 of the Code of Civil Procedure, 1908 but if he proves any document in his examination in chief, that will be considered legally and his cross-examination will also be considered legally.

As all the 05 witnesses of the OP company have not filed their evidences in chief by affidavit, their oral evidences regarding the facts and circumstances of this case cannot be considered legally and they deposed on and from 06.02.2018 but they have proved some documents in chief and they have been cross-examined and their cross-examinations and their evidences in chief in court regarding proof of documents can be considered legally.

So the OP company has violated the **mandatory provisions** of Order 18 Rule 4 of the CPC and Rule 24 of the West Bengal Industrial Disputes Rules, 1958, by not filing affidavit-in-chief in respect of the evidences of the abovementioned 05 witnesses and accordingly the said oral statements of the abovementioned 05 witnesses in court in respect of the incident and other matters cannot be considered legally and those have no legal value to consider in this case.

In this case the O.P. company has based its case on the basis of the Standing Orders (Exhibit-D) followed by the O.P. company and during argument the Ld. Lawyer for the O.P. company has cited Rule 5(b) of the 2nd part of the said Standing Orders and as per this Rule 5(b), the special or registered badli workers names may be removed from the list of the registered badlies for any of the acts or omissions listed as **misconduct** in the Standing Orders

According to Rule 14 of the 1st Part of the said Standing Orders, wilful insubordination or disobedience, whether alone or in combination with others, to any lawful or reasonable order of a superior and riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline shall be treated as **misconduct**.

So in order to remove any badli worker from the list as per Rule 5(b) of the 2nd Part of the Standing Orders, any of the acts or omission as mentioned in Rule 14 as misconduct in the Standing Orders has **to be proved** by the OP company.

Only oral allegations without any substantive evidences on record in respect of said oral allegations cannot save the OP company because the said oral allegations cannot be given any legal value.

In its written statement, the O.P. company has claimed that on 29.05.2011 at about 7:00 a.m. the petitioner along with others wrongfully confined one D.R. Thakur of the Weaving Section for half an hour in the Weaving Department of the mill and forced him to mark **their attendance** despite the fact that they had refused to work at their allotted place of work on that date and tried to work forcefully at the places of their own choice and when said Thakur tried to convince them, the petitioner along with others assaulted him physically by fists and blows causing serious injuries to him and then **internal enquiry** was held and after enquiry the Disciplinary Authority delisted the petitioner and others on 01.11.2011 from the list of badli workers as per Rule 5(b) of the 2nd part of the Standing Orders followed by the O.P. company.

But the O.P. company has not examined said D.R. Thakur, **the victim and most vital witness of the alleged incident**, as witness in this case and no medical certificate has been produced to show that said Thakur sustained severe injuries on his body due to assault and though the O.P. company has claimed in the written statement that **after through internal enquiry**, the Disciplinary Authority terminated the service of the petitioner, no such paper of the said internal enquiry has been produced and proved in this case by the O.P. company and the petitioner was not directed to file any show cause regarding the incident and he was not called in the said enquiry and in his absence the said enquiry if any, was held.

So this is a clear case of violation of the principles of natural justice and without the presence of the petitioner at the time of internal enquiry and without giving him any opportunity to submit his case, the O.P. company has terminated the service of the petitioner most illegally and whimsically, causing serious injustice to him, **by**

deliberately violating Rule 14 and Rule 5(b) of its own standing order.

The OP company has not given any explanation as to why said D.R. Thakur has not been examined in this case.

According to the written statement of the OP company, on 29.05.2011 the deceased petitioner alongwith others assaulted one D.R. Thakur causing injuries to him and then one internal inquiry was held and then disciplinary authority by one letter dated 01.11.2011 delisted those persons from the list of badli workers because they were found guilty of misconduct and the letter dated 01.11.2011 sent by the OP company to the deceased petitioner mentions **specifically that "the management has strong evidence i.e. of eye witnesses as such there is no need of any formal enquiry in the matter and the acts of misconduct committed by you all stand proved beyond doubt"**.

