

(2)

No. Labr/571/1(5)(LC-IR)

Date: 18/06/2024.

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

1. M/s. Bata India Ltd., 27 -B, Camac Street, Kolkata - 700016.
2. Sri Pradip Chakraborty, 1A-13, Sector - III, Salt Lake City, Kolkata - 700097.
3. The Assistant Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B. New Secretariate Building, 1, K. S. Roy Road, 11th Floor, Kolkata- 700001.
5. The Deputy Secretary, IT Cell, Labour Department, with the request to cast the Award in the Department's website.

H.A.(IT)
19/06/24
Dipankar
19/06/2024



Assistant Secretary

No. Labr/ 571 /2(2)(LC-IR)

Date: 18/06/2024.

Copy forwarded for information to:

1. The Judge, Second Industrial Tribunal, 3rd Floor, N.S. Building, 1, K.S. Roy Road, Kolkata - 700001 West Bengal with reference to his Memo No. Dte/2nd I.T/056/2024 dated - 10/06/2024.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata -700001.

Assistant Secretary

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

No. Labr /571/(LC-IR)/22015(16)/485/2019 Date: 18/06/2024.

ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. Labr/1139/(LC-IR)/ dated 04/11/2010 the Industrial Dispute between M/s. Bata India Ltd., 27 -B, Camac Street, Kolkata - 700016 and its workman Sri Pradip Chakraborty, 1A-13, Sector - III, Salt Lake City, Kolkata - 700097 regarding the issue mentioned in the said order, being a matter specified in the Second / Third Schedule to the Industrial Dispute Act, 1947 (14 of 1947), was referred for adjudication to the Judge, Second Industrial Tribunal, West Bengal.

AND WHEREAS the Second Industrial Tribunal, West Bengal, has submitted to the State Government its award dated 07/06/2024 in Case No. VIII - 47 of 2010 u/s 10(2A) on the said Industrial Dispute vide memo no. Dte/2nd I.T/056/2024 dated - 10/06/2024.

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,

Sdt
Assistant Secretary
to the Government of West Bengal

Before the 2nd Industrial Tribunal, Kolkata

Present : Shri Partha Sarathi Mukhopadhyay, Judge

2nd Industrial Tribunal, Kolkata

Case No. VIII- 47 of 2010

Under Section 10(2A) of The Industrial Disputes Act, 1947

Pradip Chakraborty

..... Petitioner

Vs.

M/s. Bata India Ltd.

..... Opposite Party

Date: 07.06.2024

J U D G E M E N T

This case has been received from the Labour Department Government of West Bengal on reference for disposal of the industrial dispute between the parties of this case alongwith two issues framed by the Labour Department....

1. Whether the termination of service of Sri Pradip Chakraborty by the management of M/s. Bata India Ltd. w.e.f. 20.10.2008 is justified.
2. To what relief, if any, is he entitled?

The petitioner has submitted in its written statement that he was recruited by the shop manager of the OP company as **temporary hand** in 1990 and he worked till 1993 and then his service was terminated by the OP company and he challenged the said termination before the Ld. 7th Industrial Tribunal, Kolkata and by award dated 29.08.1997 the Ld. 7th Industrial Tribunal, Kolkata reinstated his service and thereafter he was posted in different shops of the OP Company and he used to get salary directly from the OP Company and being the temporary hand he had to perform duties like attending the customers, provide the shoes as per the choice of the customers, maintaining the shoe box in proper manner and all other jobs like the permanent employee as per the directions of the shop manager of the OP company and in this way he worked for more than 240 days continuously without any interruption and then suddenly on 20.10.2008, the shop manager of the OP company without any notice, directed him not to join in his duty in the shop of the opposite party and without his laches, the OP company illegally terminated his service and he made one representation dated 20.10.2008 to the OP company but the OP company did not give any reply and then he moved the Labour Commissioner, West Bengal, and raised his grievances and then the Labour Department has referred this case to this Tribunal for adjudication of the present dispute.

Hence, the petitioner has filed this case praying for reinstatement of his service alongwith back wages and consequential reliefs.

The OP Company has contested this case by filing a written statement denying therein all the material allegations in the petition of the petitioner.

The OP Company has submitted in its written statement that the case is not maintainable in its present form and law and the reference is not maintainable as appointment as a temporary employee does not confer any right to the post and appointment for a stipulated period becomes infructuous after the expiry of the stipulated period leaving no scope either for continuance or for any benefit in any manner whatsoever and a temporary employee cannot have any vested right to the post and engagement of daily wage cannot be construed to be retrenchment under The Industrial Disputes Act, 1947 and interview for the temporary appointment does not confer any right to the post or right to appointment and the petitioner, being a temporary hand, was engaged by the shop manager to cater the need of temporary requirement and the temporary employment for a stipulated period comes to an end after the expiry of the said period and no requirement of giving any notice or any course as wrongly contended arises and there is no question of any reinstatement since no illegal action has been taken by the OP company and the statutory dues have been paid to the petitioner and accordingly this OP company has prayed for dismissal of this case.

Issues Nos. 1 & 2

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

Decisions with reasons:

In order to prove his case the petitioner has examined himself as the PW 1 and he has proved some documents while the OP company has examined one witness and proved some documents.

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.

Though the petitioner has examined himself as the PW1 on and from 19.09.2014, he did not file any affidavit in chief in respect of his evidence and accordingly his oral evidences before this Tribunal regarding the facts and circumstances of this case cannot be considered legally because he 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 his evidence but he has proved some documents in chief and he has been cross-examined and accordingly his cross-examination and evidences in chief in this Tribunal regarding proof of documents can be considered legally.

The OP Company has examined one witness as the OPW1 and the OPW1 has filed affidavit in chief in respect of his evidence and he has been cross-examined in full by the petitioner.

From the Written Statement, evidences and exhibited documents of both sides, it has been proved that since 1990 to 19.10.2008 the petitioner worked in the shop of the OP Company as the **temporary hand** and admittedly on and from 20.10.2008 he was not allowed to join his duty in the shop of the OP Company.

Now it is to be discussed as to whether a temporary staff has any right to be reinstated after termination of his service and whether his service from 1990

to 19.10.2008 was **uninterrupted** and whether the petitioner can be termed as temporary staff even after working for a long period from 1990 to 19.10.2008 and whether the petitioner is a workman under Section 2(s) of The Industrial Disputes Act, 1947.

In its Written Statement the OP Company has repeatedly submitted that when the temporary employment for a **stipulated period** comes to an end after the expiry of the said period, the question of reinstatement does not arise **but within the four corners of the Written Statement, the OP company has not specifically mentioned the date when the temporary employment of the petitioner was started or what was the specific tenure of the said stipulated period for the temporary employment,** and proof of starting of this stipulated period by the OP company for the petitioner as the temporary hand was a must because the OP company has repeatedly taken this plea that when the temporary employment for a stipulated period comes to an end after the expiry of the said period, the question of reinstatement does not arise.

The OP Company has not proved any document to show the alleged statutory period for employment of the petitioner as the temporary hand.

In this case there is one earlier circumstance when the petitioner's service was terminated by the OP Company in 1993 and as per the submission of the petitioner, in 1993 his service was terminated by the OP company on the ground that the company was passing through a lean period on account of labour trouble at the factory at Batanagar and then the petitioner challenged the said illegal termination before the Ld. 7th I.T. Kolkata in case no. VIII- 160/1994 and in that case on 29.08.1997 the Ld. 7th I.T., Kolkata passed an Award directing reinstatement of the petitioner by the OP company as the temporary hand and the petitioner has proved the said

Award dated 29.08.1997 passed by the said Ld. 7th I.T. Kolkata as the Exhibit 1 and the Exhibit 3 dated 01.04.1998 shows that the OP company asked the petitioner to join in his service in the OP company on purely temporary basis and one letter dated 01.04.1998 (Exhibit 4) issued by the OP company shows that the OP company directed the manager of Bata Shoe Store of Park Circus to allow the petitioner to join his duty as a temporary Shop Assistant.

So as per the said Award dated 29.08.1997, the OP Company **reinstated** the petitioner in its shop as the temporary Shop Assistant from 01.04.1998 and the petitioner started working there, **but there is nothing on record and the OP company has not produced any documentary evidence to show that the OP company challenged the said Award dated 29.08.1997 before any higher Forum.**

So it is proved from the above circumstances that the OP Company had **no grievance** against the said Award dated 29.08.1997 for which the OP Company directed, in writing, the petitioner to join in the OP Company as the temporary shop assistant and in this way he was **reinstated** in his previous service.