So the above letter dated 01.11.2011 specifically mentions that **no formal enquiry** was made by the OP company against the said deceased petitioner in respect of the alleged incident dated 29.05.2011, but in its written statement the OP company has **specifically** stated that one internal enquiry was held in respect of the said incident dated 29.05.2011 and then the disciplinary authority, being satisfied, removed the name of this petitioner and others from the list of badly workers and the OPW Arvind Kumar Rai has stated in his **cross-examination** that the OP company held one enquiry over the said incident, but they have not filed any documents in respect of the said enquiry and **the documents of the enquiry are lying in the OP company.**

The OPW Babulal Chowdhury has stated in his **cross-examination** that he does not know if any enquiry was held against those workers over the said incident.

So the said letter dated 01.11.2011 issued by the OP company (Exhibit 4 and C) shows that **no formal enquiry was held** in respect of the said incident dated 29.05.2011 but the written statement of the OP company mentions and two witnesses of the OP company have stated about one enquiry over the said incident. So this is a vital contradiction made by the OP company in respect of holding internal enquiry over the said incident and accordingly the above statements of the OP company and their witnesses are vague and valueless.

The petitioner's specific case is that **no enquiry was held** in respect of the abovementioned alleged incident but on 01.11.2011 the OP company dismissed him from service on the ground of misconduct.

The writer of the letter dated 01.11.2011 (Exhibit 4 and C) has not been **examined** by the OP company in this case and the said victim D.R. Thakur has not been examined also in this case by the OP company. It may be that said Thakur has left the service of the OP company after the said incident but the OP company should have produced him as witness in this case to prove the said incident of assault dated 29.05.2011 as he was the only victim of the said incident.

The deceased petitioner as the PW1 has filed affidavit-in-chief and he has stated in the affidavit that he was a regular employee of the OP company since 1984 and his service was terminated by the OP company by a letter dated 01.11.2011 and no enquiry was held in

respect of the said allegation of misconduct and then he made representation before the Deputy Labour Commissioner, Howrah for conciliation and the OP company appeared in that proceeding and he applied for issuance of certificate to file case before the Tribunal, and in his cross-examination he has stated that he did not file any document to show that he worked in the OP company regularly and continuously since 1984 and he has not filed any pay slip issued by the OP company and he has not filed any document to show that he worked in the OP company continuously for 240 days in a year and his family consists of himself, his wife, elder brother and one minor child and his elder brother maintains his family.

The PW1 has proved his ESI card and two medical certificates as Exhibit -1, 2 and 2/1 and he has proved copies of two letters dated 30.05.2011 and 01.11.2011 issued by the OP company as Exhibit 3 and 4 and he has proved two letters sent to the OP company as Exhibit 5 and 6 and he has proved two letters sent by him to the Deputy Labour Commissioner, Howrah and Assistant Labour Commissioner, Howrah as Exhibit 7 and 7/1.

From the examination in chief and cross-examination of the PW1, it is proved that he has stated about his termination from his service without any enquiry held by the OP company and he has not produced any documents in this case to show that since 1984 he worked regularly and continuously in the OP company and he has not filed any paper to show that he worked in the OP company continuously for 240 days in a year.

The OPW Rajat Pal has stated about missing of the conciliation files from their office this circumstance is alarming but the OP company cannot get any legal advantage for such type of missing of the conciliation files of this case. In his **cross-examination** he has

stated that the Assistant Labour Commissioner namely Sima Das was the Conciliation Officer. So from such type of cross-examination it is proved that one conciliation proceeding was proceeded before the office of the Deputy Labour Commissioner before filing of this case before this Tribunal.

The witness Arvind Kumar Rai has proved one badli record as Exhibit A and two letters dated 30.05.11 and 01.11.2011 as Exhibit B and C and one standing order of the OP company as Exhibit D.

In his **cross-examination** the above witness has stated that he has no proof to show that he had been working in the OP company at the time of his deposition in this case and he has not filed any authorised letter to show that he has been entrusted to depose in this case on behalf of the OP company and he saw the incident dated 29.05.2011 and the OP company **maintains registers regarding attendance and departure for the badli workers** but they have not filed the said registers before this Tribunal and in Exhibit A, the word "**casual**" has been written in the remark column.