At present the OP company has submitted that a temporary staff cannot be reinstated in his previous temporary post because the temporary employees cannot have any right to the post and in absence of any right to the post, the question of reinstatement does not arise, **but the question is** as to why the OP Company did not challenge the Award dated 29.08.1997 for reinstatement passed by the Ld. 7th I.T. Kolkata before any Higher Forum --- unfortunately there is **no answer** from the side of the OP Company.

According to the West Bengal Amendment, Section 2 Clause (oo) shall be renumbered as Section 2 clause (ooo) and the expression "**by notice or otherwise**" has to be inserted after the words "termination by the employer" in Section 2 clause (ooo).

So according to the abovementioned amendment of the West Bengal, Section 2 clause (ooo) shall run as --- retrenchment means the termination by the employer **by notice or otherwise** of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but **does not include** -----.

In this case both parties have not taken the plea of retrenchment for termination of the service of the petitioner and accordingly the matter of retrenchment cannot be discussed in this case.

However, according to the amended Section 2 clause (ooo) of The Industrial Disputes Act, 1947, **notice has to be given** to the workman concerned for his retrenchment and according to Section 25-F of the said Act, notice has to be given by the employer to the employee regarding reasons for retrenchment, but in this case, before termination of service of the petitioner on 20.10.2008, **admittedly** no such notice was issued to the petitioner by the OP company.

Now it is to be considered as to whether the petitioner is a workman under Section 2(s) of The Industrial Disputes Act, 1947, and admittedly the petitioner worked as the temporary staff in the OP company from 19.06.1990 to 19.10.2008 and the provision of Section 2(s) does not **specifically mention** a **temporary staff** as a workman. On the contrary,

this section mentions that workman means **any person employed** in any industry to do any manual, unskilled, etc. work for hire or reward.

The Section 2(s) specifically mentions in its 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 **temporary worker** is not a workman under the Industrial Disputes Act, 1947.

Admittedly the petitioner worked as the temporary staff in the OP Company from 19.06.1990 to 19.10.2008 and the OP Company used to pay him daily wages. So this circumstance means that the OP Company **employed** the petitioner as a temporary staff to do work for hire or reward and there was a relationship of the employer and employee between them though the petitioner used to work as a temporary staff.

Hence, I hold that the petitioner was a workman under the OP company as per Section 2(s) of the Industrial Disputes Act, 1947.

Section 2(s) of The Industrial Disputes Act, 1947 mentions in the middle portion of this Section that - **“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.”**

So a temporary workman according to Section 2(s) of The Industrial Disputes Act, 1947, on being dismissed or discharged or retrenched, has right to file any case regarding the industrial dispute.

According to the amended Section 2-A of The Industrial Disputes Act, 1947, refusal of employment of a workman by his employer has to be considered as termination of service of the said workman.

So it is clear that the petitioner of this case was a workman according to Section 2(s) of The Industrial Disputes Act, 1947 and **as the OP Company did not allow him to join on 20.10.2008, it is to be held that the OP Company refused employment to him and his service was terminated on and from 20.10.2008.**

In his cross-examination the petitioner has submitted that he has not filed any document to show that the OP company terminated his service from 20.10.2008 and the OP company has not issued any termination letter in writing. But according to the case of the petitioner, on 20.10.2008 the OP company did not allow the petitioner to join in his duty. So it means that he was not allowed by the OP company on that date to join his duty but according to the amended provision of Section 2A of The Industrial Disputes Act, 1947, **refusal of employment** is to be counted as **termination of service.**

The OP Company has not admitted the said refusal but admitted that as on 20.10.2008 the statutory period of temporary employment of the petitioner came to end, his service was terminated but the OP Company did not prove the said statutory period and as such this matter of statutory period cannot be relied upon legally. As per the case of the petitioner, it is not his case that by any termination letter the OP Company terminated his service on 20.10.2008. On the contrary, it is his positive case that on 20.10.2008 he was not allowed by the OP Company to join his duty.

The Exhibit 6, the letter was issued by the petitioner to the OP Company on 21.10.2008 regarding termination of his service on 20.10.2008 and it bears the signature and seal of the OP Company on the top of this letter. So it is proved that the petitioner informed the OP Company by the Exhibit 6 about termination of his service from 20.10.2008.