So from the above **cross-examination** of this witness it is proved that at the time of his deposition he was not the employee of the OP company but without any authorisation letter of the OP company he has deposed in this case and this is highly illegal.

In his **cross-examination** he has admitted that the OP company maintains registers regarding attendance and departure of the badli workers but the same have not been filed in this case and this is against the case of the OP company because in order to prove their allegation that the petitioner did not complete 240 days in a year at

any point of time, the OP company should have produced those registers **mandatorily**.

The OPW Babulal Chowdhury has stated in his **cross-examination** that the OP company has not filed registers of the permanent and badli workers and vouchers of paid workers in this case and this circumstance is against the case of the OP company.

The OPW Dipto Narayan Mukhopadhyay has deposed twice as the OPW 3 and the OPW 4 in this case and in his **cross-examination** he has stated about missing of files, and filing of General Diary at the P.S. concerned, but the OP company has not produced copy of the said General Diary in this case to prove allegation against the petitioner.

According to the definite case of the OP company, the deceased petitioner was the badli worker of the OP company but the Exhibit A mentions the said petitioner as Casual worker in the remark column of the badli record and this exhibit A is not sufficient to hold whether the petitioner used to work as badli or casual worker in the OP company and according to the Rule 2 of the Standing Order of the OP company (Exhibit D), badli worker and casual worker are not the same. So the above circumstance clearly proves that the OP company does not know at all whether the petitioner was a badli or a casual worker under the OP company.

In its written statement the OP company has stated that on 29.05.2011 the petitioner and others forced D.R. Thakur to mark their attendance but why the OP company has not produced the said attendance register in this case to prove his said allegation.

Rule 14 of the Standing order of the OP company mentions some Acts and Omissions as misconduct and for such type of misconduct **disciplinary action has to be taken** and Rule 14 (e) of the said Standing order mentions that **no order of dismissal shall be made unless the workman concerned is informed in writing of the alleged misconduct and is given an opportunity to explain the circumstances alleged against him** but in this case no such explanation was called for from the petitioner by the OP company and no letter was given to him with the information of the alleged misconduct and according to Rule 14(f) of the said Standing order, the suspension order shall set out in detail the alleged misconduct and the workman shall be given an opportunity of explaining the circumstances alleged against him. **The letter dated 30.05.2011 (Exhibit B) does not mention that the OP company asked the petitioner to explain the circumstances alleged against him.**

So the above materials on record clearly prove that the OP company did not comply with its own standing order regarding misconduct before terminating the service of the petitioner and this is highly illegal and it has also violated the Principles of Natural Justice and the standing order of the OP company and it also proves that the OP company whimsically and illegally has terminated the service of the deceased petitioner.

On the basis of the above materials on record and above discussion I hold that the OP company has failed to prove that the petitioner was guilty of misconduct in respect of the incident on 29.05.2011, and so the order of termination of the service of the petitioner dated 01.11.2011 was totally illegal, invalid, whimsical and unjustified and accordingly it cannot be allowed to stand legally.

In this case the petitioner has taken a plea that since 1984 he has been working as a regular employee under the OP company but he has not produced any paper in this respect in this case and accordingly I hold that the petitioner has failed to prove that **since 1984 he has been working in the OP company as a regular employee.**

In its written statement the OP company has stated that since 01.02.1997 the petitioner worked in the OP company as badli and his name was enrolled in the registers. So the OP company has admitted that from 01.02.1997 the petitioner worked in the OP company and on 01.11.2011 his service was terminated.

So from the admission of the OP company I hold that it has been **proved** that from 01.02.1997 to 01.11.2011 the deceased petitioner worked in the OP company **though both sides have not produced any document in this matter.**

Now it is to be considered whether the deceased petitioner worked as a regular worker or badli worker in the OP company from 01.02.1997 to 01.11.2011.