The Exhibit 1 shows that the Ld. 7th I.T. Kolkata allowed the previous case filed by the petitioner against the OP company for termination of his service in 1993 and then the Ld. 7th I.T. Kolkata passed Award in that case directing the OP company to reinstate the service of the petitioner as the temporary hand and the Exhibit 3 shows that the OP Company directed the petitioner on 01.04.1998 to join his service in the OP Company and the Exhibit 4 also shows that the OP Company directed the manager concerned to allow the petitioner to join his duty as a temporary shop assistant and thereafter the petitioner joined his service as temporary hand **on being reinstated** and the OP Company did not challenge this Award before any Higher Authority but **on the contrary**, the OP Company **reinstated the petitioner** in his previous post.

From the record it is proved that in 1990 the petitioner joined in the OP company as a temporary hand and in 1993 his service was terminated and then as per Award of the 7th I.T. Kolkata on 01.04.1998 he was allowed to join his previous service in the OP company and now again from 20.10.2008 his service has been terminated by the OP company as the OP company did not allow him to join. **So it is clear** that though the OP company did not challenge the said Award dated 29.08.1997 passed by the Ld. 7th I. T. Kolkata before any higher authority and reinstated the petitioner in his previous post according to the said Award, but again on and from 20.10.2008 the OP company did not allow him to join in his duty on the

ground that the statutory period of his temporary employment had ended on 20.10.2008 and it proves that the OP Company **deliberately violated** the said Award dated 29.08.1997 passed by the Ld. 7th I.T. Kolkata.

The OP Company has admitted that there was **no allegation** against the petitioner for his termination from 20.10.2008 and the OP Company only raised dispute regarding completion of statutory period for termination of the petitioner on 20.10.2008 but could not prove the tenure of said statutory period, proving thereby that it was a case of whimsical and illegal termination by an employer.

In his written statement the petitioner has submitted that in 1993 the OP Company terminated his service on the ground that the OP Company had been passing through a lean period on account of labour trouble at Batanagar and then he was reinstated in his duty as per the order of the Ld. 7th I.T. Kolkata and then **without any reason** on 20.10.2008 the OP Company did not allow him to join his duty.

In its written statement the OP Company has taken a plea that **as the stipulated period of the service of the petitioner was completed, his service was terminated** and the temporary employment for stipulated period comes to an end after the expiry of the said period. So as per the submission of the OP Company, as the stipulated period for temporary employment of the petitioner came to an end, the service of the petitioner was terminated but the OP Company has not produced any documentary proof in respect of the **tenure of the said stipulated period for temporary employment** of the petitioner.

In its written statement the OP Company has submitted that interview for the temporary appointment does not confer any right to post or right to appointment and being a temporary hand the petitioner was engaged by the OP Company to cater the need of temporary requirement on being approached by the petitioner.

As per the case of the petitioner, from 19.06.1990 to 19.10.2008 he worked as the temporary hand **without any interruption** in the OP Company and **he has not specifically stated** that during the said long period of about 18 years he completed more than 240 days **in any particular year** and on the contrary, it is his case that without any interruption he worked from 19.06.1990 to 19.10.2008.

As the petitioner did not take any **specific** plea of completing more than 240 days in a particular year, it is not his onus or burden to prove it and accordingly the decisions cited by the OP Company regarding burden of the petitioner to prove working for more than 240 days in a year are not applicable in this case.

It is true that in 1993 his service was terminated by the OP Company and then as per the Award dated 29.08.1997, he was reinstated in his previous job on and from 01.04.1998. So from 1993 to 01.04.1998 i.e. for about 05 years he could not work as his service was terminated by the OP Company and then from 01.04.1998 he continued his service till 19.10.2008.

So it is to be considered now as to whether the said gap of about 05 years can be considered as the **uninterrupted service** or **interrupted service**.

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.

The petitioner could not work for the abovementioned 05 years from 1993 to 1998 as his service was terminated by the OP company and **it was not the fault on behalf of the petitioner** and accordingly as per Section 25-B(1) of The Industrial Disputes Act, 1947, **a cessation of work which is not due to any fault on behalf of the workman cannot be treated as the interrupted service.** On the other hand, it has to be treated as the **uninterrupted service** according to this section and it has to be taken into account that **the petitioner was in continuous service from 19.06.1990 to 19.10.2008 without any interruption.**

In this case the petitioner has not taken a specific plea of working for more than 240 days and accordingly **he has no liability to prove** it and on the contrary, he has taken a plea of **uninterrupted service** during the **entire tenure of his service.** On the other hand, the OPW 1 has stated in his examination-in-chief that the **petitioner never worked for 240 days in any year.** So it was the **burden** of the OP Company **to prove it** but did not prove it by producing **any cogent documentary evidence.** So the OP Company has violated the decisions of the Hon'ble Supreme Court cited by it in this matter.

The OP Company has taken a plea that the temporary employment of the petitioner for a stipulated period came to an end after the expiry of the said stipulated period and interview for the temporary appointment does not confer any right to the post or appointment. As the OP company has taken the plea that interview for the temporary appointment does not confer any right to the post or appointment and the temporary employment of the petitioner for a stipulated period came to an end after the expiry of the said stipulated period, it was the **mandatory duty** of the OP company to produce documentary evidence regarding the **particular statutory period of the temporary employment** of the petitioner to show that the said statutory period came to an end for which the service of the petitioner was terminated.

It is very much peculiar and surprising to see that the OP Company admittedly takes interview for the temporary appointment of the staff but has not produced any such paper to show that interview of the petitioner for temporary employment was taken.

It is also peculiar to see that the OP company has not produced any document to show that after interview the petitioner was appointed as a temporary hand in 1990 because it is the positive assertion of the OP company that the OP company used to pay daily wages to the petitioner and paid all his dues after his termination and the OP company has proved some pay sheets.

Is to be believed that for a long period of 18 years the OP company paid wages to the petitioner and held his interview before appointment though the OP company did not issue any appointment letter as a temporary staff to the petitioner!

How the temporary staff is appointed by the OP Company! Whether the OP company **orally** calls any person to work as temporary staff for a long period of 18 years and takes his interview and pays wages to him **from the cash of the OP company** and then **as per its whimsical choice** throws him out of the service without any termination letter or issuing any show cause to him without any allegation against him----- **certainly it is not followed** in the OP company which is one of the famous and largest companies of our country.

The OP Company has proved some pay receipts through the PW 1 to show payment of wages to him but the OP company has not produced and proved any document regarding appointment and termination of service of the petitioner, though the Exhibit 3 and 4 show something like appointment letter of the petitioner as the temporary staff after the Award dated 29.08.1997 was passed by the Ld. 7th I.T. Kolkata.

But the OP Company did not produce any paper to show that by any paper or appointment letter the OP Company allowed the petitioner to join as the temporary staff since 19.06.1990 in the OP Company.

Such type of oral appointment from 19.06.1990 and oral termination of service is not a legal procedure even if in case of a temporary staff and it is nothing but violation of Principles of Natural Justice as the relationship of employer and employee between the petitioner and the OP Company was established as the OP Company used to pay wages to the petitioner.

It is also surprising to see that the OP Company, one of the famous and largest companies of our country, does not maintain any **standing order** for

the permanent or temporary staff of it because the OP Company has not produced any such standing order in this case to support his case.

So the total picture of this case proves that the OP Company orally allows the temporary staff to work in the OP Company for any period without any paper and pays daily wages to him and then on a given day throws him out of service without any notice or, show cause or any allegation or any termination letter like a domestic servant in the house.

In his examination before the Tribunal the PW1, the petitioner of this case, has proved the Award dated 29.08.1997 passed by the Ld. 7th I.T. Kolkata, as Exhibit 1 and copy of publication of the said Award as Exhibit 2 and the copies of letter dated 01.04.1998 and one inter-memo issued by the OP company as Exhibit 3 and 4 and one letter of the OP company dated 14.05.2004 as Exhibit 5 and copy of one letter dated 21.10.2008 as Exhibit 6 and one copy of letter dated 21.10.2008 sent by him to ALC as Exhibit 7 and one form regarding P.F. and ESI as Exhibit 8.

In his cross-examination the PW1 has stated that he raised one dispute before the Labour Department regarding his earlier termination and by Award dated 29.08.1997 the Tribunal passed order for reinstatement as temporary hand and he has proved some pay sheets as Exhibit A, A/1 to A/4 and he has stated that the OP company has not issued any appointment letter from 1990 to 2008 as a permanent employee and in his written statement he did not mention in which year he worked 240 days continuously in a year and the OP company used to give him wages on daily basis in fortnight and the OP company has not issued any termination letter in writing and he does not know if the OP company has stopped recruiting temporary hands through the Shop Manager.