I have already discussed above that the petitioner has failed to prove that **since 1984 he has been working in the OP company as a regular employee** and from the admission of the OP company it has been **proved** that from 01.02.1997 to 01.11.2011 the deceased petitioner worked in the OP company.

So what was the **status** of the petitioner when he admittedly worked in the OP company from 01.02.1997 to 01.11.2011?

According to the case of the OP company, the petitioner used to work as the **badli** worker from 01.02.1997 to 01.11.2011, and the petitioner has failed to prove that during that period he used to work as the regular worker there.

Now it is to be considered as to whether the petitioner was a workman under Section 2(s) of the Industrial Disputes Act, 1947 and during argument the Ld. Advocate for the OP company submitted that the petitioner was not a workman as per Section 2(s) of the Industrial Disputes Act, 1947 because he was a badli worker and accordingly he had no right to be protected by the Industrial Disputes Act, 1947.

According to Section 2(s) of the Industrial Disputes Act, 1947, workman means **any person 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 expressed or implied.

In its written statement the OP company admitted in para no. 14 that the petitioner worked in the OP company from 01.02.1997 as badli worker and he had been enrolled in the employment of the OP company. So it is clear that the OP company admitted the petitioner as the badli worker from 01.02.1997 under the OP company and his name had been enrolled in the employment of the OP company and accordingly I hold that the petitioner was **employed** under the OP company as a badli worker and he used to receive salary from the OP company and **it is not the circumstance** that the petitioner had no connection with the OP company from 01.02.1997.

It is true that Section 2(s) of the Industrial Disputes Act, 1947 does not **specifically mention** the word "badli", but this Section 2(s) **specifically** mentions in clause numbers (i) to (iv) who are not the workmen under Section 2(s) and these clauses of Section 2(s) do not mention specifically that **a badli worker is not a workman** under the Industrial Disputes Act, 1947.

Section 25-C (Explanation) of the Industrial Disputes Act, 1947 mentions that badli workman means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has **completed** one year of continuous service in the establishment. So **it is clear that if a badli worker completes one year of continuous service in the establishment, he will not be called as badli worker and he will be called a regular worker.**

According to Section 25-B (1) of the Industrial Disputes Act, 1947, a workman **shall be 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 behalf of the workman.

So this section says that if a workman is in continuous service without **any interruption**, it is to be presumed that he was in continuous service for the period concerned.

Section 25-B(2) of the above act mentions that when a workman is **not** in continuous service as per Section 25-B(1) of the above Act for

the period of **one year or 06 months**, he shall be deemed to be in **continuous service** under an employer for the period of one year if he has **actually** worked under the employer **for not less than 240 days**.

So this Section mentions that when a workman is not in continuous service for a period of one year, he shall be deemed to be in continuous service for a period of one year if he actually worked for not less than 240 days in that year, and if it is proved that the workman worked for 240 days in a year, **it is to be deemed** that he was in **continuous service** for a period of one year.

In this case the petitioner has **not taken a plea** that he used to work as a badli worker under the OP company since 21.09.1984. On the contrary, his definite case is that he worked as a **regular worker** since 21.09.1984 but he has not produced any documentary evidence to show that since 21.09.1984 he used to work as a regular worker under the OP company. So **it was his onus or burden to prove** that since 21.09.1984 he used to work as a regular worker under the OP company but he has failed to prove the same. **He had no burden or onus to prove** that he was a badli worker during the relevant period because **he did not take such plea**.

On the other hand, the OP company took a plea in para 14 of its written statement that since 01.02.1997 the petitioner worked under the OP company as badli and his name was enrolled as such under the OP company, and from such type of admission of the OP company it is proved that from 01.02.1997 to 01.11.2011 the petitioner worked under the OP company but whether he worked at that time as a **badli worker** - the OP company has to prove it

because it took this **plea of badli worker** and **it is its onus or burden**.

From the cross-examination of the PW1, it has not been proved that from 01.02.1997 to 01.11.2011, he worked as a badli worker. Moreover, he did not say it in his written statement and affidavit-in-chief as evidence.