So from the above cross-examinations of the PW1, it is proved that by Award dated 29.08.1997 the Ld. 7th I.T. Kolkata passed order for his reinstatement as a temporary hand and the OP company has not issued any appointment and termination letter to him during entire tenure of his service and he used to get wages on daily basis in fortnight, and the above cross-examinations have not damaged the case of the petitioner **on material points.**

The OPW1 Subhashis Sen Sharma, the Assistant Manager- HR of the OP company, has stated in his affidavit in chief that the petitioner was a temporary employee of the OP company and in the said Award dated 29.08.1997 the Ld. Tribunal passed order for reinstatement of the petitioner as the temporary hand and the petitioner never worked for 240 days in the OP company and prayer for reinstatement with full back wages is a baseless one since his engagement was purely need based and at present the system of engaging the temporary hand has been discontinued by the OP company.

In his cross-examination the OPW 1 has stated that the petitioner was appointed in the OP company on temporary basis for which **his records are not maintained in a proper way** and from the case history he (OPW1) has come to know that the petitioner was also terminated by the OP company earlier once and it is the fact that for earlier termination the petitioner filed one case before the Industrial Tribunal and then he was reinstated as a temporary employee and after the order of reinstatement was passed by the Tribunal, the petitioner was reinstated on the temporary basis and he (OPW1) **cannot say the exact date on which he was not given any work** and **he was unable to produce any document** as the records **are not maintained** and in the shop, **a sheet is maintained** for recording the attendance and it may not be possible to get **those attendance sheet as it is a case of 2009** and after verification of the attendance sheet, salary of the petitioner used to be paid in cash and he (OPW1) cannot remember if signature of the petitioner used to be taken on the pay sheet or not and he

(OPW1) cannot say if the money from the P.F. was given to the petitioner or not.

In his further cross-examination the OPW1 has stated that the petitioner would sign the register for attendance cum pay sheet but he (OPW1) has not filed the said attendance cum registers as the **same is old** and he has not filed any document to show that the **petitioner did not continuously work for 240** days and previously the petitioner was terminated but he got Award from the Court and resumed his duty as a temporary hand and there is no document to show that he would work in temporary capacity only and it was stated to him orally and he (OPW1) cannot show **any old record** to prove that the petitioner was not given work from time to time.

So from the above cross-examinations of the OPW1, it is proved that no records were maintained in a proper way for temporary appointment of the petitioner and no attendance cum pay registers have been produced as the same are old and no document has been produced to show that the petitioner was not given work from time to time.

So as per the above cross-examinations of the OPW1, no records have been maintained properly for appointment of the petitioner on temporary basis and the attendance registers cum pay sheets have not been produced as the same are old and such type of evidence of the OPW1 is nothing but a childish one, and missing of the said documents cannot support the case of the OP company legally, and it shows the whimsical attitude of the OP company.

In his cross-examination the OPW 1 has **admitted** that earlier the petitioner was terminated and the petitioner filed one case before the Tribunal and by

an Award the Tribunal reinstated the petitioner as a temporary employee. The OP Company has not produced any **specific** document to show that the petitioner was not given any work from 1990 to 2008 and this circumstance is against the case of the OP Company.

In his affidavit in chief the OPW 1 has stated that the petitioner never worked for 240 days in any year nor even worked continuously since 19.06.1990, but to prove it the OP company has not produced any cogent documentary evidence on record to show that the petitioner never worked for 240 days in any year, and **the OP company was bound to prove it** because this plea was taken by it.

The OP company has cited one decision of the Hon'ble Supreme Court passed in a case namely Sita Ram and Others Vs. Moti Lal Nehru Farmers Training Institute as reported in (2008) 5 Supreme Court cases page 75 para 23 and in that case the Hon'ble Supreme Court has held that.....

"Indisputably, the Industrial Court, exercises a discretionary jurisdiction, but such discretion is required to be exercised judiciously. Relevant factors therefore were required to be taken into consideration; the job nature of appointment, the period of appointment, the availability of the job, etc, should weigh with the Court for determination of such an issue."

In this present case the job nature of appointment is that admittedly the petitioner was appointed as the temporary hand from 19.06.1990 to 19.10.2008, and regarding the period of appointment, the OP company has not produced any documentary evidence but the petitioner has claimed that from 19.06.1990 to 19.10.2008, i.e. for a long period of 18 years, he was posted as temporary hand in the OP company and the OP company also admitted the said period of appointment of the petitioner as a temporary hand.

Regarding availability of the job, the OP company has stated that at present the system of engaging the temporary hand has been discontinued by the OP company but the OP company has not produced and proved any documentary evidence to show that on and from 20.10.2008 till now there was no availability of job of the temporary hand in the OP company and the system of engaging the temporary hand has been discontinued by the OP company. On the contrary, **at present** in almost all shoe shops of the OP company in West Bengal, it is seen that many temporary or casual staff, male or female are being appointed for work by the OP company in the said shops and this circumstance proves that appointment of temporary or casual staff has not been stopped by the OP company at present or from 20.10.2008.

In this case the petitioner has proved the nomination form for provident fund submitted by him as Exhibit 8 and he has proved some pay sheets as Exhibit A to A/4 in his cross-examination but the OP company has not produced the **standing order** of the OP company, the paper regarding interview and appointment of the petitioner as a temporary hand and the document regarding statutory period of temporary employment of the petitioner. In para 20 of the abovementioned Judgement, the Hon'ble Supreme Court has held that the OP Company should have **statutorily** required to maintain documents like wage sheet, the Provident Fund records and other documents lying in their possession and accordingly adverse inference can be drawn against the OP Company.

In the abovementioned decision the Hon'ble Supreme Court has held that *"Relevant factors therefore were required to be taken into consideration; the job nature of appointment, the period of appointment, the availability of the job, etc, should weigh with the Court for determination of such an issue"*.

Regarding "etc" i.e. other matters of this case, the OP company did not challenge the Award dated 29.08.1997 passed by the Ld. 7th I.T. Kolkata for reinstatement of the petitioner as the temporary hand before any higher authority and the petitioner was reinstated in his temporary post by the OP company **without any objection** and again on 20.10.2008 the OP company terminated his service by refusing him to join without any allegation or punishment relating to his service, but on the plea that the statutory period of the temporary employment was completed though no document in respect of the statutory period has been produced, and no document regarding interview and appointment of the petitioner as temporary hand in the year 1990 has been produced by the OP company. Moreover, the petitioner was not appointed for a **seasonal work or purpose** for any short period and on the contrary, he was appointed as a temporary hand and he worked as such from 19.06.1990 to 19.10.2008, without any interruption.

After considering the abovementioned circumstances like job nature of appointment, the period of appointment, the availability of the job, etc as per the abovementioned decision of the Hon'ble Supreme Court to give value for determination of the issue, **it is clear** that for a long period of 18 years from 19.06.1990 to 19.10.2008 the OP company committed injustice on the petitioner on different grounds as mentioned above, without any fault of the petitioner.

So what should be the **judicious discretion** because the relationship of the employer and employee between the petitioner and the OP Company was established for a long period of 18 years.

By reinstating the petitioner as the temporary hand in 1998 as per the Award dated 29.08.1997 passed by the Ld. 7th I.T. Kolkata and again by

terminating his service without filing any case in Tribunal praying for termination of service of the petitioner on any ground on 20.10.2008, the OP company violated the said Award dated 29.08.1997 passed by the said Tribunal by not allowing him to join and this is nothing but contempt of Court's Order dated 29.08.1997.

In the written argument the OP company has taken a plea that the OP company **neither terminated nor refused** the petitioner to join his service and it is the case of the petitioner that by any termination letter the OP company did not terminate his service but **the company did not allow him to join his service on and from 20.10.2008**. Though the OP company has submitted that the OP company neither terminated nor refused the petitioner to join his service, the OP company did not submit as to whether the petitioner has been working till now from 20.10.2008 **as he was neither terminated nor refused** and it proves that the OP company has taken the abovementioned false plea and admittedly on and from 20.10.2008 the petitioner has not been working in the OP company and so the matter of refusal is proved as per the case of the petitioner because the OP company did not **specifically** say that the petitioner **wilfully did not join** on 20.10.2008 and on the contrary, it is the positive case of the OP company that due to completion of statutory period of the temporary employment of the petitioner, he was terminated but the OP company has not produced and proved any document to show completion of said statutory period of temporary employment.

The Industrial Disputes Act, 1947 does not **specifically** mention that a temporary staff cannot be reinstated if he wins his case after his termination because the temporary staff does not have any right to the post, but the OP company has cited some decisions of the Hon'ble Supreme Court wherein it has been **opined** that temporary staff cannot be reinstated. On perusing the said decisions, I find that on the basis of materials on record in those cases

mentioned in the said decisions, the Hon'ble Supreme Court has opined that temporary staff cannot be reinstated but in those decisions the Hon'ble Supreme Court did not hold that the said opinions have to be treated as **law declared by the Supreme Court**.