In para 15 of its written statement the OP company submitted that the petitioner worked **intermittently** as a badli worker as and when vacancy arose but have **never** worked continuously for 240 days at a stretch and in fact in 2010 he worked for 107 days and in 2011 he worked for 88 days.

It is peculiar to note that the OP company has admitted in its written statement that from 01.02.1997 till termination the petitioner worked as badli worker under the OP company but the OP company did not give any picture of number of working days of the petitioner for every years starting from 01.02.1997 till termination of service of the petitioner, and **only for years 2010 and 2011** the OP company gave description of number of working days of the petitioner in the written statement, which has not been admitted by the petitioner in any way.

Before this Tribunal during his **cross-examination** the OPW Arvind Kumar Rai has stated that the OP company maintains registers regarding attendance and departure for the badli workers and the OPW Babulal Chowdhury has stated in his **cross-examination** that the OP company has not filed registers of the permanent and badli workers and vouchers of the paid workers. **So the question is as to why the OP company did not produce and prove the said**

registers in this case to show that at any point of time from 01.02.1997 the petitioner did not work at a stretch for 240 days and there is no explanation from the side of the OP company as to why the same have not been produced in this case though the same are lying in the OP company.

In para 15 of the written statement the OP company has taken a plea that the petitioner worked **intermittently** and **never** worked continuously from 01.02.1997 till the termination. So as the OP company took this plea of intermittent or uninterrupted service, the burden is on it to prove the same but the OP company did not produce any **cogent documents** to prove the said uninterrupted or intermittent service given by the petitioner during the said long period from 01.02.1997 till the termination and though it mentioned some numbers of working days for 2010 and 2011 in its written statement in para no. 15, the OP company did not produce any document in respect of these **two years also**. So it is proved that the OP company has failed to prove the said plea of intermittent or uninterrupted service or above working days of the years 2010 and 2011 of the petitioner during tenure of his entire service.

As the OP company has failed to prove its plea of intermittent or uninterrupted service of the petitioner during tenure of his entire service, in view of Section 25-B(1) of the Industrial Disputes Act, 1947, I hold that it has to be presumed that the petitioner was in **continuous service** during the tenure of his entire service from 01.02.1997 till his termination.

So in view of the above Sections of the Industrial Disputes Act, 1947, and materials on record, I hold that the OP company has failed to prove that the petitioner never worked for 240 days in a year and he

was a badli worker during the tenure of his entire service from 01.02.1997 till his termination.

In view of Section 25-B(1) of the Industrial Disputes Act, 1947, I hold that the petitioner used to work as the **regular** worker from 01.02.1997 till his termination by working continuously for more than 240 days in a year.

According to Section 25-C(Explanation) of the Industrial Disputes Act, 1947, if a badli worker completes one year of continuous service in the establishment, he cannot be treated as the badli worker. According to this Section, a company may appoint one badli worker for service in place of another workman and Section 2(s) of the Industrial Disputes Act, 1947, **does not specifically** say that a **badli worker** cannot be called a workman in a company and on the contrary, this section mentions that workman means **any person employed in any industry** and the said worker may be unskilled, etc. and if such type of workers as mentioned in Section 2(s) are dismissed, discharged or retrenched in connection with the Industrial Disputes, they may file proceeding. So if **combined effect** of Section 2(s) and Section 25-C(Explanation) of the Industrial Disputes Act, 1947, is given, it is clear that if a badli workman is dismissed or discharged or retrenched, he may file a proceeding under this act.

As the deceased petitioner did not take any plea of badli worker in this case, the decisions cited by the OP company in this case are not considered because the petitioner had no onus to prove himself as badli worker.

This case has been filed under Section 10 (1)(b)(d) of the Industrial Disputes Act, 1947 and as per this section, the appropriate Government may refer any dispute to a Tribunal for adjudication.

According to Section 2-A(2) of the Industrial Disputes Act, 1947, **notwithstanding** anything contained in Section 10, any such workman as is specified in sub-section (1), may make an application **direct** to the Tribunal for adjudication of the dispute after the expiry of 45 days of filing the application to the conciliation officer of the appropriate Government for conciliation of the dispute.