According to Article 141 of the Constitution of India, the **law declared by the Supreme Court** shall be binding on all Courts within the territory of India. This Article 141 of the Constitution of India does not **specifically** mention that **all decisions** passed by the Hon'ble Supreme Court shall be binding on all Courts within the territory of India.

So there is a difference between decisions passed by the Hon'ble Supreme Court and law declared by the Hon'ble Supreme Court.

The decisions cited by the OP Company do not specifically mention that the Hon'ble Supreme Court declared the law to the effect that temporary staff cannot be reinstated.

Judicious discretion means it should be legal as per the statute concerned or any law declared by the Supreme Court.

The Hon'ble Supreme Court has held in a case namely Commissioner of Central Excise, Bangalore-Vs-Srikumar Agencies Etc. as reported in LAWS(SC) 2008 11 200 that Courts should not place reliance on decisions without discussing as to how the factual situation fits in, with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in

the context in which they appear to have been stated. Judgements of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes, their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly reliance on a decision is not proper.

The facts and circumstances of all the cases mentioned in all the decisions of the Hon'ble Supreme Court which have been filed by the OP company in this case are different from the facts and circumstances of this case, and in this case the petitioner has not been temporarily appointed for **any seasonal purpose** for any **short period** and the petitioner of this case did not **voluntarily** abandon his service and **on the contrary**, on 20.10.2008 the OP company **refused employment** to him and admittedly the OP company did not stop his employment on and from 20.10.2008 **as punishment for any offence related to his service** and the OP company has submitted that as the statutory period of temporary employment of the petitioner ended on 20.10.2008, he was terminated from his service **but to prove** it the OP company has not produced and proved any document to show the said statutory period and any standing order of the OP company in this matter.

So in view of the decision of the Hon'ble Supreme Court passed in a case namely Commissioner of Central Excise, Bangalore-Vs-Srikumar Agencies Etc. as reported in LAWS(SC) 2008 11 200, I hold that this case has to be disposed of in view of the **facts and circumstances of this case and the oral and documentary evidences on record.**

Admittedly the petitioner used to work as a temporary hand in the OP Company from 19.06.1990 and on 20.10.2008 his service was terminated by the OP Company as he was not allowed to join his duty. So it is clear that for a long period of about 18 years the petitioner worked as the temporary hand though his service was not made **permanent** by the OP Company.

The Human Rights, Legal Relief and Natural Justice demand that the uninterrupted service of 18 years given by the petitioner should be made permanent, but **it is the decision of the OP company** whether his service for a long period as a temporary hand should be made permanent or not.

Though the petitioner worked for 18 years as a temporary staff in the OP company and his service was terminated by the OP company suddenly on 20.10.2008 **without any punishment or allegation regarding his conduct in employment**, I hold that he should be reinstated as temporary hand and he should be allowed to work as the temporary hand **till he** commits any offence regarding his work in the OP company.

As admittedly in 1993, the OP company terminated his service earlier and by Award dated 29.08.1997 passed by the Ld. 7th I.T. Kolkata, he was reinstated as the temporary hand by the OP company without challenging the said Award before any higher authority and again **without any legal justification** the OP company terminated his service on and from 20.10.2008 causing serious injustice to him and putting him under acute financial problem, I hold that the OP company should be directed to pay adequate cost to the petitioner as compensation.

So considering the entire materials on record and the decisions of the Hon'ble Supreme Court, I hold that the case is maintainable in law and the petitioner is entitled to get relief as prayed for.

Hence it is,

ORDERED

That the case no. VIII-47/2010 under Section 10 (2A) of The Industrial Disputes Act, 1947 is allowed on contest against the OP company with a cost of Rs. 1,00,000/- to be paid to the petitioner by the OP company within 30 days from this date of order.

It is hereby declared that the order of termination dated 20.10.2008 in the form of refusal of employment made by the OP company against the petitioner is illegal, invalid, baseless and unjustified.

The OP Company is directed to reinstate the petitioner as the temporary hand in the OP Company **immediately** and the petitioner is directed to join in the OP Company **immediately**.

The OP Company is directed to pay the full back wages alongwith consequential reliefs from 20.10.2008 **till the date of payment** with a compound interest of 10% per annum on the entire arrear amount of back wages and consequential reliefs to the petitioner within 30 days from this date of order.

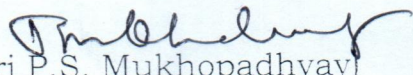
Let this judgement and order be treated as an Award.

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
Judge
2nd Industrial Tribunal
West Bengal