In this case **admittedly** before filing this case before this Tribunal, the petitioner approached the Labour Department for conciliation of the dispute but as the matter was not disposed of there, the petitioner filed the present case before this Tribunal for adjudication.

Admittedly this case was not **referred** by the Labour Department of the State Government to this Tribunal for disposal and the petitioner filed this case **directly** under Section 10 (1) (b) (d) of the Industrial Disputes Act, 1947, for adjudication before this Tribunal but Section 10 (1) (b) (d) of the Industrial Disputes Act, 1947 is not applicable in this case as it was not referred by the Labour Department and it is a case under Section 2-A(2) of the Industrial Disputes Act, 1947 as the petitioner has directly filed this case before this Tribunal due to non-disposal of his application by the Labour Department.

However, as the case filed by the petitioner does not mention Section 2-A(2) of the Industrial Disputes Act, 1947, it cannot be said **legally** that this case is not maintainable in law and such mistake has been done by the concerned advocate and **it is the settled law that for laches of the advocate, party should not be allowed to suffer.**

Accordingly I hold that wrong mention of section in the case or any petition cannot suo moto reject the said case or petition as not maintainable in law, and I also hold that this is a case under Section 2-A(2) of the Industrial Disputes Act, 1947.

During the pendency of this case, the petitioner has expired and he has been substituted by his wife and minor son though in spite of repeated attempts the name of said minor son could not be collected and due to death of the petitioner during proceeding of this case, **no order for reinstatement can be passed** but order for back wages and other consequential reliefs in favour of the substituted petitioners of this case can be passed.

There is no proof on record to show that after termination of his service the petitioner used to work elsewhere and earn something and there is also no evidence on record to show that after death of the petitioner, his legal heirs have been earning something from any source.

Admittedly since 01.11.2011 the service of the petitioner was terminated illegally and since then the petitioner suffered from extreme problem of financial matters to run his family and after death of the petitioner, his legal heirs have also been suffering with acute financial condition.

I have already discussed above that by deliberately violating the standing order of the OP company and the Principles of Natural Justice and without giving any opportunity to the petitioner to defend himself, the OP company has terminated the service of the

petitioner most illegally and without proof of alleged misconduct the OP company has dismissed his service causing serious injustice to the petitioner and putting him in the acute financial problem and for the abovementioned unjustified conduct of the OP company I hold that adequate cost should be ordered to compensate the substituted petitioners.

So considering the entire materials on record I hold that the case is maintainable in law and the substituted petitioners are entitled to get back wages alongwith consequential relief.

ORDERED

that the Case No. 05 of 2012 under Section 2-A(2) of The Industrial Disputes Act, 1947 is allowed on contest against the O.P. company with a cost of Rs. 100,000/-

It is declared that the order of termination dated 01.11.2011 passed by the OP company against the deceased petitioner is illegal, invalid, baseless and unjustified.

The O.P. company is directed to pay the full back wages according to the salary of the deceased petitioner on 01.11.2011 from 01.11.2011 alongwith consequential reliefs to the substituted petitioners till payment with a compound interest of 10% p.a. on the entire arrear amount of back wages and consequential reliefs alongwith abovementioned cost of Rs. 100,000/- within 30 days from this date of order.

As the name of the minor son of the deceased petitioner could not be collected and as the wife of the deceased petitioner alongwith her

minor son did not attend this Tribunal after receiving the summons, the wife of the deceased petitioner, if payment is made by the OP company to her as per this order, is directed to give half of the said amount to her minor son without any fail.

Let this judgement and order be treated as an Award.

According to Section 17AA of The Industrial Disputes Act, 1947, let a certified copy of this award be sent to the Principal Secretary to the Government of West Bengal, Labour Department, New Secretariat Buildings, 1, K.S. Roy Road, Kolkata 700 001 for information, and let a certified copy of this award be supplied to each of both the parties of this case, free of cost, forthwith for information.

The case is disposed of today.

Dictated & corrected by me.

Judge

(Shri P.S. Mukhopadhyay)
Judge
2nd Industrial Tribunal
Kolkata